

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE OPERATIONS
AND REGULATIONS COMMITTEE

OPEN SESSION

Monday, April 7, 2014

3:02 p.m.

Legal Services Corporation
3333 K Street, N.W., 3rd Floor
F. William McCalpin Conference Center
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson
Robert J. Grey Jr.
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

Sharon L. Browne
Victor B. Maddox
Father Pius Pietrzyk, O.P.
Julie A. Reiskin
Gloria Valencia-Weber

STAFF AND PUBLIC PRESENT:

James J. Sandman, President

Lynn Jennings, Vice President for Grants Management

Richard L. Sloane, Special Assistant to the President

Ronald S. Flagg, Vice President for Legal Affairs,
General Counsel, and Corporate Secretary

Mark Freedman, Senior Assistant General Counsel,
Office of Legal Affairs

Stefanie Davis, Assistant General Counsel, Office
of Legal Affairs

Katherine Ward, Executive Assistant, Office of Legal
Affairs

David L. Richardson, Comptroller and Treasurer,
Office of Financial and Administrative Services

Carol A. Bergman, Director, Office of Government
Relations and Public Affairs

Wendy Long, Office of Government Relations and Public
Affairs

Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel, Office of the Inspector General

David Maddox, Assistant Inspector General for
Management and Evaluation, Office of the
Inspector General

Daniel Sheahan, Program Evaluation Analyst, Office of
the Inspector General

Magali Khalkho, Resource Management Specialist,
Office of the Inspector General

STAFF AND PUBLIC PRESENT (Continued):

Lora M. Rath, Deputy Director, Office of Compliance
and Enforcement

Janet LaBella, Director, Office of Program
Performance

Traci Higgins, Director, Office of Human Resources

LaVon Smith, Office of Information Technology

Ed Marks, Executive Director, New Mexico Legal Aid

Herbert S. Garten, Non-Director Member, Institutional
Advancement Committee

Thomas Smegal, Non-Director Member, Institutional
Advancement Committee; Friends of LSC

Allan J. Tanenbaum, Non-Director Member, Finance
Committee (General Counsel, Equicorp Partners)

Diana Camosy, Post-Graduate Fellow

Flor Gardea, Intern, Office of Legal Affairs

Don Saunders, National Legal Aid and Defenders
Association (NLADA)

Robin C. Murphy, NLADA

Terry Brooks, American Bar Association Standing
Committee on Legal Aid and Indigent Defendants
(SCLAID)

Dominique Martin, Law99.com

Berish Anver, National Immigrant Women's Advocacy
Project

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1 P R O C E E D I N G S

2 (3:02 p.m.)

3 CHAIRMAN KECKLER: If everybody can take their
4 seats, we're getting a little bit of a late start.
5 Hopefully we will be able to finish on time today,
6 which is 5:30, but we do need to get started here.

7 I will, noting the presence of a quorum, call
8 to order the scheduled and noticed meeting of the
9 Operations and Regulations Committee today. Is there a
10 motion to approve the agenda?

11 M O T I O N

12 MR. GREY: So moved.

13 MS. MIKVA: Second.

14 CHAIRMAN KECKLER: All in favor?

15 (A chorus of ayes.)

16 CHAIRMAN KECKLER: The agenda, then, is
17 approved.

18 Is there a motion to approve the minutes of
19 our telephonic meeting?

20 M O T I O N

21 MR. GREY: So moved.

22 MS. MIKVA: Second.

1 CHAIRMAN KECKLER: All in favor?

2 (A chorus of ayes.)

3 CHAIRMAN KECKLER: The minutes are approved.

4 Our first item of substantive business is a
5 report on performance management and human capital
6 management. And I will turn it over to our President,
7 Jim Sandman.

8 PRESIDENT SANDMAN: This is a report pursuant
9 to our risk management matrix, which you can find in
10 the Board book starting on page 81, I believe. And the
11 portion we're going to be addressing is pages 82 and
12 83, which requires that we report regularly to this
13 Committee on performance management issues.

14 There's a memo in the Board book that gives an
15 overview of recent activities in connection with
16 performance management. We've done a lot. There was a
17 comprehensive presentation on this in the Board
18 materials that were provided for the Austin meeting.

19 We have gone through a process of identifying
20 performance plans for each office of LSC and are
21 currently doing performance plans for each employee,
22 both of which will be tied to the strategic plan goals.

1 I'd like to ask Traci to spend just a couple
2 of minutes amplifying on a few things that we have done
3 in the Office of Human Resources to improve our
4 performance management, specifically focusing on
5 hiring, how we've improved our processes for bringing
6 new people into LSC, and to provide an update on where
7 we stand in implementing our performance management
8 plans for employees. Traci?

9 MS. HIGGINS: Good afternoon. We have
10 revamped our hiring process by following a very simple
11 idea: quality in, quality out. So we worked to create
12 a quality process that will allow us to attract and
13 identify the caliber of candidate that we need to
14 perform our important work. And we've done a couple of
15 things to accomplish that.

16 First, we pay attention to where we put our
17 postings. There are a couple of key sites that have
18 yielded good candidates, a rich and diverse applicant
19 pool. So we're sticking with that.

20 The second and larger issue is we've
21 implemented a rigorous application vetting and
22 interview process. That includes a couple of

1 components.

2 First, before each search, we are enlisting a
3 cross-section of appropriate staff to participate in
4 the interview panels. For example, because the General
5 Counsel touches all corners of the building, we had
6 folks from OLA, OLA staff, office directors, program
7 counsel, administrative assistants, human resources
8 staff, and staff from reprographics participate in
9 those interviews.

10 When we went to hire our human capital manager
11 in OHR, OHR staff was involved, finance and
12 administrative services were involved, and we had
13 program counsel participating as well.

14 The second thing we've done is we are working
15 closely with those who know best the skills needed for
16 success in the positions we're recruiting for. And
17 we're asked them to help us create exercises, exercises
18 that are designed to engage the capacity of applicants
19 to perform at the level needed for LSC success. Some
20 of these have been in the form of homework that we give
21 to the applicants before they come in for their
22 interview, and some of it is day of, work that we have

1 them perform.

2 For example, when we were hiring for the Vice
3 President for Grants Management, their homework
4 assignment was to draft a memo on the implementation of
5 the recommendations of the -- how they would implement
6 the recommendations of the Fiscal Oversight Task Force.

7 When we were hiring Peter Campbell's position,
8 chief information officer, we enlisted the help of the
9 IT staff and the TIG staff. And together they came up
10 with eight scenarios that a chief information officer
11 was likely to face on the job, and the candidates for
12 that position had to provide us written responses to
13 each of those scenarios. And those were reviewed by
14 the IT staff and TIG staff -- because they're the most
15 tech-savvy folks in the building -- and they were a
16 vital part of the interview process.

17 When we recently hired our human resources
18 administrative assistant, those candidates had to do an
19 Excel spreadsheet exercise. They had to draft a
20 letter. And then they had to take a letter that was
21 just riddled with mistakes and proofread it and edit
22 it.

1 And these have really been very beneficial
2 because we found people who could really talk well and,
3 great, everything was wonderful. And then you gave
4 them these exercises, real-life stuff that they would
5 have to do on the job, and it really just sort of
6 separated the candidates that we wanted to continue
7 with and the candidates who were like, good that we
8 didn't waste our time there.

9 And then the other search, we used that for
10 the Assistant General Counsel. Those candidates had to
11 write a memo on rulemaking options for additional
12 enforcement mechanisms, and an informal opinion on the
13 outside practice of law. So no cakewalks with any of
14 these. We're really digging deep because it's
15 important.

16 And the third thing we've done is making sure
17 that OHR is actively managing and overseeing all
18 aspects of the recruitment and hiring process so we
19 have one process that is consistently enforced and
20 implemented. Do you want me to continue with the
21 others? Okay.

22 Yes?

1 CHAIRMAN KECKLER: Sorry, Traci. Thanks for
2 that. One question now. We're not on USAJOBS. Is
3 that right? Do we advertise on USAJOBS?

4 MS. HIGGINS: Currently we don't. We're
5 talking with the OIG about that because their positions
6 lend themselves more to that pool of folks. But yes.

7 CHAIRMAN KECKLER: Right. But is there a
8 reason that we can't do that, or is it that we don't
9 want to?

10 MS. HIGGINS: No. There's not a reason that
11 we can't -- well, we don't know if there's a reason
12 that we can't. We're looking into that.

13 PRESIDENT SANDMAN: Yes. I have thought that
14 those were for government jobs. The LSC Act says we're
15 not a government agency, so I'd always assumed that we
16 couldn't. But it's a good point.

17 CHAIRMAN KECKLER: Yes. It might be worth --
18 I guess you are looking into it. We're a federal
19 entity. There's always ambiguity with different
20 things, yes. So it's logical to think maybe -- but I
21 was just looking on there, and there's different
22 things. There's the Export/Import Bank. There's the

1 Broadcasting Board of Governors. There's some things
2 -- so it'll be interesting to find out if we are able
3 to do that. Thanks.

4 Oh, and the other question is, at one point we
5 were thinking of having a written addendum to the
6 strategic plan as a strategic human capital plan. Did
7 we do that?

8 PRESIDENT SANDMAN: Yes. We completed a
9 strategic human capital plan. It was part of the GAO
10 recommendations, and that was done in December, as I
11 recall.

12 CHAIRMAN KECKLER: It was December. And we
13 did get a copy of that? That was sent to the Board, or
14 was it --

15 PRESIDENT SANDMAN: I can't remember whether
16 it was in the Board book in January, but we'll
17 doublecheck. If it wasn't, we'll circulate it.

18 CHAIRMAN KECKLER: Okay. Thank you.

19 MS. HIGGINS: So a couple of other things that
20 we're doing around human capital management and
21 performance management because they're very
22 interrelated. I think human capital management is what

1 this all is, and performance management is a bucket
2 underneath it.

3 But I meet regularly with office directors to
4 discuss staff performance. So we are meeting twice
5 monthly, several of us, to discuss identified
6 performance issues and working to create plans to
7 address them, identifying any needed training as well.

8 And then the directors go and meet with the
9 staff at issue, talk to them about their concerns, and
10 identify the plan that we've come up with for
11 addressing it. So now we're in the implement, monitor,
12 assess, discuss, identify next steps, stay the course,
13 the ongoing communication, because we're committed to
14 improving outcomes all over the building. So this is
15 work that is really key for us to do.

16 We've also identified some key training that
17 is needed. We recently issued a survey through the
18 efforts of OIT and OHR, and we've learned that
19 organization-wide, we need office-specific training on
20 much of Microsoft Office, especially Word and Excel.

21 So we are planning trainings that are going to
22 be led by Jessie Posilkin, who's our training and

1 implementation specialist, and they're going to be
2 designed to look at the specific documents and
3 templates that an office needs. So it's not going to
4 be general. It's going to be targeted to the work that
5 they actually perform. So it's real and has a nexus
6 with their daily work.

7 We've also identified that there's some staff
8 that need training in certain areas. Some of them need
9 new skills and some of them need refresher courses.

10 For example, we do have some staff who need to
11 strengthen their writing skills, and we've received
12 some proposals from vendors, and we're looking at
13 those. We have staff who need a refresher course for
14 interview skills. I mean, they know how to interview,
15 but it's a refresher course, new ideas, new ways of
16 looking at things. And these are the folks who do
17 oversight visits to grantees.

18 We also need training for our fiscal folks in
19 OCE, who are not our fiscal folks but they're
20 intimately involved in that work. So this is a new
21 skill set that we're going to introduce to them to make
22 them more efficient and enhance the collaboration

1 between the program counsel and the fiscal compliance
2 analysts.

3 And the other important thing that we're doing
4 around performance management and part of our rollout
5 is we are using case studies in our meetings with
6 managers and with staff. And we're doing this so that
7 we begin the process of norming what performance looks
8 like at the various levels.

9 We have four performance levels under our
10 performance management process -- exceeds expectations,
11 meets expectations, needs improvement, and
12 unacceptable.

13 So to do this we use the case studies to look
14 at a set of facts that allow us to focus on things such
15 as the quality of work that's performed, the quantity
16 of work, regularity of performance. Is this person
17 consistent or inconsistent?

18 And then looking at all of these things
19 together, what level of performance does this add up
20 to? What does this look like? And if it's not meets
21 expectations, what's missing? What would this person
22 have had to do to meet expectations?

1 We're using these because we want to create a
2 shared understanding across the building of what
3 performance looks like at each of the levels because we
4 want to ensure consistency in the assessment of
5 employees across the building because it's not fair if
6 we have some managers who are really tough reviewers
7 and some who aren't as tough. It doesn't lead to good
8 outcomes.

9 These case studies have spurred some good
10 conversation, I'll say. And because it's new -- this
11 is a new process; there's a culture shift that's going
12 on here -- we know that it's going to take time.

13 So this isn't a one-and-done sort of approach.
14 We'll continue to have sessions where we look at
15 additional case studies to continue that dialogue and
16 that engagement so it's very clear what we're talking
17 about when we're talking about meeting expectations at
18 LSC because we view that as a high bar.

19 You have to do good and consistent work in
20 order to meet expectations. It's not you show up and
21 you meet expectations. There's much more involved in
22 that.

1 I'll take any questions that you have.

2 CHAIRMAN KECKLER: Julie.

3 MS. REISKIN: Thank you. This is great. I
4 was really pleased to read about that and to hear what
5 you're doing. This is all awesome. I only had one
6 question, and this was going back to the budget
7 documents where they were talking about the new
8 positions that had been requested and needed.

9 And a little bit in the strategic plan but
10 mostly in the financial oversight, I thought there was
11 going to be more hiring of accountants or people with
12 financial and grantmaking expertise as opposed to more
13 lawyers. And I was wondering if you could talk about
14 that or one of you could talk about that.

15 PRESIDENT SANDMAN: I'd be happy to talk about
16 that. We have done that and are doing more of it. So
17 we are increasing the size of the fiscal compliance
18 specialist staff. Those are not lawyers; those are
19 pill with fiscal expertise.

20 And very significantly, we're adding a deputy
21 director position in the Office of Compliance and
22 Enforcement specifically for fiscal compliance. And

1 that, we hope, will get us a high-level person who not
2 only has experience there but will be capable of
3 managing that function in a new and improved way.

4 CHAIRMAN KECKLER: Yes, Laurie. Please go
5 ahead.

6 MS. MIKVA: I just am wondering how employees
7 are taking the changes, knowing how well people like
8 change.

9 MS. HIGGINS: I think in general it's been
10 going well. I will say that in terms of the
11 performance management process that we've come up with,
12 we worked closely with union. We were very much on the
13 same page in terms of what we wanted to see and our
14 expectations for excellence.

15 So we didn't have any battles there. I think
16 it is, for some folks, a bigger shift; for others, it's
17 like, okay, that's what I know. That's what I'm used
18 to. But I think in general it's going well, and
19 because it is a new process and it does represent for
20 some significant change, we're going to keep at it.
21 Slow and steady wins the race.

22 PRESIDENT SANDMAN: I'd add something to that,

1 Laurie. I think any time an organization changes its
2 employee assessment system or its compensation system,
3 there is unavoidably anxiety, and sometimes high
4 anxiety.

5 I think the key is in good communication and
6 in fairness of implementation. The proof will be in
7 how the system is implemented, and whether people see
8 the system being implemented in a way that they regard
9 as improved and understandable and fair. So stay
10 tuned.

11 CHAIRMAN KECKLER: Very good. Are there any
12 further questions for Jim or Traci?

13 (No response.)

14 CHAIRMAN KECKLER: This has been helpful, and
15 I look forward to further updates. I know we're
16 focusing on a risk matrix and on risks, but I think
17 this covers a broader sense of how the organization is
18 evolving.

19 MS. HIGGINS: Thank you.

20 CHAIRMAN KECKLER: We'll now move to the next
21 item on our agenda, which is the first of three rules
22 we're going to consider today, 45 CFR Part 1613. And I

1 will turn it over to the Office of Legal Affairs and
2 Ron.

3 MR. FLAGG: Stefanie will speak to the 1613
4 rule, which I think is the first of the three.

5 CHAIRMAN KECKLER: Yes.

6 MS. DAVIS: Sure. Good afternoon, and we will
7 kick off with 1613, which is the final rule with regard
8 to legal assistance with respect to criminal
9 proceedings.

10 This rule was updated to reflect changes to
11 the LSC Act that had been made through the Tribal Law
12 and Order Act of 2010. The Tribal Law and Order Act of
13 2010 expanded the ability of LSC recipients to provide
14 legal assistance to any defendant charged with a crime
15 in tribal courts.

16 So this rule went out for public comment in
17 November. We've received only seven comments to the
18 rule. Only two of those were substantive, and they
19 focused on the fact that LSC had proposed a change in
20 the standard for accepting or declining an appointment
21 to represent an individual in criminal court. And that
22 is both with tribal courts and with criminal courts

1 generally.

2 One commenter requested the elimination of our
3 standard or the creation of a rational basis standard.

4 LSC had proposed revising the standard to allow
5 recipients to decline an appointment if the
6 representation would impair their ability to provide
7 legal assistance in civil cases consistent with their
8 responsibilities under the LSC Act.

9 So this commenter requested that we either
10 eliminate the standard altogether or lessen the
11 standard such that recipients only needed to show that
12 they had a rational basis for declining the
13 representation.

14 Julie?

15 MS. REISKIN: Yes. So is this a decision that
16 they make in general, saying kind of globally, we are
17 or are not going to do criminal defendant work? Or is
18 it each time the court has a case and they say, we want
19 you to do this, they have to decide for each case?

20 MS. DAVIS: It's the latter. It's a
21 case-by-case basis.

22 MS. REISKIN: Okay. So could a grantee say,

1 we don't want to do this, period, or no?

2 MS. DAVIS: I think they could. The law
3 simply authorizes recipients to provide representation
4 in criminal proceedings if they want to.

5 MS. REISKIN: So they don't have to?

6 MS. DAVIS: Correct. They're not required to.

7 So again, the one comment was regarding the
8 change of the standard. And the other commenter
9 suggested that a recipient's decision whether to accept
10 or decline representation should turn on whether
11 accepting the criminal appointment was necessary to
12 avoid injustice.

13 LSC considered all of these comments and
14 determined to keep the language that we had proposed in
15 the NPRM, which was that a recipient could decline to
16 accept a criminal appointment if they determined that
17 doing so would impair their ability to provide civil
18 legal services, consistent with their mission under the
19 LSC Act.

20 We decided to keep the revised standard
21 because we thought it provided more meaningful guidance
22 than the previous standard, which had been that the

1 acceptance of the representation would not be
2 inconsistent with, or would be inconsistent with, their
3 responsibility to provide civil legal services.

4 We also believed that the standard that we
5 chose did not prevent recipients from considering
6 whether representation would be necessary to promote
7 equal justice. That can be one of the factors that
8 they consider in determining whether to accept or
9 decline a representation.

10 So we made no changes to the proposed text of
11 the final rule, and we would recommend that it be
12 passed as final as it stands.

13 CHAIRMAN KECKLER: Questions or comments from
14 the Committee?

15 FATHER PIUS: This is Father Pius. If you
16 limit it just to "impair," is there any case that
17 wouldn't at least in some way impair their ability?
18 Would you want to add a qualifier, something like at
19 least "materially impair" or something?

20 The worry is that you've now provided an
21 excuse that's so broad that it could be really
22 anything. Just by definition, anything could matter.

1 Just your thoughts?

2 MR. FLAGG: We considered that. I think the
3 intention here is to give recipients maximum
4 flexibility to make a determination. And we considered
5 using the word "materially," decided that that would
6 permit courts then to second-guess whether or not the
7 diminution in resources available to them was material,
8 and did not like that idea.

9 The idea of using the word "impair" was to
10 suggest to our recipients as they're considering these
11 issues that they think about how that would impact
12 their delivery of civil legal services; and if they
13 could fairly say, this doesn't impair us in a
14 meaningful way, they would have authority, but not the
15 requirement, to go forward.

16 So Management's recommendation is not to add a
17 materiality type of modifier because it would at least
18 make an argument that would allow others to
19 second-guess that decision.

20 CHAIRMAN KECKLER: Julie?

21 MS. REISKIN: This may be a silly question or
22 something that all the lawyers understand. But why

1 wouldn't you just say they can do it if they want? Why
2 do you have any standard? If it's maximum flexibility,
3 why not just say they can choose to do it or not? Why
4 would you have any word in there?

5 MR. FLAGG: Because Congress has given them
6 the authority to do it. There's clearly a legal need
7 for this assistance. And so we'd like our recipients
8 to think about it in a respectful way, considering all
9 of their other priorities, and we thought this was the
10 better way to go than to just say, do whatever you
11 want. We don't care.

12 CHAIRMAN KECKLER: Gloria?

13 PROFESSOR VALENCIA-WEBER: In keeping with
14 what we've just heard here, I would suggest
15 consideration of a style change on page 4 on the last
16 lines above Roman numeral II, Procedural Background.
17 It says, "LSC recipients may be faced with increasing
18 numbers of appointments."

19 I think what we will be facing will be
20 increasing requests for appointment. And I think that
21 captures the whole sense of the statutory change as
22 well as what we want to keep our grantees in mind, that

1 they will have requests but it is within their
2 authority with their priorities to refuse.

3 CHAIRMAN KECKLER: Thank you, Gloria. That
4 also makes sense to me if we can put that in. That's
5 predetermining that we'll have greater numbers of
6 appointments in there. Our prediction is that may be
7 true, but our prediction is requests.

8 Are there any further questions or comments?

9 (No response.)

10 CHAIRMAN KECKLER: If not, then we will turn
11 to public comment on this rule before acting upon it.
12 Is there any public comment here or on the telephone
13 regarding 45 CFR Part 1613?

14 (No response.)

15 CHAIRMAN KECKLER: Hearing none, with the
16 change to the preamble, two-word change to the preamble
17 suggested by Professor Valencia-Weber, I can now
18 entertain -- yes?

19 MS. MIKVA: I just want to clarify what the
20 change to the preamble is.

21 CHAIRMAN KECKLER: Oh, I'm sorry. Okay. So
22 here it is. It's page 4, the second paragraph.

1 MS. MIKVA: So is it, "LSC recipients may be
2 faced with increasing numbers of requests to
3 represent"? Is that what it is? I think that's what
4 we mean. Right?

5 MR. FLAGG: "Increasing requests for
6 appointments to represent criminal defendants."

7 CHAIRMAN KECKLER: We could have "increasing
8 numbers of requests."

9 MS. MIKVA: Requests or appointments to me
10 sounds like they're requesting to be appointed, that's
11 all. So it's confusing to me.

12 CHAIRMAN KECKLER: It's the courts requesting
13 --

14 MR. FLAGG: How about, "LSC recipients may be
15 faced with increasing numbers of judicial requests for
16 appointments to represent criminal defendants"?

17 CHAIRMAN KECKLER: Very good. That follows
18 the sense of --

19 PROFESSOR VALENCIA-WEBER: Yes.

20 CHAIRMAN KECKLER: So it will read, the last
21 phrase, "LSC recipients may be faced with increasing
22 numbers of judicial requests for appointments to

1 represent criminal defendants." Is that correct?

2 MR. FLAGG: That sounds good to me.

3 CHAIRMAN KECKLER: All right. So if that
4 sounds good to everybody, I will now entertain a motion
5 to recommend to the Board publishing this as a final
6 rule.

7 M O T I O N

8 MS. MIKVA: So moved.

9 CHAIRMAN KECKLER: Second?

10 MR. GREY: Second.

11 CHAIRMAN KECKLER: All in favor?

12 (A chorus of ayes.)

13 CHAIRMAN KECKLER: The motion is approved, and
14 we will recommend to the Board the publication of this
15 as a final rule. Thank you for your work on it, and
16 thank you to Professor Valencia-Weber for that final
17 change and for your work and help on this rule.

18 We'll now turn to the next item on the agenda,
19 which is a final rule prepared regarding restrictions
20 on legal assistance to aliens, 45 CFR Part 1626. And I
21 will turn it back over to Stefanie Davis.

22 MS. DAVIS: Great. Thank you, Charles. So

1 this is the second round of presenting a final rule on
2 Part 1626 to the Committee. This rule was originally
3 presented as a final rule at the January Board meeting
4 in Austin, but was changed into a further notice of
5 proposed rulemaking after receiving some comments at
6 the January meeting.

7 At that Committee meeting, there was an
8 extended amount of discussion regarding the language
9 that the Corporation had proposed to use in section
10 1626.4(c) regarding the location of victims of
11 trafficking who were seeking legal assistance.

12 The Corporation had proposed revising that
13 language in the final rule to remove the requirement
14 from the proposed rule that the trafficking had to
15 occur in the United States in order for a victim to be
16 eligible for legal assistance from an LSC-funded
17 provider, and instead revise the language in the way
18 that the Corporation believed was most consistent with
19 both the Trafficking Victims Protection Act and VAWA of
20 2005 to require that individuals who were victims of
21 trafficking or victims of severe forms of trafficking
22 had to be in the United States at the time they applied

1 for legal assistance in order to receive assistance
2 from a recipient.

3 In response to the public comment, we
4 published as a further notice of proposed rulemaking
5 essentially the final rule, with two questions aimed at
6 section 1626.4(c).

7 The first question had to do with the term "in
8 the United States" and how it applied to victims of
9 trafficking and victims of severe forms of trafficking,
10 meaning whether in the United States -- what that
11 meant. Did it mean that the trafficking occurred in
12 the United States or did it mean that the victim was in
13 the United States?

14 And second, we asked whether "in the United
15 States," as used in the Violence Against Women Act
16 amendments of 2005, modified the crime of trafficking,
17 all of the crimes listed in the statute, or only the
18 victims of those crimes and their location.

19 Regarding the first question specifically
20 having to do with victims of trafficking and severe
21 forms of trafficking, we received comments and there
22 was a split opinion on whether "in the United States"

1 meant whether we had applied it correctly or whether it
2 meant that it could be applied to either the victims or
3 the crimes or both.

4 The majority of commenters recommended or
5 suggested that the analysis we should use is that the
6 term "in the United States" could apply to either the
7 crime of trafficking or to the victim, and the
8 rationale for this reading was that because both VAWA
9 2005 and the Trafficking Victims Protection Act are
10 remedial statutes, the remedial purpose, the purpose of
11 ameliorating the effects of these crimes, would best be
12 achieved by reading the phrase as broadly as possible
13 to allow people who either had been subjected to
14 trafficking who were no longer in the United States or
15 who were subjected to trafficking and now were in the
16 United States to receive legal assistance from our
17 recipients.

18 With respect to the second question, what "in
19 the United States" modifies in VAWA 2005, commenters
20 agreed that the term modified only trafficking but
21 split on whether it modified the trafficking itself,
22 the victim of trafficking, or again, both. And the

1 suggested reading for that language was again to read
2 "in the United States" to modify both victim and
3 trafficking, and the rationale was the same as under
4 the Trafficking Victims Protection Act.

5 We considered the rationale. We looked at all
6 of the applicable statutes, meaning we looked at the
7 TVPA. We looked at VAWA. We looked at the Immigration
8 and Nationality Act, which is the underlying basis for
9 the T visa, which victims of severe forms of
10 trafficking can receive.

11 And the Corporation determined after all of
12 those things that we were going to retain the language
13 in the final rule to say that victims of trafficking
14 must be in the United States at the time they seek
15 legal assistance in order to be eligible.

16 We think this is a matter of statutory
17 interpretation. Looking at the language in the TVPA,
18 the TVPA specifically says that victims of severe forms
19 of trafficking who may receive services from LSC-funded
20 recipients are -- their definition is narrower than the
21 definition that's contained in the larger TVPA.

22 The definition of victims of severe forms of

1 trafficking who are eligible for LSC-funded legal
2 assistance must have been subjected to one of the
3 crimes that's listed in the TVPA, one of the forms of
4 trafficking, they must be a minor under the age of 18,
5 or they must have either filed a bona fide application
6 for a T visa, which has not been denied, or they must
7 have been granted continued presence to remain in the
8 United States to assist with the trafficking
9 prosecution.

10 Both the application for the T visa and
11 continued presence require that the individual be in
12 the United States in order to receive either of those
13 statuses. So judging from all of that language
14 together, we believed that it was Congress's intention
15 that individuals be in the United States in order to
16 receive legal assistance if they were victims of severe
17 forms of trafficking.

18 In the interests of uniformity, we also gave
19 that same reading to the term "in the United States" in
20 VAWA 2005. So for both victims of trafficking under
21 VAWA 2005 and under the TVPA, the victim must be in the
22 United States at the time they apply for eligibility.

1 CHAIRMAN KECKLER: Right. So in the TVPA, the
2 severe form of trafficking doesn't have to occur in the
3 United States, but at least some elements of the
4 eligibility, the person has to be in the United States?

5 MS. DAVIS: Right. The individual has to be
6 in the United States at least at the time that they
7 apply. The TVPA does not contain a requirement for the
8 crime itself to violate the crimes of the United
9 States. Trafficking is defined within the TVPA. So as
10 long as whatever the individual suffered contravened
11 the terms of the TVPA, they would qualify as a victim
12 of trafficking.

13 CHAIRMAN KECKLER: In addition, with regard to
14 the second question that was in the FNPRM, we've
15 determined that the geographical presence requirement
16 -- that is to say, in particular the term "in the
17 United States" -- is a reference to the victim of
18 trafficking. Right?

19 MS. DAVIS: Yes.

20 CHAIRMAN KECKLER: And so there's this other
21 group of categories. The dot dot dot there is battery,
22 extreme cruelty, and sexual --

1 MS. DAVIS: Assault.

2 CHAIRMAN KECKLER: -- and sexual assault,
3 which are defined in the statute in 1626.2, definitions
4 (b) and (k)(1).

5 MS. DAVIS: That's correct. And both of those
6 definitions are taken from statute.

7 CHAIRMAN KECKLER: Okay. So (b) and (k)(1).
8 And then within what we've been working on -- I'm doing
9 the cross-references here, so everybody follow along --
10 1626.4(c) divides up that group by saying that an alien
11 defined in 1626(b) or (k)(1), that's battery and
12 extreme cruelty or sexual assault, need not be present.
13 That's in 1626.4(c)(2)(i).

14 MS. DAVIS: Yes. That's correct.

15 CHAIRMAN KECKLER: Okay. But an alien defined
16 in 1626.2(j), that is the TVPA.

17 MS. DAVIS: Correct.

18 CHAIRMAN KECKLER: And (k)(2) is trafficking
19 under VAWA.

20 MS. DAVIS: That's correct.

21 CHAIRMAN KECKLER: Those must be present in
22 the United States to be eligible for assistance.

1 MS. DAVIS: That's correct. And if I might
2 take the opportunity here to address another comment
3 that we received in response to the further notice of
4 proposed rulemaking, a number of commenters suggested
5 that the language we had originally included in the
6 final rule, which required victims of severe forms of
7 trafficking under the TVPA to be present in the United
8 States on account of the trafficking, was too narrow.

9 We considered those comments. We looked at
10 the TVPA and the continued presence regulation and
11 determined that that was correct, that that was in fact
12 too narrow. So we've stricken that requirement, and as
13 Charles points out, victims of severe forms of
14 trafficking under the TVPA are now covered under
15 1626.4(c)(2)(ii).

16 CHAIRMAN KECKLER: Okay, (ii). So there's a
17 category within VAWA and the TVPA that needs to be
18 present in the United States when applying for
19 services.

20 MS. DAVIS: Correct.

21 CHAIRMAN KECKLER: And there's a category that
22 does not need to be present. But there's still

1 1626.4(c)(1). So that's a separate requirement for
2 eligibility. Is that right?

3 MS. DAVIS: That's correct. That has to do
4 with the location of the crime. And as we've
5 explained, in none of the instances in the TVPA, in
6 VAWA, regarding either the battery, extreme cruelty,
7 sexual assault, or trafficking, or the secondary part
8 where an individual is qualified for a U visa -- none
9 of those statutes include a requirement that the crime
10 itself be located in the United States or have occurred
11 in the United States.

12 And we've explained in the preamble that the
13 crime has to either have occurred in the United States
14 or violated the laws of the United States. So I think
15 we would recommend, in order to make clear that both
16 (1) and (2) must be met in order for eligibility to
17 adhere, it might make sense to have a revision to (1)
18 to include a conjunctive, so to stick in an "and."

19 CHAIRMAN KECKLER: So you're suggesting at
20 1626.4(c) -- this is on page 194 of the Board book --
21 that 1626.4(c)(1), and then at the end it says, "or the
22 territories and possessions of the United States"

1 period, we would change that to a comma and put "and"?

2 MS. DAVIS: I think that would help make it
3 clear that both a violation of United States law or
4 occurring in the United States of the crime and the
5 location of the victim need to be -- both of those
6 things have to be considered in determining
7 eligibility.

8 CHAIRMAN KECKLER: Could we perhaps put
9 something in the preamble? I think I noted you could
10 put it -- there's different places we discuss
11 1626.4(c). But I was thinking about page 165. This is
12 where we say -- you're changing things.

13 In the second paragraph, we start talking
14 about (c)(2), and then it says, "Finally, section
15 1626.4(c)(2) addressed victims of trafficking." You
16 could just delete that "Finally" and just put in a
17 notation to the effect that individuals having
18 eligibility under 1626.4 must satisfy 1626.4(c)(1) and
19 one of the alternatives available under 1626.4(c)(2),
20 as a clarifier.

21 MS. DAVIS: Right. I see where you're talking
22 about, and I think we can --

1 CHAIRMAN KECKLER: You could put it someplace
2 else, but --

3 PROFESSOR VALENCIA-WEBER: It should be
4 connected, though.

5 CHAIRMAN KECKLER: Yes. That's where you'd go
6 through your list of 1626.4(c).

7 MS. DAVIS: Right. I think that discussion
8 precedes the discussion of the comment and the
9 subsequent proposal that came up in the January Board
10 meeting. So I think we can include such language in
11 the preamble somewhere.

12 CHAIRMAN KECKLER: But that's a possibility to
13 put it somewhere, maybe, just clarifying.

14 Okay. Do you have continued comments?

15 MS. DAVIS: Of course. Are we all good on
16 where we are with regard to those provisions?

17 CHAIRMAN KECKLER: So you changed a couple of
18 items in response to the FNPRM.

19 MS. DAVIS: Correct.

20 CHAIRMAN KECKLER: And then otherwise we've
21 brought forward the NPRM from January.

22 MS. DAVIS: Correct.

1 CHAIRMAN KECKLER: And besides what we just
2 did right now with adding an "and," the things that we
3 changed were, one, we got rid of the fact that the
4 person had to be in the United States on account of
5 trafficking. They have to be in the United States, but
6 not on account of the trafficking.

7 MS. DAVIS: Not in the rule. Correct.

8 CHAIRMAN KECKLER: Not in the rule. And did
9 we change anything else from the FNPRM?

10 MS. DAVIS: No. I don't think we did. We did
11 include some language in the preamble that was inspired
12 by the discussion in Austin regarding whether the
13 individual had to remain in the United States after
14 representation began.

15 CHAIRMAN KECKLER: Oh, yes.

16 MS. DAVIS: And we did not include anything in
17 the rule text itself, but we did include language in
18 the preamble confirming that absence from the United
19 States after a recipient has begun representation does
20 not necessarily render the client ineligible to
21 continue receiving legal assistance.

22 CHAIRMAN KECKLER: Right. And I know that's a

1 concern that a lot of people had, so let's take a look
2 quickly. That starts on page 169 and goes over to page
3 170 of your Board book. That's page 20 and 21 of the
4 rule preamble.

5 And so you can take a look for yourself on how
6 that issue is dealt with, but summarize briefly our --

7 MS. REISKIN: 169, you said?

8 CHAIRMAN KECKLER: It starts on 169 and goes
9 to 170.

10 FATHER PIUS: That was the original Board
11 book, not the revised.

12 CHAIRMAN KECKLER: Okay. Page 20 to 21, that
13 should be -- belts and suspenders. Sometimes you need
14 those suspenders. Page 20 and 21 of the preamble for
15 the rule.

16 MS. DAVIS: Sure. And this language again is
17 addressing the concern that some commenters had that
18 the way the rule was drafted made it appear -- by
19 requiring that some victims be in the United States at
20 the time they applied for services, some commenters
21 were concerned that that could be read as saying that
22 the individual had to remain in the United States the

1 entire time that they were receiving representation.

2 And so this language is just reiterating that
3 LSC believes that if an individual has to depart the
4 United States after representation has begun, that
5 doesn't necessarily mean that the individual is
6 ineligible.

7 We believe that that determination needs to be
8 made by the recipient on a case-by-case basis, and
9 we've cited to Program Letter 2000-2, which discusses
10 the factors that recipients should consider in making
11 that determination.

12 CHAIRMAN KECKLER: Gloria, you had a comment
13 on that.

14 PROFESSOR VALENCIA-WEBER: Yes. I think what
15 you have on page 20-21, 169-170, correctly reflects not
16 just the statute but what is the actual status of some
17 immigration cases, where the victim may have
18 involuntarily been removed from the country and we have
19 had some federal district courts that have ordered ICE
20 to return the victim, or the victim may have left the
21 country under less than honest circumstances by the
22 trafficker. So there was no intent in the statute to

1 disqualify the victim from continuing to be
2 represented.

3 CHAIRMAN KECKLER: Thank you, Gloria. I had
4 one other question, then I'll turn it over to the Board
5 and Committee. So one item that we did talk about
6 briefly in January was the appendix.

7 Now, my understanding is that what we did with
8 the appendix is that we -- part of what we're doing is
9 we're going to transform what's currently published as
10 the appendix into a program letter that's issued when
11 needed so that we don't have to go back and do it, but
12 that following the January meeting, under the terms of
13 what we did, the program letter was issued. Is that
14 correct?

15 MS. DAVIS: No. The program letter was
16 published for public comment.

17 CHAIRMAN KECKLER: For public comment.

18 MS. DAVIS: Yes. And the comment period
19 closes today.

20 CHAIRMAN KECKLER: Can you give us insight
21 into whether -- and I know you won't be able to cover
22 till the end of the day, but have comments come in

1 regarding the program letter?

2 MS. DAVIS: We've received only one comment so
3 far.

4 CHAIRMAN KECKLER: You've received one
5 comment. Okay. And so as we proceed with this today,
6 do we need to vote including the publication of that
7 appendix again, or do we not need to do that now? What
8 do we need to --

9 MR. FLAGG: The final rule contemplates that
10 the modification of that list will be by program
11 letter. So you'd be voting on approval of that
12 approach to dealing with what had previously been in
13 the appendix. The whole idea was not to get the board
14 involved.

15 Again, this appendix is just a listing of
16 documents which changes from time to time, and absent
17 some controversy about them, we thought it did not make
18 sense to every time we changed the list -- we were
19 happy to solicit public comment on it, but the need for
20 Board involvement or Committee involvement would only
21 be if there was some controversy about the list.

22 So I think you can vote on the final rule,

1 including the proposal that what had been in appendix
2 be covered by a program letter. And program letters
3 are issued by the Corporation, not by the Board.

4 FATHER PIUS: Then just to clarify, the
5 program letter, obviously, the reason we were putting
6 it out for public comment is just good practice, it's
7 not because we're required by law or because we're
8 publishing it?

9 MR. FLAGG: That's right. We decided this was
10 a reasonable compromise between the formality of
11 keeping it in the rule and requiring the Committee and
12 the Board to be involved every time a new document
13 sprung up in the federal bureaucracy; and on the other
14 hand, in a complicated area of law, making sure that
15 when we made changes to the list, we solicited public
16 comment on it.

17 CHAIRMAN KECKLER: Okay. Go ahead, Gloria.

18 PROFESSOR VALENCIA-WEBER: Overall, I think
19 this is a very well-drafted proposal because having
20 taught and done immigration law, it is a bag of worms.

21 For purposes of style, perhaps, more than
22 anything else, I'll call your attention to the pages

1 191, 192, and 193. If you look at 191, the practice
2 among immigration attorneys and the casebooks and all
3 the instructional materials that teach this law is to
4 cite the Immigration and Naturalization Act, INA.

5 There is this fiction that we still have one
6 organized act, but as I said, it's a bunch of
7 cumulative little wormlets of law. And so there, if
8 you see at 191, page 42, you cite the INA. On the
9 opposite page, 192, under (1), if you look just above
10 "Prohibition," you're using the USC cite. And on the
11 next page, if you look at the small (ii) number, you
12 have the cite where you first use the INA and then put
13 the USC cite in parentheses.

14 And this style on 44 is the one that is most
15 used by immigration law practitioners and the
16 instruction materials that train them. And it just
17 makes it much more consistent to do it like on page 44.

18 CHAIRMAN KECKLER: Right. So what you're
19 suggesting, Gloria -- thank you for that catch -- is
20 that it looks like on page 42, we have just the
21 citation of the INA section and not the USC code, and a
22 couple places. We have it in (h)(1) in the heading and

1 then (h)(1)(ii) -- or (h)(2), We have (h)(2), yes, and
2 then in (h)(2). And then over on page 43, we have just
3 the USC code and we don't have the section of the INA.

4 Is that correctable before publication?

5 MR. FLAGG: Yes.

6 PROFESSOR VALENCIA-WEBER: It's a style
7 change, but it also simplifies it for the user.

8 CHAIRMAN KECKLER: Yes.

9 MS. DAVIS: And conveniently, it's also what
10 the Federal Register prefers. So yes, we can
11 definitely do that.

12 CHAIRMAN KECKLER: Great. That's a great
13 catch, and I think that's all agreeable to people.
14 That's fine. And it's belt and suspenders again. Say
15 it twice, people believe it.

16 Okay. So are there further questions or
17 comments regarding this rule? Julie?

18 MS. REISKIN: I just want to thank you for
19 agreeing about that section was too restrictive. I
20 appreciate that.

21 MR. MADDOX: Charles?

22 CHAIRMAN KECKLER: Yes?

1 MR. MADDOX: I've got a question about the
2 process really more than anything else. I've been
3 trying to read through this memo to understand its
4 relationship to the previous discussions we've had.
5 It's not as easy as I would have thought.

6 So on page 8 of the memo at the bottom, we say
7 that, "LSC agrees with the commenters that the VAWA
8 term 'trafficking,' incorporating as it does crimes
9 that would constitute trafficking if they violated
10 state or federal law, is broader," et cetera.

11 When it says, "LSC agrees," is that a
12 reflection of where the Board stood as of the end of
13 our January meeting? Or is that where the staff stands
14 now in light of the comments with a recommendation that
15 it's making to the Board that the Board adopt tomorrow?

16 CHAIRMAN KECKLER: Well, let me give you a
17 brief answer, and I'll let OLA answer, too. As far as
18 I'm concerned, when this comes out of the Board, the
19 Committee or the Board, when it says "LSC," that's us.
20 LSC has to agree as an organization, as an agency, as
21 a federal entity, to that.

22 Now, this is proposed language. If it's

1 historical, right, if it's not true, then -- I mean, it
2 is a little bit imprecise in the sense that when you
3 talk about it historically and you're talking about the
4 process and the staff process and the Committee, if you
5 said, "LSC agreed," for instance, that would make it
6 historical about the process that they went through
7 talking about it.

8 By making it "agree," as it's current that
9 that's what we think -- and we shouldn't ever say in
10 something like this that LSC agrees unless we really
11 agree right now with it. But when people read it in
12 the Federal Register, it is something that accurately
13 represents the considered view of the organization.

14 Now, if you talk about it historically, then
15 you could have it a little bit -- it's kind of
16 imprecise, but I think it's acceptable, maybe, to do
17 it.

18 MR. MADDUX: Right. Well, so when we say we
19 believe, is that a reflection of the fact that we
20 believed it in January and that's the position we have
21 now, or we've changed our belief in light of the
22 comments? Because as I understand it, seven of the

1 eight comments urged some change in the position I
2 think we adopted, or at least the tentative position we
3 had, as of the end of our last meeting.

4 And let me take it to another page. On page
5 10, Charles, at the bottom, we're talking about the
6 geographic location, and we say, "LSC believed" -- now,
7 this is in the past tense -- "that this interpretation"
8 -- i.e., that there had to have been trafficking in the
9 U.S. -- "was necessary because LSC read the qualifier
10 to apply to activity of trafficking," et cetera.

11 Now if we go over to page 13, I gather, in
12 light of the commentary that's been received since the
13 further notice, it says at the beginning of the first
14 full paragraph that, "LSC agrees that it would be
15 inconsistent with the plain language," et cetera, to
16 require that the activity had been in the U.S.

17 So the way I read it, it says, as of our last
18 meeting we believed that it would be appropriate to
19 require that the activity be in the U.S. Now we've
20 received commentary, apparently, and in light of that
21 commentary we are being asked to vote tomorrow to
22 reverse that position and adopt instead the view that

1 the legislative history of the various related
2 statutes, et cetera, means that there was no
3 requirement for it to be in the U.S. Is that where
4 this is?

5 CHAIRMAN KECKLER: Well, let me say that yes,
6 this is good that we need to be thoughtful about this.

7 And we shouldn't ever say anything in the present
8 tense, I think, as a matter of style, even if it's
9 historical -- even if it's from the old version of the
10 NPRM and so on, we shouldn't say anything in the
11 present tense that we don't believe in the present
12 tense.

13 Now, when we talk about "believed," now,
14 "believed," that, I think, is accurate that LSC,
15 delegating, at least in the process, LSC's
16 representation to OLA and to staff as they receive
17 comments, LSC believed that this interpretation was
18 necessary but no longer believes it.

19 MR. FLAGG: Yes. And just to be clear, and I
20 know this is narrower and narrower issues being
21 presented to the Board, but the language you focused on
22 we actually changed in the NPRM that was reviewed in

1 January and recommended to you that we change our
2 collective view on that issue. And from the
3 discussion, I think there was agreement that our change
4 of view was appropriate.

5 But there were still questions raised, and the
6 Committee agreed that we should review these issues
7 again in this supplemental notice of proposed
8 rulemaking, which we've done. And as the discussion
9 between Stefanie and Charles had indicated, we're
10 making almost no changes in response to the comments on
11 the supplemental notice of proposed rulemaking other
12 than one or two changes that have been explicated.

13 But on the basic question of what "in the
14 United States" modifies, we're sticking with where we
15 were in January, which was a change from where we were
16 in October. And I agree we ought to get the verb
17 tenses in the preamble right to indicate that.

18 And Charles is absolutely right that at the
19 end of the day, when this document certainly speaks of
20 LSC's views at the end of the process, it's the Board's
21 views.

22 MR. MADDUX: Right. So that's very helpful,

1 Ron, because I was having trouble remembering where we
2 ended up in January. But apparently what we had done
3 was we had changed the position that we'd previously
4 taken, and so when we saw here on page 13 that we agree
5 that it would be inconsistent, that's really a
6 confirmation of the position we adopted in January.
7 And the comments that we received largely support that
8 position. Correct?

9 MR. FLAGG: No. The commenters -- and
10 obviously there were many commenters -- a number of
11 them took slightly different positions at this point.
12 But I think it's fair to say that the commenters, as
13 Stefanie pointed out, said in effect, gee, it's really
14 not that clear what "in the United States" modifies
15 here.

16 Since this is supposed to be a statute that's
17 helping people, let's help the most people we can and
18 interpret "in the United States" to be satisfied if
19 either the bad act occurs in the United States or the
20 person who is seeking help is in the United States.

21 Our view was, we agreed that the statute was
22 challenging to construe, but that reviewing all of the

1 materials -- the statutory materials and all of the
2 surrounding materials that Stefanie alluded to -- that
3 the best reading was no, Congress did not mean anything
4 satisfies this standard.

5 But as Stefanie and Charles walked through the
6 various provisions, that's what it meant, that by and
7 large "in the United States" modified where the person
8 applying for assistance was, although again that's a
9 generalization, and you have to walk through each of
10 the statutes and each of the various provisions.

11 MR. MADDUX: So I'm sorry, perhaps I'm slower
12 than some on this, but I think I'm close to
13 understanding it. But it seems like the concluding
14 sentence on page 13, Ron, says, "For this reason, LSC
15 is revising the language in proposed 1626.4(d)(1) to
16 remove the requirement that an alien have been
17 subjected to trafficking activity in the United
18 States."

19 So is that the position that we landed on at
20 the end of our last meeting?

21 MR. FLAGG: Yes. It was changed in January.

22 MR. MADDUX: Thank you.

1 CHAIRMAN KECKLER: Go ahead, Gloria.

2 PROFESSOR VALENCIA-WEBER: And on page 13, the
3 next paragraph to the paragraph you're talking about,
4 Victor, that's a correct statement of the law in
5 immigration terms in that the activity that is
6 violative of U.S. law need not have occurred in the
7 United States because trafficking victims can be
8 beguiled by acts in a foreign country, whether it be in
9 employment or marriage or something else, brought to
10 the United States, and then trafficked. And the
11 fraudulent marriage or fraudulent job offer or
12 whatever, that crime occurs elsewhere. The victim is
13 here.

14 MR. MADDIX: No. I appreciate that, Gloria.

15 CHAIRMAN KECKLER: Laurie?

16 MS. MIKVA: While you're explaining, Gloria,
17 could you explain -- I'm having trouble picturing what
18 would be a case where the victim was not in the United
19 States and had presented a case to a legal services --

20 PROFESSOR VALENCIA-WEBER: This is not unusual
21 in that once the victim is cooperating with the
22 prosecution -- and the most common thing is that

1 whoever brought them to this country, and it's
2 frequently a her, will try to get her out of the
3 country, often under misleading reasons.

4 And there have been a few federal district
5 court cases where the immigrant already had filed a
6 case. There was some pending action going on. And by
7 mistake, ICE deported and removed them. And it was
8 very contested and settled that no, that interference
9 by ICE was illegal, and they've been directed to go
10 bring the person back.

11 MS. MIKVA: But have there been cases where
12 they have allowed a person who is no longer in the
13 United States to file a claim in the United States?

14 PROFESSOR VALENCIA-WEBER: No. You're going
15 to have to file in the United States.

16 CHAIRMAN KECKLER: Right. So the issue, as
17 you're pointing out, is that there can be individuals
18 who have been subject to trafficking, illegal
19 trafficking -- it violates the trafficking laws of the
20 United States -- who are not in this country.

21 But as I understand the way we're revising the
22 regulation in conjunction with the statute, they're not

1 going to be able to get services. And it would be
2 difficult for them, in any case, to contact an attorney
3 in the United States, obviously.

4 But the point is that in order to give meaning
5 to the term, the clause, "in the United States," the
6 trafficking victims, wherever the trafficking occurred,
7 those individuals need to be in the United States. Not
8 everybody does, but they do.

9 MS. MIKVA: Right. And I'm trying to
10 understand just what we're excluding. That's all I'm
11 doing.

12 CHAIRMAN KECKLER: Right. Exactly. And there
13 are people that are excluded by giving meaning to the
14 term "in the United States." It's hopefully not that
15 many people, but there are some people it may affect.

16 MR. FLAGG: And again, we certainly tried to
17 get a sense of that in interpreting this. But at the
18 end of the day, we were guided by the language of the
19 statute and all of the surrounding provisions of the
20 statute that illuminated that issue.

21 CHAIRMAN KECKLER: Are there further comments
22 or questions from the Committee?

1 (No response.)

2 CHAIRMAN KECKLER: And I note that we've made
3 a couple of things -- Professor Valencia-Weber has made
4 a couple of points in the statute itself regarding
5 citations. We talked about adding a conjunction and
6 preamble language that references the conjunction. And
7 also, Victor has asked for a review, at least, to make
8 sure that we have our verb tenses on board here.

9 So if there are no more questions from the
10 Committee or Board, I will then turn this matter over
11 to public comment.

12 MR. SAUNDERS: Thank you, Mr. Chairman. I'm
13 Don Saunders with the National Legal Aid and Defender
14 Association.

15 I want to stress in my brief remarks the
16 importance of the rule, as your conversation today has
17 indicated. It's a devastating crime with enormous
18 human consequences, and one that your grantees take
19 very, very seriously.

20 I also want to appreciate the Committee's and
21 the Board's consideration in Texas to reopen the
22 conversation. Most of the comments that were received

1 earlier were playing off of the understanding that
2 geographic presence was not an issue. So it was very
3 much appreciated by your grantees and others who are
4 involved in trafficking issues to have an opportunity
5 to review the other circumstances.

6 I want to commend Stefanie and Ron and your
7 OLA staff for a very open, transparent process. I'm
8 not going to rehash; the summary that Stefanie gave you
9 of our comments and views was very fair and very
10 thorough. I would like to just reiterate a couple
11 points, and particularly raise the one area of
12 difference that we continue to have with the draft
13 before you.

14 This is a terrific improvement in the existing
15 situation of program letters and various
16 interpretations. So I want to begin by saying this is
17 a very good move for LSC to take. And particularly, we
18 strongly support the recommendations to continue
19 representation when it was initiated in the United
20 States. We strongly support the view that "in the
21 United States" in VAWA 2005 only applies to the
22 trafficking provisions, not the assault and other

1 provisions.

2 The complete clarification of the physical
3 presence requirement does not apply to U visas. That
4 was helpful and really clarified some questions in the
5 field. And the comment that Stefanie made earlier
6 about changing the Trafficking Victims Protection Act
7 to not require the physical presence, only to be on
8 account of trafficking, those are all very positive
9 provisions.

10 We do, however, as indicated in our comments
11 and summarized by Stefanie, continue to believe that
12 both the Trafficking Victims Protection Act and VAWA
13 2005 can be read -- can be read -- to allow eligibility
14 whenever there exists a nexus with the United States,
15 where either the trafficking occurred in the United
16 States or a victim of international trafficking is
17 present in the United States.

18 We certainly respect and understand the views
19 of OLA in this, and theirs is certainly reasonable
20 interpretation. What we are saying, for example, is
21 indicated by the earlier views of drafts that felt that
22 an interpretation of physical presence was not

1 required.

2 It's clear, as Ron pointed out, that this is
3 not a clearly defined statute or statutes, and the
4 legislative intent behind them does not give a clear
5 answer to the question. Therefore, we think a
6 reasonable interpretation could include either/or, that
7 the nexus has to be in the U.S.; either the trafficking
8 occurred in the United States or that the victim is
9 present.

10 We base that basically on the fact that human
11 trafficking is a grave human rights abuse. It's a
12 transnational crime. The cases and certainly much of
13 the commentary around these statutes indicate the
14 strong remedial purpose of addressing this crime, and
15 particularly as it relates to sex trafficking and labor
16 trafficking, and that it would be reasonable for you as
17 a Board to interpret that to mean either/or.

18 I'm certainly not suggesting that OLA's
19 interpretation is not reasonable. And given the
20 importance of this issue and what's at stake for the
21 people we represent, it's our view that you should take
22 an expansive remedial interpretation, that that is

1 reasonable, and that's really -- it is a policy
2 question, but we believe the laws are such that this
3 Board would have the discretion to engage in
4 considering the policies underlying your decision.

5 I could really go on, but I think you all know
6 this pretty well, so I will stop there. Thank you.

7 CHAIRMAN KECKLER: Thank you, Mr. Saunders.

8 MR. FLAGG: I just want to make one comment.

9 CHAIRMAN KECKLER: Yes?

10 MR. FLAGG: I think Don's comments were well
11 presented and I appreciate his comments. My one
12 comment is, respectfully, I don't think this is a
13 policy decision. I think this is a difficult issue of
14 statutory interpretation and probably an issue as to
15 which people might differ, and obviously do.

16 I think our view was it was implausible that
17 Congress meant either/or without saying either/or, so
18 that to give "in the United States" some meaning, it
19 either meant the trafficking or the bad act, the
20 violence, occurred in the United States or violated a
21 U.S. law, or the victim was in the United States.

22 And since Congress didn't use either/or and as

1 Stefanie had explained, there were various indicia to
2 indicate that as between the two, it was probably the
3 victim being in the United States that was the
4 recommendation we made as to the statutory
5 interpretation, which we view as purely a legal issue,
6 albeit a difficult legal issue, but at the end of the
7 day a legal issue and not a policy issue.

8 CHAIRMAN KECKLER: Right. I appreciate the
9 views, and it certainly is -- we are dealing with a
10 remedial statute that is designed to help people. But
11 as we've discussed, there's putting in a couple of
12 limiting phrases in there in terms of directing who it
13 is that we're helping in this instance.

14 And so I myself, to be totally candid with
15 you, I can see reading it either way, "in the United
16 States" meaning that the crime took place in the United
17 States or that the individual is in the United States.

18 But it's harder for me to read it with a
19 plural meaning of meaning either/or. It could be one
20 or the other, but it's hard for me to read it as both.

21 So that's been my own struggle going forward with it.

22 But I appreciate the comments of all on it.

1 Julie?

2 MS. REISKIN: I thought I understood it; now I
3 just want to make sure. So if someone is violated in
4 another country but it somehow is a violation of one of
5 our laws, and then they later come, still within, I
6 guess, whatever statute of limitations, if they exist
7 here, we can still help them.

8 So they have to just be here when they apply
9 and there has to be a connection to our law. Is that
10 right?

11 MS. DAVIS: Sure. I think that's accurate.
12 None of the statutes place a geographical requirement
13 on where the trafficking occurs. And so as long as it
14 violates the laws of the United States, which means it
15 could be trafficking as defined within the Trafficking
16 Victims Protection Act and the individual is here at
17 the time they're seeking legal assistance, they would
18 still be eligible.

19 CHAIRMAN KECKLER: Okay. So comments?
20 Gloria?

21 PROFESSOR VALENCIA-WEBER: I think Mr.
22 Saunders raises a good point, that where it's

1 ambiguous, as it clearly is here, there is some
2 discretion to read it as broadly as possible. Having
3 said that, I think it's better to get this rule in
4 place than no rule.

5 CHAIRMAN KECKLER: Okay. If there's nothing
6 further, then I will seek a motion to recommend to the
7 Board publication of 45 CFR Part 1626, as modified in
8 this session with modifications, for publication as a
9 final rule.

10 M O T I O N

11 MR. GREY: So moved.

12 CHAIRMAN KECKLER: Is there a second?

13 MS. MIKVA: Second.

14 CHAIRMAN KECKLER: All in favor?

15 (A chorus of ayes.)

16 CHAIRMAN KECKLER: The recommendation is
17 approved and will be brought to the Board tomorrow.
18 Any list of changes that we made -- you might not get
19 the exact language, but just perhaps a list of changes
20 with one sheet might be useful.

21 MR. FLAGG: We're going to shoot to be a
22 little more ambitious and actually implement the

1 changes. But since Stefanie will be doing it and I'm
2 just promising it --

3 (Laughter.)

4 MR. FLAGG: -- you have to take the promise
5 with a grain of salt.

6 CHAIRMAN KECKLER: Okay. I know we've got
7 time issues, but I want to raise one final issue before
8 we leave this topic, so don't all run away. This is on
9 page 185 of the Board book and page 36 of the preamble
10 to the rule. And this is just a thought that I had
11 going through it, and I'll be interested in any
12 comments now or later about it.

13 This has to do with extending our capacity for
14 representation for individuals who are subject to
15 withholding of removal under the Convention Against
16 Torture, or deferral of removal under the CAT. Several
17 comments were received by LSC suggesting that we extend
18 the regulation so that those individuals would be
19 eligible for services.

20 And the conclusion of OLA, which I don't
21 question -- otherwise I would have brought it up before
22 we voted -- was that that was not statutorily

1 authorized.

2 Personally, I think that's unfortunate, and so
3 we in this Committee can't do anything about it. OLA
4 couldn't do anything about it. The Committee can't do
5 anything about it. The only individuals who can do
6 anything about it are Congress.

7 Just speaking for myself, from time to time we
8 as an organization will reach out for some assistance
9 from Congress where we've bumped up against a statutory
10 restriction that we find that they may want to consider
11 revising.

12 And so if it is true, as the comments make it,
13 that this is in line with the intent of a lot of other
14 anti-abuse statutes that we have put in place in terms
15 of the type of people who Congress has felt in the past
16 ought to be eligible for LSC eligibility, that's
17 ultimately a congressional decision that it is
18 parallel.

19 But anyway, my own thought is this might be an
20 occasion in which we might want to reach out to our
21 congressional partners for a fix. And I'll open it up
22 for further comments on that. We're not voting on it.

1 We're not sending it to Congress. But I'm soliciting
2 any thoughts about that.

3 Julie?

4 MS. REISKIN: I agree with you.

5 CHAIRMAN KECKLER: Gloria also agrees with me.

6 Thank you.

7 Well, anyway, that's a thought, and -- yes,
8 Father Pius?

9 FATHER PIUS: Did you think about what form
10 that might take? Would it be part of our budget
11 request to Congress, or would it be a separate letter
12 to the oversight committee?

13 CHAIRMAN KECKLER: There's a way that we do it
14 normally, which is that it usually goes, I think,
15 through OMB clearance in the budgetary process. I
16 believe that's the way we did it before in terms of
17 getting the census adjustments fixed and that sort of
18 thing.

19 But again, that's kind of a staff decision.
20 The idea is that it's a Board decision, a policy
21 decision, that we would reach out to Congress. It's a
22 staff decision, I think to some extent, the manner in

1 which it would be best to do that.

2 FATHER PIUS: And I guess my own other thought
3 was at least with the census issue, that was an issue
4 of just simply impossibility. It was impossible to
5 conform to that. So we were telling Congress, you've
6 asked us to do something that is absolutely impossible.

7 This is really policy guidance, so it's much
8 more of an advocacy role than simply telling them, this
9 is impossible. That's just my thought, and I haven't
10 formed yet a conclusion.

11 I certainly agree with you that this is
12 bizarrely inconsistent. Why wouldn't we be able to
13 have these people -- I mean, these people are subject
14 to torture if they go back home, but sorry, we can't
15 help you. If you were an abused spouse, we could, but
16 sorry, if you're going to be tortured by your
17 government, you're out of luck.

18 It just obviously is bizarre. But I'm
19 sensitive to the manner by which we make that known to
20 Congress. That's my only thought.

21 CHAIRMAN KECKLER: Oh, yes. And that's all
22 open to discussion and deliberation gong forward. But

1 occasionally, very occasionally, we do it, and I'm
2 thinking this might be one of those very occasional
3 moments.

4 MR. GREY: This is a problem. Since we are a
5 new group and are doing a lot of things on first
6 impression -- that wouldn't be exactly something we do
7 every day -- that the idea of how you talk to those who
8 would be required to be part of the decision that we
9 would make to go forward, maybe those that we would
10 seek their advice beforehand to understand how you run
11 this flag up the pole before you notify everybody
12 you're doing it, and to get the particulars of that
13 right so that, should we consider something like that,
14 it is with full knowledge of the ramifications and
15 circumstances.

16 MR. MADDOX: I agree with Robert, Charles.
17 I'd also like to know more about the Convention. There
18 may be definitional issues that I'd like to have some
19 guidance on. There have been a number of controversies
20 in the last decade about what is torture and how
21 expansive is the definition. So before we go asking
22 Congress to change the law --

1 CHAIRMAN KECKLER: Oh, yes. The
2 practicalities here are, is there Board interest worth
3 getting a memo on the subject?

4 FATHER PIUS: Yes.

5 PROFESSOR VALENCIA-WEBER: Yes.

6 CHAIRMAN KECKLER: Yes. All right.

7 MR. FLAGG: We will undertake, in conjunction
8 with our Government Relations office, to put together
9 both a substantive memo addressing the issues that
10 Victor just mentioned as well as the issue of process.

11 CHAIRMAN KECKLER: Thank you very much. That
12 will be very helpful and eases my mind.

13 Okay. We can now move to the next item of
14 business, which is a proposed rule -- those last two,
15 of course, being final rules -- a proposed rule on
16 private attorney involvement, 1614.

17 MR. FLAGG: Again, the Committee will not be
18 surprised that Stefanie will be speaking to the details
19 of this. But I do want to make a few preliminary
20 comments that put into context what we have before us.

21 The process that got us here today was
22 initiated by recommendations of the Pro Bono Task

1 Force. The Task Force's recommendations were followed
2 up by two workshops, at which Charles and others took
3 the testimony and questions and answers from twelve
4 commenters.

5 There was an additional round of written
6 comments from ten parties. That led to really a
7 collaborative draft prepared by staff, and when I say
8 collaborative, I mean it was not just the Office of
9 Legal Affairs.

10 But the Office of Legal Affairs in
11 consultation with the rest of the organization put
12 together a draft which this Committee had a preliminary
13 chance to look at early in March. The Committee gave
14 us some helpful comments, and we revised the draft as
15 reflected in the Board book.

16 There are actually two versions of the
17 document in the Board book. One is a clean version and
18 the other is a redlined version. The yellow markings
19 are indications of changes from the existing PAI
20 regulation to the new proposal, and then the actual
21 redlinings -- that is, the strikeouts and underscores
22 -- are the relatively small set of changes that were

1 made between the beginning of March and today.

2 Just a couple of observations about the
3 process, which I think are worth keeping in mind. The
4 regulation as proposed addresses a wide range of
5 vehicles through which recipients may leverage their
6 resources. They vary from involvement of private
7 attorneys, who may be providing direct representation
8 as private attorneys; alternatively, it also covers
9 screening and referral in the context of an advice and
10 referral clinic.

11 The volunteers, as covered by the new rule,
12 can include, as they always have, private attorneys,
13 but we've proposed to extend the coverage of the
14 regulation to law students, recent law graduates, and
15 other professionals.

16 In considering the various alternative
17 vehicles by which the PAI reg requirements can be
18 satisfied, we were guided at the end of the day by two
19 different thoughts.

20 First, the most effective and efficient
21 vehicle for a recipient to use to satisfy their PAI
22 requirements is likely going to vary depending on the

1 specific legal needs and available resources in a
2 recipient's service area. That is to say, one size is
3 not likely to fit all when it comes to the optimal PAI
4 model to satisfy these requirements.

5 Second, if we at LSC were wont to dictate a
6 certain vehicle, I think we would want to have a good
7 deal of data and evidence to support that a particular
8 vehicle was superior to any other vehicle before we
9 would make such a prescription. And we do not have
10 such evidence.

11 So for these reasons, the draft regulation
12 generally does not impose any strict requirements as to
13 what the right vehicle is. That is, it doesn't say,
14 you must do at least 50 percent extended services, or
15 50 percent direct representation, or only use students
16 20 percent of the time.

17 We just didn't have a basis to make those
18 sorts of judgments, and thought it better to leave the
19 system flexible so that our recipients could satisfy
20 these PAI requirements depending on the legal needs and
21 the available resources available to them.

22 I'd also like to address in a general way a

1 couple of issues that arise in connection with clinics
2 and the other vehicles in which our recipients screen
3 and refer people to PAI volunteers.

4 The current PAI rules generally require that
5 when such referrals are made, that not only the case be
6 referred to a PAI lawyer, but that the recipient take
7 the case on as its own, even for statistical purposes,
8 even as it passes the case on to a PAI lawyer. And
9 that creates a fair bit of administrative time and
10 effort on both the PAI lawyer's part and the part of
11 the recipient.

12 The Pro Bono Task Force commented on that
13 aspect of the current PAI rules quite directly. We
14 received many comments on those aspects. We've also
15 heard, not specifically with regard to those
16 requirements but generally from Congress, that they
17 want to see us make it easier for pro bono work to be
18 done.

19 And this draft is responsive to those comments
20 and sentiments by eliminating the requirement that when
21 referrals are made, that the cases be referred and kept
22 within the grantee's records as so-called CSR cases, so

1 that the only tracking that's required once a referral
2 is made under the proposed rule is with respect to just
3 the number of cases referred and the number of cases
4 placed with a private attorney or other professional.

5 And then lastly, I want to comment on another
6 issue that comes up in the screening context, and that
7 is whether our consideration of whether statutory or
8 regulatory requirements limiting the legal assistance
9 that LSC is able to fund to eligible clients could
10 somehow be avoided in whole or in part.

11 And we spent a lot of time thinking of
12 alternative models which would lighten the burden of
13 screening to make sure that we're providing assistance,
14 LSC-funded assistance, only to eligible clients. And
15 as Stefanie will describe, after considering all of
16 those alternatives, we were not able to identify a way
17 to create an exception or a shortcut to that kind of
18 screening.

19 With that general overview, I'll turn the
20 program over to Stefanie.

21 MS. DAVIS: Great. Thank you, Ron. So I'm
22 not going to go into a whole lot of detail in the

1 approach so as not to be redundant of the meeting in
2 March. I will just note, as I think Ron already said,
3 that the Pro Bono Task Force's recommendation 2, which
4 spoke about revising the PAI regulation to expand
5 opportunities for pro bono, was the framework that we
6 looked at the changes to the rule in.

7 The areas that we addressed generally fell
8 into five categories, and you'll see how those spun out
9 in the rule text that we've provided you. Those were:
10 the definition of private attorney, which was not a
11 popular one -- we hope the new one is better; the
12 involvement of law students; the involvement of
13 paralegals and other professionals in PAI activities;
14 clinics, including screening; intake and referral
15 activities, including tracking.

16 So we made changes through the rule. These
17 are primarily through the introduction of new text
18 because much of this was not contemplated at the time
19 the original rule was drafted.

20 We generally did not make changes to the
21 substance of other rule provisions that were not
22 directly implicated by the Pro Bono Task Force

1 recommendations. We did move some around to improve
2 the logic and comprehensibility of the rule. And in
3 some of those provisions, we revised text to add law
4 students, law graduates, and other professionals where
5 it was necessary to make the rule more comprehensive.

6 We would also note that this is still called
7 the private attorney involvement regulation. Part of
8 that comes from the fact that it's been known as the
9 private attorney involvement regulation since its
10 inception, and part of it comes from the fact that we
11 couldn't think of anything better that captured
12 everyone. So if anyone has a great idea, I would love
13 to hear it.

14 MR. FLAGG: I would add, I think there was at
15 least a small additional consideration, which is, at
16 the end of the day, we think there is a proper emphasis
17 on encouraging private attorney involvement in that
18 while, as I said before, we're not prescribing the
19 extent to which you can prefer attorneys or should
20 prefer attorneys over law students or other
21 professionals, but certainly the origin of the rule was
22 to encourage private attorney involvement, and that is

1 still a major purpose of the rule.

2 So at the end of the day, we were not terribly
3 troubled by the thought of continuing the use of the
4 PAI acronym, although the President of LSC is on the
5 warpath against acronyms.

6 CHAIRMAN KECKLER: External attorney? Outside
7 attorney?

8 MS. DAVIS: OAI? Well, that is a perfect
9 segue, then, into the discussion and the
10 section-by-section highlights of the rule.

11 You will see in section 1614.1, which is where
12 we have our first new bit of highlighted text, that we
13 have continued the focus of the rule on private
14 attorneys, as Ron suggested. So the rule is designed
15 to ensure that recipients of LSC funds involve private
16 attorneys, and encourages recipients to involve law
17 students, law graduates, and other professionals in the
18 delivery of legal services.

19 MS. BROWNE: Can I just ask a question? Why
20 didn't you include "or other legal professionals"? You
21 just said "other professionals," which in your
22 definition says accountants as well.

1 MS. DAVIS: That's correct. And part of that
2 was the recommendation of the Pro Bono Task Force.
3 Throughout the report they mentioned involving both law
4 firm professionals, such as paralegals and support
5 staff, but they also did mention other people who are
6 involved in extralegal professions, such as accountants
7 or forensic investigators who might help legal services
8 providers, LSC funding recipients, improve the delivery
9 of legal services to their clients -- so, for example,
10 an accountant who might work with a recipient who's
11 representing a individual at a bankruptcy proceeding.

12 The accountant could assist with reviewing the
13 client's records to prepare them for that proceeding.
14 And so an accountant is not a legal professional, but
15 they are a professional whose services could improve
16 the delivery of legal services to eligible clients.

17 MR. FLAGG: In that context, in the kind of
18 case that Stefanie just described, a private law firm,
19 and certainly one of our recipients, would have the
20 choice of using their own staff attorneys to try to
21 figure out what the accounting issues are, what the tax
22 issues are, or they could get somebody with tax

1 expertise or accounting expertise to help them.

2 And it seemed to us to be consistent with the
3 recommendations of the Pro Bono Task Force and the
4 commentators to be appropriate to permit credit, if you
5 will, if they brought in a professional other than a
6 legal professional in that context to advance the legal
7 representation and not require them, in order to get
8 that sort of credit, if you will, to hire or to get the
9 assistance of a lawyer.

10 MS. BROWNE: I understand the rationale for
11 it. We call it private attorney involvement, PAI. And
12 so with that focus, if we start going outside of the
13 legal arena -- which can be quite large; you can get a
14 tax attorney to be of assistance under a bankruptcy
15 proceeding -- but would you go then to a doctor to talk
16 about a medical issue?

17 I'm just trying to see, are we on a slippery
18 slope when we start using the term "other
19 professional"?

20 MR. FLAGG: We've tried to define it to make
21 it clear that it's basically where the other
22 professional is replacing a lawyer. And so I don't

1 think the hypotheticals of the doctor giving expert
2 testimony or as an expert consultant would satisfy
3 that.

4 And the purpose of the rule is -- there are
5 two perspectives to look at it. One is the PAI
6 perspective; that is, this is to help promote
7 assistance by outside lawyers. But the other, and we
8 think equally if not more important, perspective -- and
9 this is what we hear from Congress -- is to leverage
10 the limited resources of our recipients with
11 assistance.

12 Now, most often, since we're in the law
13 business, that assistance is going to be from lawyers
14 and other legal professionals. But there could be some
15 instances, and they were identified by the Pro Bono
16 Task Force and by the commenters, where somebody is
17 providing assistance that theoretically a lawyer could
18 provide, but it could be as efficiently or more
19 efficiently and expertly provided by some other
20 professional.

21 And in those instances, we think consistent
22 with the purpose of the reg and the comments we've

1 received, it's appropriate to permit -- again what is
2 being credited is not the time of the outside
3 professional. It's the time and resources of the
4 recipient in promoting the assistance of that
5 professional.

6 So again, at the end of the day, yes, we are
7 drawing a line. There may be instances in which the
8 line becomes hard to draw. But I think we felt very
9 comfortable drawing the line where it is in this draft.

10 MS. BROWNE: I think you hit my concern, and I
11 think you've answered it. It's where the attorney is
12 using his or her time as opposed to the accountant or
13 the doctor or the social worker or whatever. That time
14 is not counted. It's the attorney who maybe is
15 reviewing the documents or the summary of the documents
16 prepared by the accountant, that time would be counted,
17 not the accountant's time in preparing the documents?

18 MR. FLAGG: Correct. If the recipient is going
19 to use its own resources to bring an outside
20 professional up to speed to help on a case, whether
21 it's as co-counsel or in some other role, that hour of
22 time or other resources associated with bringing those

1 private resources into play, that's what gets allocated
2 to the PAI account.

3 CHAIRMAN KECKLER: Well, just in conjunction
4 with that, but of course we have low bono kinds of
5 payments that can be part of PAI, too. So I guess one
6 of the questions would be that an attorney who is paid
7 under a low bono fee or paid some fee for taking a
8 case, that can count as part of your 12-1/2 percent
9 PAI. What about the recipient hiring, at perhaps a
10 reduced fee, accountants?

11 MR. FLAGG: In order to qualify for credit,
12 and again I don't think we like the use of the word
13 credit, but in order to allocate those sorts of
14 dollars, that is, dollars paid to an outside lawyer or
15 other professional, they have to be discounted by less
16 than half of the market rate for those services or you
17 can't count it at all.

18 But we would, in that instance where the
19 heavily discounted services are provided by another
20 professional in the kind of context I was describing,
21 that is, where it's in furtherance of legal
22 representation and are in essence leveraging the

1 resources of our recipient -- again our recipients
2 aren't doctors so they can't leverage their resources
3 by providing medical testimony or expertise.

4 But on tax issues, reasonably they could use
5 their own tax expertise or hire a lawyer. And again,
6 we thought it was arbitrary to say in that instance
7 that they couldn't seek the assistance and allocate
8 appropriate expenses to bringing in some other
9 professional.

10 CHAIRMAN KECKLER: Okay. I think that the
11 issue -- and it's not wrong to have a certain level of
12 flexibility in the language. But I think the language
13 that Sharon's talking about here is in (f), in the
14 other professional definition, "providing services in
15 furtherance." Right? "In furtherance." And so the
16 question is, ultimately, how restrictive is the term
17 "in furtherance"? Right?

18 Because I thought of another example, which is
19 we have a lot of landlord/tenant cases. It would be
20 great, and I'm sure that recipients should do this,
21 that they should get some engineers come inspect
22 people's places to see if they have a warrant of

1 habitability.

2 And it would be great if those people did it
3 for free or did it for a low cost, that they would come
4 by and help out poor people. And I'm sure there's some
5 people who'd do that who are engineers and construction
6 people.

7 But we have to think about in terms of what
8 you're talking about, Sharon, on a slippery slope
9 basis, if that kind of help and that kind of
10 volunteerism is really part of PAI.

11 MR. FLAGG: Yes. Again, nobody is precluded,
12 and we'd certainly applaud and encourage our recipients
13 to get the kind of assistance you're describing. The
14 issue for us here is whether that assistance or the
15 costs associated with getting that assistance can be
16 allocated to the PAI requirement. And I hear the
17 issue, and we may need to make it clear that -- well,
18 we need to make it clear what it is we mean here.

19 The other thing I'll say, there are a number
20 of instances here where the language is general and we
21 have not tried to spell out every detail as to how the
22 accounting for PAI ought to be done. We've not created

1 real bright lines in every instance. And we've done
2 that intentionally because to try to resolve all those
3 issues is difficult.

4 But I think you've raised a fundamental point,
5 and it's one that we perhaps ought to address and make
6 clearer in the language of the proposal.

7 CHAIRMAN KECKLER: We're doing a proposal.
8 It's an issue that's flagged for comment. And so as we
9 move to the final, it's an issue, particularly as we
10 get comments on that. And I think the commenters may
11 go different ways on that in terms of a narrow or a
12 broad -- some people have interest in a broad
13 definition; other people want to keep the focus of PAI
14 on attorney or more legal.

15 And so I think that once we look at the
16 comments and so forth, that language, in furtherance,
17 and the nature of other professionals and the nature of
18 our expansion in other professionals, which is an
19 important part of the rule, it's something to think
20 about.

21 MS. DAVIS: No. That's a very valid comment.

22 And as long as we are on the definition of other

1 professional, I'll note that there are a couple of
2 changes to the definition from the March meeting, one
3 of which was that we struck the example of the
4 independent social worker providing support services to
5 a client because in discussions with Julie, we came to
6 the conclusion that although we had an idea in mind of
7 what that meant, sort of to Sharon's point, that has a
8 very wide range of services and we thought that the
9 example wasn't one that we could hone down to a clear
10 point that would exemplify what we were talking about
11 in this definition.

12 So it's not that we don't think the work could
13 qualify here. It's just that we wanted to leave this
14 example or this definition with fairly clear examples
15 of what we were discussing and what we had in mind when
16 we were thinking about services provided by other
17 professionals.

18 CHAIRMAN KECKLER: Yes, Julie?

19 MS. REISKIN: Just to be clear, that also
20 doesn't mean that that can't happen and can't be
21 counted, like on their 990 or for other in-kind. It's
22 just not the 12-1/2 percent.

1 MS. DAVIS: That's correct. This rule is not
2 making any representations or having implications for
3 accounting; at least, we don't intend it to.

4 MS. REISKIN: Or to discourage in any way.

5 MS. DAVIS: Correct.

6 MS. REISKIN: It's just what gets counted.

7 Right?

8 MS. DAVIS: That's correct. What a recipient
9 can allocate towards its PAI requirement. That's
10 correct.

11 CHAIRMAN KECKLER: Okay. Are there some other
12 questions? Yes, go ahead, Julie. Continue.

13 MS. REISKIN: Well, this is in another page,
14 so is that okay?

15 CHAIRMAN KECKLER: Yes.

16 MS. REISKIN: Okay. On page 32 of the
17 document, and it's I think 235 of the book, it talks
18 about if someone is employed less than a thousand hours
19 a year, and then they give more freely.

20 I thought labor laws didn't allow -- I thought
21 that if you got paid to do something, that you couldn't
22 then volunteer, that that became a labor law issue. Is

1 that not true?

2 MR. FLAGG: Well, I'm not going to opine on
3 that, and certainly there's nothing here that is meant
4 to conflict with any labor laws. All we're saying here
5 is that if -- I think what we had in mind was somebody
6 who was employed part-time at a recipient, and then had
7 their own law practice and took a case pro bono as part
8 of their own law practice, that again the cost
9 associated with getting them involved in that pro bono
10 case could be allocated to PAI, and the fact that they
11 also worked part-time with the recipient was not
12 necessarily disqualifying.

13 MS. REISKIN: Oh, okay.

14 MR. FLAGG: I'm not aware of that being a
15 violation of the labor laws, but certainly nothing we
16 say here is going to supersede or preempt the labor
17 laws.

18 CHAIRMAN KECKLER: As long as we're on that
19 page, on the definition of private attorney, there's
20 two exceptions to private attorney, essentially telling
21 you who's not a private attorney. Right?

22 The first person who's not a private attorney

1 is somebody working more than a thousand hours at the
2 recipient, so a legal aid lawyer, legal services lawyer
3 at one of our recipients. And the other one is for
4 attorneys employed by non-LSC-funded legal services
5 providers.

6 So the problem that I see potentially with
7 that is that there's a lot of collocation. There's a
8 lot of traditional relationships there between non-LSC
9 providers -- I mean, it's part of the legal aid
10 community, and sometimes they have historical
11 relations, even, between the organizations.

12 I don't know. From the idea that -- and it's
13 different than what Julie's point is making -- it's
14 that somebody can be employed extensively at a non-LSC
15 legal aid entity and then can go over to essentially
16 supplement their work, including with getting
17 potentially some paid work, at a reduced rate but some
18 paid work, from the recipient.

19 That seems to be a little problematic from the
20 standpoint of what we're trying to do with PAI, which
21 is to reach out to the larger external community of
22 attorneys and the larger bar rather than the legal aid

1 world.

2 And so I was wondering if there's a way to
3 talk about that and say, maybe, that they should be a
4 thousand hours, too, that if somebody's working a
5 thousand hours at our -- they're legal aid lawyers if
6 they're working more than thousand hours at our entity.

7 And also, maybe somebody who does a thousand hours at
8 the provider is also one.

9 MS. DAVIS: Well, this provision covers
10 individuals who are employed by another legal services
11 provider during the course of their employment.

12 CHAIRMAN KECKLER: Right.

13 MS. DAVIS: Right. So I think they would be
14 covered by -- they'd certainly be covered by the
15 800-hour limit in 1614.5. But I think the reason -- in
16 fact, the reason that we had excluded them from this
17 definition generally -- is that they are involved in
18 providing legal services to low-income individuals part
19 of their everyday work.

20 And so if they are volunteering outside the --
21 we were trying to balance something here. We were
22 trying not to discourage our recipients from getting

1 the services of other legal services providers in their
2 off time, if they wished to volunteer that. But we
3 also are cognizant of the fact that involving them is
4 not truly reaching the purpose of the PAI.

5 CHAIRMAN KECKLER: Yes. I'm just wondering.
6 I'm sure they're very valuable in terms of coming in
7 for cases and having expertise. And again, it's
8 another thing that you don't want to -- you don't want
9 to discourage people from volunteering, and there's a
10 lot of volunteers that are helpful.

11 The question is counting them. And so I
12 imagine that for whatever reason, somebody's work gets
13 a little slow at one of the non-LSC providers and then
14 they can call up and they can ask for cases, and the
15 question again is really the compensated cases.

16 They would say, do you have some cases? Well,
17 yes, we'll pay you a little bit to take some cases,
18 because the work is slowing down at that provider for
19 you, and so we're picking up some cases and some income
20 out of the other one.

21 So I'm just curious about why not make that a
22 thousand hours for both of them as who --

1 MR. FREEDMAN: This is Mark Freedman. If I
2 may, we've split it a little bit since we've said that
3 any employment at the other legal services program
4 can't constitute PAI. So it basically is zero hours.
5 We've got a lower requirement for work being done in
6 the capacity of working at the other legal services
7 provider.

8 If an individual who's at the other entity
9 says, hey, I'd like to do as either low bono or
10 volunteer some cases outside of my employment at the
11 other legal services provider, that's got to be
12 genuine.

13 That can't be, oh, I'm still working at my
14 desk and I'm still using all the resources of the other
15 legal services provider. Exactly where the line would
16 be drawn we haven't spelled out here, but we have made
17 it clear that it wouldn't be in that capacity.

18 And putting in a thousand-hour threshold here
19 I think actually would have the potential of further
20 confusing our bright line of saying, if you're doing
21 work at another legal services provider, that work at
22 that provider cannot be PAI work.

1 It's only when you're really volunteering
2 outside of that work and on top of that work -- which,
3 I think you're right, could easily happen where
4 someone's working 60 percent at another legal services
5 program and they say, hey. Rather than spending my new
6 extra free time doing another consulting job or
7 something like that, I want to do some volunteer or
8 some low bono cases. We are permitting that where
9 there's this opportunity for bringing in someone who
10 has an expertise and is not being actively employed.

11 We could make it more expansive. We could
12 make it more of a categorical, look, you're a legal aid
13 lawyer even if you're part-time somewhere else, or
14 that's just outside of our scope entirely. There isn't
15 a strong rule for it.

16 This was more meant to be a good balance so
17 that we weren't completely excluding them in situations
18 where they were offering to volunteer or do low bono
19 work above and beyond the work that they're doing for
20 pay.

21 CHAIRMAN KECKLER: Yes. But the reason I
22 mention collocation is just that -- and I'm not sure of

1 the exact language, and again we can think about this
2 as we move towards the final rule -- those people are
3 very valuable.

4 But it's almost too easy in some ways to just,
5 if you're right there, oh, we need to spend some PAI.
6 Well, who are you going to call? Knock knock. Go next
7 door. Right? I think part of PAI, as I conceive it,
8 is to really encourage that reach-out, is to really
9 encourage people to reach out to people that they don't
10 know, lawyers that don't work next to them, lawyers
11 that don't know anything about legal aid, that haven't
12 been involved and don't live that as part of their life
13 and their career in the service of poor people, that
14 they bring those people in. And that's my concern.

15 MR. FLAGG: I think we agree with you. But,
16 on the other hand, there's a great need to encourage
17 pro bono work. And if it's genuine enough, that pro
18 bono work could actually be done by somebody else who,
19 in their day job, was a legal services lawyer.

20 So I think right at the margins of the line
21 you're talking about, we view it as an enforcement
22 issue, and that we think that the line that's drawn

1 here, which does permit this if it's genuine, is the
2 right line.

3 And then if practice turns out that there's
4 efforts to -- people are not reaching out and they're
5 in essence just hiring other legal services attorneys
6 in what is essentially their day jobs, there is a prior
7 OLA opinion on that topic which says that -- and the
8 facts are more complicated than I'm going to describe
9 them, but where the private attorney was other legal
10 services lawyers providing their services as part of
11 their job. And the office said that that could not be
12 allocated to PAI, and we say in this preamble that we
13 believe that that opinion is still valid.

14 CHAIRMAN KECKLER: All right. That's good.
15 That's something to think about.

16 One other item that I wanted to raise has to
17 do with the final provision in the rule, which is --
18 you brought up enforcement and failure to comply. And
19 that has to do with 1614.10(c), and that is -- people
20 are using different ones here -- in the non-redlined
21 version, that is on page 59 to 60, pages 262-263 of the
22 book.

1 So in that, the way it reads now, "Any funds
2 withheld by the Corporation pursuant to this section
3 shall be made available by the Corporation for use in
4 providing legal services in the recipient's service
5 area through PAI programs."

6 So if we recall from our sanctions, lesser
7 sanctions rule, we had a discussion about this
8 traditional process. That is the rule; it's not
9 something we made up. But the traditional rule is that
10 funds that we take go back to the service area.

11 But the problem is that under the modern
12 conditions as currently existing, that almost always
13 means that we take money from the grantee and then we
14 give it back to them. And so if I recall, we kept it
15 in basic field; it doesn't go into some kind of honey
16 pot.

17 But is there a way or a thought that people
18 have -- and this is certainly open to Committee
19 discussion -- about giving the Corporation discretion
20 to either give it back to the same service area or to
21 reallocate it somewhere else for PAI or other basic
22 field?

1 MS. DAVIS: Yes. We've had some discussions
2 internally on that point, and we have drafted -- we
3 drafted over the weekend -- some language that would
4 essentially revise the provision consistent with the
5 lesser sanctions rule, as you discussed.

6 So rather than simply that the funds would go
7 back to the service area, it would read that the
8 Corporation would be given the discretion or that the
9 Corporation could reallocate the funds as it saw fit,
10 which could include being competed back to the service
11 area for PAI purposes. We will have that proposed
12 language tomorrow as well.

13 CHAIRMAN KECKLER: But the effect of it, in
14 terms of not the actual language but the effect, is to
15 give the Corporation discretion. Is it restricted to
16 basic field or --

17 MS. DAVIS: No. It's not restricted to basic
18 field -- well, it's restricted to basic field including
19 PAI activities.

20 CHAIRMAN KECKLER: Including PAI? Okay.

21 MS. DAVIS: Yes. Yes, sorry. And again,
22 we've drafted some language to that if that is in fact

1 the approach that everyone wants to take.

2 CHAIRMAN KECKLER: Okay. Thank you.

3 Are there further comments or questions?

4 Father Pius?

5 FATHER PIUS: A question about just the clinic
6 side, the clinic side that regards not to providing
7 basic legal information, but to providing individual
8 legal information. To what extent can an LSC grantee
9 use LSC funds to provide a legal clinic to provide
10 legal services to those people who are not screened?

11 MS. DAVIS: You mean substantive legal
12 assistance?

13 FATHER PIUS: Yes. For example, looking at
14 just PAI clinics, which is on page 48 of the document,
15 or actually going down to 49, "If the clinic provides
16 legal assistance to individual clients" -- et cetera,
17 et cetera -- "if the clinic screens for eligibility and
18 provides legal assistance only to clients who may be"
19 -- can a grantee set up a clinic in which it does not
20 screen for eligibility and provides legal assistance
21 using legal services funds?

22 MS. DAVIS: I think the answer is no.

1 FATHER PIUS: So then why is it so
2 complicated, this section? In other words, if you can
3 use LSC funds for a legal clinic, you can use those
4 funds for PAI. Why not get rid of all this extra
5 information and say, to the extent in which the clinic
6 is using LSC funds, those LSC funds can be used for
7 PAI?

8 MS. DAVIS: I'm not sure if this is the answer
9 to your question, but I think --

10 FATHER PIUS: But my point is that people are
11 coming away with this that you're providing extra
12 restrictions on them in providing clinics, and that's
13 what I'm worried about. And it seems to me that
14 there's a level of complexity here that might not be
15 necessary.

16 MS. DAVIS: Sure. So when we were discussing
17 the rule, as we were having discussions internally and
18 reviewing the Pro Bono Task Force report, the comments
19 that had been provided in response to the request for
20 information, the discussions that were held during both
21 of the panel workshops, and our own internal
22 discussions with the Office of Compliance and

1 Enforcement and the Office of Program Performance, what
2 we determined was that "clinics" has a very wide range
3 of activities.

4 And we explained some of them in the preamble,
5 but clinics as we conceptualized them in the draft rule
6 -- the term was intended to encompass all of those
7 activities that fit within clinics.

8 So the reason that it's drafted the way it is
9 is to say, look. If you're doing a clinic that
10 provides individualized legal assistance to an
11 individual, because we have restrictions on what we can
12 do and what our recipients can do with their LSC funds,
13 you have to screen individuals before you do that.

14 If you are just providing legal information,
15 if you're having a session at which people come in and
16 learn about the landlord/tenant court process and
17 you're not giving them individualized legal assistance,
18 you don't have to screen for that. And if you're
19 holding a clinic at which both of those things occur,
20 you must screen before you provide any individualized
21 legal assistance.

22 FATHER PIUS: But that's irrespective of the

1 PAI requirement?

2 MS. DAVIS: Yes.

3 MR. FLAGG: And the other place where the
4 complication comes in -- so part of the complication is
5 the fact that you don't need to screen if you're just
6 providing information.

7 FATHER PIUS: Right.

8 MR. FLAGG: But you can use -- and Mark can
9 better explain this than me -- you can use non-LSC
10 funds to provide services, for example, to people who
11 are just above our financial cutoff.

12 FATHER PIUS: But they wouldn't use that money
13 to count as PAI funds, either, would they?

14 MR. FLAGG: That's correct. So all we've done
15 is made that clear, that you can have a clinic that
16 serves both LSC-eligible, including financially
17 eligible, clients as well as people who are just above
18 our financial cutoffs using non-LSC funds. That's
19 permissible. And then only the portion of that clinic
20 supported by the LSC funds for the LSC-eligible clients
21 would be allocable to PAI.

22 MR. FREEDMAN: And I think, to add to that,

1 you're right, Father Pius. If we said this as what
2 thou cannot do yourself, you cannot support, period.
3 This is a place in the regulation where, as Stefanie
4 was explaining, we're going into some more detail about
5 what that really means.

6 And we're doing it in part to respond to the
7 Task Force and the extensive comments about people
8 being very interested in saying, well, this is PAI
9 clinic. The worst thing that can happen is a private
10 lawyer helps an ineligible client. Why would that be a
11 concern?

12 So here we've provided a framework that's
13 explaining, for the first time really in a regulation,
14 something that is predicated on definitions in the CSR
15 manual that our grantees are obviously familiar with
16 and have been working with, and also on the experience
17 of what OCE and OPP explain to recipients and how we
18 work through these issues.

19 So you have correctly noted this is a place
20 where we're really explaining in detail something that
21 itself is not constrained to the PAI context, but has
22 come up in this context and we want to be able to

1 provide the most clear response as possible.

2 And we discussed the very point you're
3 raising, which is, is this the right way to do it? And
4 I think we don't have a position that this is
5 necessarily the best answer because, as you pointed
6 out, it gets into a lot of details in this rule. But
7 it also helps to provide a framework for responding to
8 a lot of the specific concerns raised.

9 FATHER PIUS: Yes. I guess the point really
10 for me is to make clear that these restrictions are
11 extraneous to PAI, right, that we're pulling them from
12 something else to make clear that to the you can't use
13 your LSC funds for this, you can't count it as PAI.
14 And that's all that this is doing.

15 This is not meant to put any additional
16 restrictions on your ability to fund these clinics or
17 provide pro bono, and some language on that, in the
18 preamble, even, might help to clarify.

19 MS. DAVIS: Sure. That's a helpful thought to
20 have in mind about putting into the preamble that we're
21 not attempting to put on any additional restrictions.

22 I would also note that it's entirely possible

1 through the public comment process that the field, the
2 commenters, will have some better way to categorize
3 these kinds of activities that may pull this construct
4 apart or find some other way to explain what it is that
5 we're trying to get at. But I definitely appreciate
6 the comment.

7 FATHER PIUS: Two other thoughts, comments.
8 The first, I think, is there a plan to provide some
9 tracking of this, especially with regards to the
10 expansive use of private attorneys, since we're
11 including more than private attorneys?

12 My thought is if we've got grantees who are
13 now using 9-1/2 percent to fund law students, whether
14 that's really what we want and whether we're planning
15 on putting a system in place to better track the use,
16 so exactly where PAI funds go, so we can track this
17 better. So that's one.

18 And the second is, this PAI rule is not based
19 on the statute at all. It is completely our creation,
20 entirely and completely our own rule; whether we should
21 have a catch-all exception, so that if a program or
22 service comes up with something that's innovative but

1 yet is outside the exact terms, that we have the
2 ability to grant an exception or an exemption for that
3 that would allow them to count it as PAI, since we have
4 complete discretion over what counts as PAI and what
5 doesn't. So those are my two thoughts.

6 CHAIRMAN KECKLER: Let me let OLA answer that.

7 But also, another alternative to what you're doing is
8 that we have an extensive waiver process in terms of
9 the rule for the 12-1/2 percent. So I think a good
10 reason for getting a waiver is that you're doing
11 something very innovative that fulfills the functions
12 of this but doesn't fit within the regulation.

13 That seems to me you're like involving private
14 attorneys. You're doing all these other things.
15 You're leveraging the federal dollar. You're getting
16 lots of volunteers. And that seems like a good reason
17 to me for a waiver, potentially, too. So that's an
18 alternative way to get at what you're saying.

19 FATHER PIUS: Yes. Yes.

20 MR. FLAGG: And let me say, you're absolutely
21 right. We're going to be looking closely at what
22 happens once this regulation goes into effect, and as

1 we do throughout the operations of our grantees, want
2 to get more data, and get a better sense as to what's
3 effective, and work with our grantees in that respect.

4 Management was quite uniform in the view that
5 the regulation ought not to specify some sort of data
6 collection or tracking system because that is clearly
7 going to be something that will evolve over time. And
8 again, we don't want to hamstring ourselves to a set
9 procedure here with respect to either data collection
10 or tracking.

11 But it is something that is on our mind, and
12 it's something that we're going to look at closely, and
13 obviously we'll report back to the Committee and to the
14 Board on that as we go forward. But the idea is to
15 have the specifics of that not be defined by
16 regulation.

17 CHAIRMAN KECKLER: Are there any further
18 questions or comments from the Board?

19 (No response.)

20 CHAIRMAN KECKLER: If not, I will open up this
21 rule to public comment.

22 MR. SAUNDERS: Thank you again, Mr. Chairman.

1 Don Saunders, NLADA. I'm joined by my new colleague,
2 Robin Murphy. She came to NLADA in February to be our
3 chief counsel for civil programs, a position formerly
4 held by Chuck Greenfield.

5 She came to us from the Department of
6 Education, where she was general supervising attorney
7 of the Office of Civil Rights. Before that, she has a
8 broad experience in Connecticut, Missouri, Arizona, and
9 Washington, D.C. in the legal aid community, both LSC
10 and not. So we're really happy to have her, and I'm
11 pleased to introduce her to you.

12 And she's fortunate that her first foray into
13 the LSC regulatory process is the private attorney
14 involvement, which she will briefly mention to you now.

15 CHAIRMAN KECKLER: Welcome, Ms. Murphy.

16 MS. MURPHY: Thank you very much. So here I
17 am. Thank you for the opportunity to provide comments
18 on 1614. As Don mentioned, while I'm not a newcomer to
19 providing direct legal services to poor people and
20 legal services programs, I am a fairly new newcomer to
21 NLADA over the past two months, and so somewhat new to
22 the Pro Bono Task Force process. So it's been a little

1 catch-up there.

2 I have been very amazed at the process, LSC's
3 devotion of time and effort to setting up the Pro Bono
4 Task Force, of being inclusive and deliberative in
5 taking a myriad of views in, particularly providers of
6 direct legal services to poor people and LSC
7 recipients.

8 NLADA, and I anticipate members of other
9 groups, are very invested in this process and will
10 provide much more detailed comments. And I think
11 you've touched on some areas already which we've
12 identified that we will be putting comments in as to
13 who should be defined as a legal services provider, how
14 you count that. That's an excellent issue to know.

15 As noted by the Task Force, while pro bono
16 can't replace the enormous contributions of full-time
17 legal aid programs in terms of the volume or expertise,
18 with 50 percent of LSC-eligible clients' needs going
19 unmet and maybe 80 percent of civil legal needs of poor
20 people unmet, clearly this is a huge and very important
21 area, increasing available resources for low-income
22 clients and improving service delivery.

1 And I note that it's clearly an important area
2 for OLA, for this Board, for LSC, given the amount of
3 time that's spent even at this particular program
4 discussing pro bono services.

5 The proposed changes are based on the
6 recommendations of the Pro Bono Task Force, which has
7 been noted. There's some very positive changes
8 implementing some of the recommendations of the Task
9 Force.

10 We're very supportive of the law student, law
11 grads, and other professionals provision. This is very
12 positive and it improves the delivery of legal
13 services. In addition, allocating time to incubator
14 programs, also very positive and also recommended by
15 the Task Force.

16 The revision of some of the OLA opinions --
17 and I'm not going to cite details, it's getting late
18 and you're tired; it's in the preamble -- also
19 increases the flexibility and ability of recipients to
20 count cases as PAI, and we applaud that.

21 Recipients can now count the time spent
22 screening LSC-eligible clients if they're referred to

1 private attorneys. And that's an extremely positive
2 development, where you can access a lot of the private
3 bar and it doesn't have to be a case of the recipient.

4 It can just be a case of the private bar. There still
5 needs to be some tracking. It's fairly minimal. So
6 that's a very positive development.

7 The areas of concern that we have, and we, as
8 I said, will be addressing more in detailed comments,
9 are where the recommendations of the Pro Bono Task
10 Force have been rejected. And I think we touched on
11 one area earlier, and this was an OLA opinion talking
12 about the use of non-LSC programs and paying non-LSC
13 programs for services that are used to screen clients
14 for eligibility.

15 Also, the clinic models are very limiting, and
16 the screening and advice and referral programs are
17 limiting. All you can count is, for a clinic, if there
18 is not screening are clinics which only provide
19 information.

20 And so one of the things we will be addressing
21 in the comments is how recipients can use other models,
22 how they can provide other screening services to poor

1 people without doing the detailed legal services
2 screening, which would be important because otherwise,
3 this is very limiting and leaves out -- and I'm not
4 going to redo all the comments of the Task Force, but
5 it really speaks to how much the services are limited
6 and leaves legal services clients out of the community.

7 We greatly appreciate, and NLADA appreciates,
8 the positive changes that have been put in. We want to
9 continue the process, and we look to you continuing an
10 open, deliberative process giving careful consideration
11 to the comments that we're going to submit, and others
12 will submit, asking that the full recommendations of
13 the Pro Bono Task Force be implemented.

14 Thank you very much and --

15 FATHER PIUS: Can I ask a question just
16 briefly? I'm sorry.

17 MS. MURPHY: Sure.

18 FATHER PIUS: Is it NLADA's position that the
19 LSC grantee could provide a clinic in which
20 individualized legal services is given without
21 screening?

22 MS. MURPHY: We believe that there are models

1 that you could do without screening.

2 FATHER PIUS: And I take it OLA's position is
3 that they don't agree with that position, that there is
4 some controversy about whether or not this is --

5 MR. FLAGG: I think what we would like to see
6 in the comments is not only a description of the
7 models, but addressing the statutory limitations and
8 restrictions under which we and our grantees operate,
9 and addressing how those models comport with those
10 restrictions.

11 FATHER PIUS: Here's my issue on this, Ron, is
12 that this issue that I've been raising with the clinics
13 is seem that is extraneous to PAI, and we should not be
14 using the PAI regulations to solve this issue; that to
15 the extent that there's a disagreement among grantees
16 and OLA and even NLADA, that resolving it within the
17 PAI regulation is not the best place for it.

18 That's why I would argue for a simplification
19 of it, to refer only to whether or not these funds are
20 permitted to be used, and if that is an ongoing issue,
21 it should be handled in another form. So that's
22 something to think about.

1 CHAIRMAN KECKLER: Thank you, Father Pius.

2 Do you want to respond?

3 MS. MURPHY: Well, yes. I would like to
4 respond.

5 CHAIRMAN KECKLER: Go ahead.

6 MS. MURPHY: So the PAI does allow you to
7 count services that wouldn't otherwise be counted, and
8 so we do think that there's models that could encompass
9 not the detailed screening that is done when we
10 represent an eligible client in our own programs.

11 One example -- I'm looking in the 1614 with
12 the range of activities -- is it's restricted now in
13 the PAI regs that an LSC recipient employee could not
14 participate in a clinic where there's no screening.
15 And I think there may be ways -- it may be very
16 difficult -- for an LSC recipient to participate in
17 that clinic, do the screening for their particular
18 clients, as opposed to leaving the whole clinic out of
19 the PAI reg.

20 And so that's one example. I think it's a
21 little more restrictive than many we would prefer --

22 FATHER PIUS: But again, I think that goes

1 back to the issue of whether or not, statutorily, LSC
2 can provide the service rather than whether it's
3 strictly a PAI issue. So long as it's statutorily
4 allowed to use LSC funds for this and it involves pro
5 bono, then it should count as PAI. That's my view.

6 MR. FLAGG: Yes. I think the issue is simply
7 going to be --

8 FATHER PIUS: It's whether or not LSC funds
9 can be used.

10 MR. FLAGG: Yes. And so the question will be
11 whether the models and the details comport with those
12 restrictions. And you're right --

13 FATHER PIUS: And just to reiterate, my point
14 is I'm not sure this is the document to handle that
15 particular point.

16 CHAIRMAN KECKLER: Okay. Thank you.

17 Terry, did you want to have a comment?

18 MR. BROOKS: Terry Brooks with the American
19 Bar Association. And I'm delighted to see that there's
20 such an outpouring of volunteers and that you don't
21 have enough seats at the table to accommodate it.

22 Lest any silence by the ABA be misinterpreted,

1 I just wanted to say that the ABA committees that focus
2 on these issues, the Standing Committee on Legal Aid
3 and the Standing Committee on Pro Bono and Public
4 Service, are very grateful for the very thoughtful and
5 thorough process that LSC and that your Committee has
6 engaged in around these issues.

7 We'll be studying the draft very carefully and
8 will submit comments in due course, and we'll likely
9 focus on some of the issues that came up today as well.

10 And we look forward to the opportunity to continue to
11 work with you to expand the ability of recipients to
12 provide pro bono and other forms of private attorney
13 involvement.

14 CHAIRMAN KECKLER: Thank you very much, Terry.

15 And we look forward to the comments of the ABA, and we
16 certainly have appreciated the help of the ABA as well
17 as NLADA over the time that this NPRM has been in
18 development. And we look forward to the comments of
19 both organizations as well as everybody else with the
20 NPRM. Thank you.

21 Well, with the conclusion of public comment,
22 I'm willing to entertain a motion to recommend to the

1 Board the publication of this NPRM with, I believe, one
2 change noted there to the last section.

3 FATHER PIUS: This is publication for
4 comments, yes?

5 CHAIRMAN KECKLER: This is a publication for
6 comments, yes, recommending -- it's not the final
7 story.

8 M O T I O N

9 MS. MIKVA: So move.

10 CHAIRMAN KECKLER: Okay. Is there a second?

11 MR. GREY: Second.

12 CHAIRMAN KECKLER: All in favor?

13 (A chorus of ayes.)

14 CHAIRMAN KECKLER: Okay. The recommendation
15 is adopted and will be presented to the Board tomorrow.

16 We now have a chance for other public comment.

17 Although we've had three opportunities today, I will
18 -- if anybody else has any public comments?

19 (No response.)

20 CHAIRMAN KECKLER: No? Okay. Then I will
21 consider to act on any other business for the
22 Committee.

1 (No response.)

2 CHAIRMAN KECKLER: Seeing no other business
3 presented, I will now entertain a motion to adjourn the
4 Ops & Regs Committee.

5 M O T I O N

6 MS. MIKVA: So moved.

7 MR. GREY: Second.

8 CHAIRMAN KECKLER: All in favor?

9 (A chorus of ayes.)

10 CHAIRMAN KECKLER: The Committee stands
11 adjourned.

12 (Whereupon, at 5:27 p.m., the Committee was
13 adjourned.)

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