OPERATIONS AND REGULATIONS COMMITTEE MEETING

Open Session

Monday, July 8, 1996
10:30 a.m.

Legal Services Corporation
750 First Street, N.E.
Board Room
Washington, D.C. 20002

COMMITTEE MEMBERS PRESENT:
LaVeeda M. Battle, Chair
Hulett "Bucky" Askew
F. William McCalpin
Ernestine P. Watlington

STAFF PRESENT:
Alexander D. Forger, President
Martha Bergmark, Vice President
Victor Fortuno, General Counsel/Secretary
Suzanne Glasow, OGC
John Tull, OGC
Laurie Tarantowicz, Office of Inspector General

ALSO PRESENT:
Linda Perle, Center for Law and Social Policy
Alan Houseman, Center for Law and Social Policy
Richard B. Teitelman, Legal Services Corporation of Eastern Missouri, Inc.

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PROCEEDINGS

(???? a.m.)

CHAIR BATTLE: I would like to call the meeting to order this, the 8th day of July 1996 and welcome here today the members of this committee, Ernestine Watlington and Bill McCalpin.

Joining us as well is Bucky Askew. We welcome you being with us today. As I understand it, we will later be joined by John Brooks and Tom Smeagle in time.

The first order of business is approval of the agenda. I'd like to make one change in that. We don't have the second page to our minutes for the February 23, 1996, meeting.

And until we receive that, we won't go into approval of those minutes, but are there any other changes suggested to the agenda?

MR. McCALPIN: I assume the agenda is as published in the Federal Register on June 28th; is that correct?

CHAIR BATTLE: Yes, it is. Yes, it is. But there are no changes?
MOTION

MR. McCALPIN: I move we approve the agenda.

CHAIR BATTLE: Okay.

MR. McCALPIN: As modified.

MR. McCALPIN: Okay.

MS. WATLINGTON: Second.

CHAIR BATTLE: It has been properly moved and seconded that we approve the agenda. All in favor?

(A chorus of ayes.)

CHAIR BATTLE: Motion carries. We can, now, approve the minutes of the May 19th meeting of the Operations and Regulations Committee. I will entertain a motion to that effect.

You should have received a copy of those minutes prior to this meeting and had an opportunity to review them, are there any corrections to those minutes?

MR. McCALPIN: Pretty --

CHAIR BATTLE: Pretty sparse, bare bones minutes.

MOTION

MS. WATLINGTON: I will make a motion for
approval of the minutes of May 19th.

MR. MacALPIN: Second.

CHAIR BATTLE: Okay. It has been properly moved and seconded that we approve the minute as drafted. All in favor?

(A chorus of ayes.)

CHAIR BATTLE: All opposed.

(No response.)

CHAIR BATTLE: Motion carries. Before we start with the daunting task that we have before us today of considering interim regs or virtually 15 different regulations in a continued meeting that will span today, tomorrow and Wednesday, I'd like to first just express my personal appreciation for the work that our staff has done in pulling this together.

We have had a brief period of time between our May 19th meeting and this meeting to pull together specific regulations, in some instances, draft new regulations, and in other instances, amend existing regulations in various areas in order to implement the new law in the appropriations bill for 1996.

And I think that our staff has done just an
outstanding job of pulling this together. We were receiving Federal Express packages up through Saturday with information in it to meet the deadline of having this meeting today.

And so all of you should have received virtually all of the proposed interim regs in the mail at some point in time, and that's, in large measure, due to our staff, to Suzanne and others in the OGC and to others who have helped to get this whole process together.

So I wanted to just express my thanks to you before we get started this morning.

Because we have quite a bit to cover today, we have, in the past, had a particular approach that we took that was very detailed and specific. We covered each draft comment and rule line by line.

Given the task that we have before us today of beginning the review of 15 regulations, we're to depart from that somewhat.

And my suggestion today is that we cover the issues in each of the regs; that we cover, to the extent that we must, line by line those issues where
there are concerns in the regulations; that we refer as
we go through the rule itself, to the commentary and
take up any issues initially that people may have on
the commentary as we go through this process.

I'd like for the staff responsible for
drafting the rule or working on the rule to first give
us the background of what the changes are before we
begin our process of review, why the particular changes
being proposed have been set out and some background as
to what the appropriation bill specifically requires so
that, as we go through, we have a sense for what it is
that we're covering in a particular draft rule, interim
rule.

Will that work for you, for the staff? All
right. Are there any questions about that process or
that procedure? I'm hoping that that will work, if we
need to depart at any point, and if there are any
comments from the public as we go through, I think we
need to entertain them as we go through rather than
waiting until the end of the day, because we simply
won't have time to go back and revisit them at the end
of the day.
The first interim reg that we have before us today is 1620, which has to do with priorities and allocation of resources. Suzanne, do you want to give us the background on this?

MS. GLASOW: Okay. As a threshold matter, I would like to mention that on almost all of these regulations there are parts of the preamble supplementary information that we're still working on to make it consistent throughout where it's talking about pretty much the same thing.

But because we have several drafters of these rules, we have not still had the time to make it consistent. So we recognize the preambles still need a lot of polishing work done to them.

CHAIR BATTLE: In that regard, I had one proposal to make, and that is any place that we speak of appropriations act, let's say 1996 Appropriations Act so that we're specific to where this particular draft comes from.

MS. GLASOW: Okay.

CHAIR BATTLE: Okay.

MS. GLASOW: Generally, the revisions to this
rule are revisions to a rule that the Corporation currently has on priorities. The main revisions are that recipients are now required not only to establish priorities, but they are also required to take cases or matters that are within those priorities.

They are no longer allowed to take any cases outside of those except for emergency situations as defined by the rule.

And it also requires its staff be informed of that and sign a written agreement that they will comply with that requirement. So those are the major changes to this rule.

CHAIR BATTLE: Okay. I have one thing. In the commentary, I think it's on page 3, under the section 1620.3, "Establishing Priorities," the fourth line from the bottom.

It indicates that the Corporation's suggested priorities were adopted by the Board on May 20, 1990. I think that's a typo. It should be 1995 --

MR. MCCALPIN: 6.

CHAIR BATTLE: I'm sorry, 1996.

MR. MCCALPIN: LaVeeda, let me make a general
comment first. I think it would be helpful where what
we are due now replaces an existing regulation in toto
we say that.

In some instances, we are just demanding parts
and leaving other parts. In other instances, as in
this case, we are replacing the present 1620 with an
entirely new regulation.

And I think it would be helpful to all
concerned that we state that. When, in fact, we are
replacing a regulation in toto, we say right up front
don’t bother looking at this one anymore. This is the
whole regulation.

Now, there are some others we’re going to come
to where we don’t replace in toto, and we’ll have some
comments about that.

CHAIR BATTLE: Okay.

MR. TULL: On this particular one, it
certainly makes sense to do what Mr. McCalpin
suggested. In this particular one, there are two
provisions of this which are lifted completely out of
the old reg and were not changed. 1620.3 was not
changed, but there --
MR. McCALPIN: But even so --

MR. TULL: Right. But to say that --

MR. McCALPIN: We ought to republish it as an integral unit.

MS. GLASOW: Actually, as we went through the process, even in some of the smaller rules where we thought there were going to be one or two changes, just to change it to apply to all funds we found that there were a lot more provisions affected than we had anticipated.

So we will be more careful in that terminology, and as we prepare these for final publication as interim rules in the Federal Register, they have very distinct terminology.

There is a difference, for instance, between "revised" and "amended," which I don't necessarily remember right at this moment, but they will help us go through that process.

And there will be a sentence before every section of the rule that very clearly designates whether it's being revised, amended, amended in part or whatever.
So all of that will be worked out, too, but  
especially in the preamble I think it's very helpful  
for the public to know just how substantively we are  
changing the rule.

CHAIR BATTLE: Okay.

MR. McCALPIN: I'm not quite sure how you  
propose to address this. Did I understand that you're  
going to look at the text of the reg --

CHAIR BATTLE: Yes.

MR. McCALPIN: -- and then refer back to  
commentary as required?

CHAIR BATTLE: Yes. Yes. That's the way  
we're going to do it.

MR. McCALPIN: Okay.

CHAIR BATTLE: So really, before we begin our  
process, we're going to get background from the staff  
preparing it so that we'll know where the issues lie in  
the actual rule.

MR. McCALPIN: I thought we had already  
received that from Suzanne.

CHAIR BATTLE: Yeah. We did, but I'm just  
telling you that's part of the process.
MR. McCALPIN: Fine.

CHAIR BATTLE: Okay. All right. Okay.

Suzanne?

MS. GLASOW: Do you want to start with Section 1?

CHAIR BATTLE: Yes.

MS. GLASOW: We, basically, revised the "Purpose" section to indicate that there are new requirements under this rule and that emergencies is an exception to the prohibition.

CHAIR BATTLE: We are using terminology "cases" and "matters" consistent with the language that we adopted, I guess it was, in timekeeping --

MS. GLASOW: That is correct.

CHAIR BATTLE: -- here that was not in the original Purpose. And that is so that we're being specific as to how -- what types of activities are covered in this allocation of resources section.

MS. GLASOW: Right. And the definitions pretty much cover the activities of a recipient in legal services situations.

Because the Board had spent so much time on
those definitions and the timekeeping rule and because they have to keep track now of the cases and matters they're involved in, we felt that it was a good idea to use the same definitions.

CHAIR BATTLE: Okay. Bill.

MR. McCALPIN: Let me go back to 1620.1. I would like to expand slightly upon the stated purpose, and that's because of the provisions now in 1620.3 which were picked out of 1620.2.

I think that the Purpose is designed to ensure that they adopt the priorities and to provide guidance for setting priorities, and that is what we do -- what we used to do in .2 and now we do now in .3.

We provide guidance in how they do it, that they have to -- well, in .3. The procedures adopted shall, appraisal of the needs, included input from the employees, governing body, members of private bar and other registered persons and so on.

So I think that not only are we saying you must do this, but we are providing some guidance as to how you do it. CHAIR BATTLE: I think the guidance issue goes almost first. "This part is
designed to provide guidance in setting priorities and
to ensure that a recipient’s governing body adopts
written priorities for the -- does that make sense?

MR. McCALPIN: It doesn’t make any difference
to me.

CHAIR BATTLE: Okay.

MR. McCALPIN: But I think that’s a more
complete statement of what this rule is about.

CHAIR BATTLE: Okay. Anything else on
"Purpose"? Suzanne.

MS. GLASOW: And Section 2 is the definitions,
"cases" and "matters" defined as in 1635.2.

MR. McCALPIN: Let me say on that one I
thought that a long time ago we adopted the principle
that we would not refer from one to another, that where
it was necessary to pick something up we would pick it
up in toto so that somebody dealing with this would not
have to go look at this and then have to thumb through
to find another regulation and come back.

I thought that we decided a long time ago that
we weren’t going to incorporate by reference.

MS. GLASOW: If we did, I simply don’t
remember doing that, but that's fine. I mean, we can
do it either way.

MR. McCALPIN: Well, and particularly since
now 1635 -- well, until today we didn't get something
like this that had 1635 in it. I'm not sure the extent
to which people in the field have 1635. Of course,
they could get it out of the Federal Register, if they
wanted to.

So I just thought that we had decided not to
incorporate by reference.

MS. GLASOW: That's your pleasure.

CHAIR BATTLE: There is one issue that Suzanne
and I discussed about, and it's probably a minor issue
but for Legal Services a major issue, and that is the
cost associated with how much we print in the Federal
Register as we go through this process.

I think, Bill, your comment is well taken.

Until you have one set of comprehensive rules, the
flipping becomes a problem, but I think, in part, what
we were attempting to do is to limit what we do to what
was necessary.

MR. McCALPIN: So far as I know, this is the
only place in the 13 regulations I’ve examined so far
where we’ve done that.

And it seems to me what we’re talking about
is --

CHAIR BATTLE: It’s two paragraphs. It is,
and it’s -- the thing that Bill keeps referring to is
what I passed out to the Board this morning, and that
is a copy of the regulations of the Legal Services
Corporation effective June 21, 1996, which includes the
regs that we most recently have adopted as a Board,
final regs on timekeeping, competitive bidding and drug
addictions are all in place.

What’s the pleasure of the committee? Bill, I
just -- I don’t remember. We may have said that we’re
going to just go ahead and restate definitions.
Somewhere in the back of my mind I remember a
discussion about that.

MR. McCALPIN: I don’t know if it was
necessarily limited to definitions. I think that two
years ago, whenever it was we were doing this, there
were questions of whether we use just simply refer to
another regulation for a provision and one that we were
discussing.

And I thought that we had said that in order
to avoid having people to move back and forth -- at
that point all we had was this. Now we have a couple
of different sources for them to move back and forth
to.

I think that given these two paragraphs -- as
I say, so far as I know, of the 13 regs I've read, this
is the only place where we've done that, and I would
think that --

MR. TULL: There are other of the new regs
where there are references to other cross-references.
I believe in 1610 it refers to 1627 where it relates to
subgrants.

I would suggest for this one I think that
Mr. McCalpin is certainly correct that this is a matter
of ease of reading the regulation and understanding --
being able to sit down with it and understanding
everything it encompasses, that simply transferring the
definition of "cases" and "matters" and repeating here
would be helpful.

Some of the other places, when we get to them,
we might want to look at whether -- we chose the cross-
reference because it solved a serious drafting problem
that we'll talk about when we get to those particular
regs, and maybe the principle won't work for those
particular ones.

MR. McCALPIN: There may be a difference
between a reference and an incorporation by reference.

MR. TULL: Right. I think that's probably a
distinction.

CHAIR BATTLE: Why don't we do this, then:
"Case" and "matter" is defined in the timekeeping reg.
We can set out that same information here, it seems to
me.

MS. GLASOW: Okay.

CHAIR BATTLE: And that solves the problem.

1620.3, "Establishing Priorities."

MS. GLASOW: This section sets out the
requirements for recipients establishes priorities.
Paragraph (a) says the governing body must adopt
procedures for establishing priorities. It applies to
both Corporation and nonCorporation resources of the
recipient.
And it also has the requirement that the procedures assure that cases and matters undertaken by the recipient are within the priorities adopted.

CHAIR BATTLE: Okay. I had one just comment under (a)(1) about five lines down. When you talk about what the appraisal should include, there is a statement "and to the extent feasible include outreach to potential and current eligible clients."

And then, when we get into No. 2, we talk about the fact that the procedures shall ensure the opportunity for participation by all significant segments of the client community.

And I wasn't really sure about that distinction and why you have permissive language, on the one hand, and then mandatory language in the other instance.

MS. WATLINGTON: And I had questioned that also.

MS. GLASOW: Well, I understand -- I raised a similar issue.

CHAIR BATTLE: Okay.

MS. GLASOW: And I understand that this is,
basically, language that's in the current regulation.

I should let John speak for himself, but I raised the
issue.

I felt that both 1 and 2 were repetitious, and
it was unclear where the distinctions -- and I felt
that we could easily take this and parse out what were
really the essentials and write both 1 and 2 together
in two or three sentences and simplify it.

But I think the reason was because they
weren't -- they wanted to change as little as possible.
That's my understanding.

CHAIR BATTLE: And you're right. As I look at
the 1620.2 procedure in the old reg, it has precisely
the same language.

So you didn't really make a change, but as you
read it today, it just is inconsistent.

MR. TULL: In drafting this, we made a
judgment call based on -- partially on the standard for
adoption of an interim reg, which is it has to have
some emergency need to be adopted on an need basis.

And this section we chose not to change,
although it clearly cries out for significant change,
because it's not particularly well drafted.

We chose not to principally because the
changes we would make didn't seem to be driven or
required by the legislative changes in the
appropriations act.

I think the assumption that we have been
operating with is that since this is a regulation which
is both an interim reg of immediate effect and also of
a regulation published for comment that the matters and
the issues that are addressed in 1620.3 can be fixed
when the final reg is adopted.

But we chose not to do it on an -- and I guess
it probably is also because of a matter of efficiency,
that there is a lot of concepts in here that do need
revisiting, because this is a very troubled area with
programs and for programs.

It does need to be rethought, I think, but to
take that on in the midst of trying to get the other
regs out we just made a judgment that --

CHAIR BATTLE: And I think, John, I tend to
agree that for this purpose -- and it will require us
to be judicious in terms of how we approach our review
that, for the interim regs' sake, probably we do need
to focus on what comes under the rubric of what an
interim reg is all about.

However, as we put this out to comment and
think of the proposed rule aspect of it, I think we do
need to clear up and start thinking about editing
changes that we need to make to this rule to clear up
the inconsistencies that are contained therein.
Ernestine?

MS. WATLINGTON: I was checking both. The
client community worked very hard through the years to
do -- and then, when you get a word where it says --

MR. McCALPIN: Where are you reading,
Ernestine?

MS. WATLINGTON: I'm in both of them, 1622
"Procedure" and it's also up here in 4, when it says,
"To the extent feasible should include outreach to
eligible clients." That's excluding us again because,
you know, they could always use that that "We didn't
have the monies to do a thorough outreach."

It's just a simple word, but it goes back to
what we worked so hard for back in the days to make it
mandatory and not -- if you leave at outing, that's there, "to the extent feasible," who is going to spend any money to do that? MS. GLASOW: In the commentary to the interim rule, I could add language stating that we recognize that there are issues in this section that although we have not changed it for the interim rule process, we can ask comments on particulars in that for a final rule in terms of where recipients either find it unclear or feel there needs to be other revisions for more substantive reasons.

So if we talk about that in the commentary at this point, then we can get the comments and change it --

CHAIR BATTLE: That's fine. I think that makes good sense. Linda?

MS. PERLE: Programs are now required -- are in the process of being required to do new priorities; is that right? Are they going to be done under this or under the old rules?

Wasn't there a memorandum sent out or a program letter on --

MR. TULL: We sent a program letter in
anticipation of this regulation being adopted. When this becomes -- assuming that the Board determines to go forward in making this an interim reg of immediate effect, then they would adopt under this --

MS. PERLE: Pursuant to this. Well, I guess my concern, then, is that this language in (a)(1) and (2) -- you really change the way that -- not just the way the priorities are being done but the reason they’re being done by this rule.

And so it strikes me that we should try to make as clear as possible what programs are supposed to do, what they’re required to do.

I think what this does by talking about assessing the needs through discussions with the client population in three different places and three different ways I think it muddies it, in terms of what Ernestine was talking about.

And I think it makes it difficult for programs to come figure out what they’re supposed to do. It also suggests that there is -- you know, with this long list of things in (1) that there is a huge burden on programs between when this rule becomes effective and
when they’re supposed to get their next set of priorities done, which also happens to be at the same time that they’re doing their response to the RFP.

So it’s a big burden on the programs to, kind of, get all this done, and if you can simplify it a little bit so that they understand better how it fits together, I think --

MR. TULL: Well, I would assume that -- my answer to Linda’s question, when she said what do we think programs will do or the impact of this will be, my response was that they would be under this reg.

But that doesn’t mean that programs would be required to go through the full appraisal process in order to change their priorities.

What we advised programs of in the program letter and what this reg, if adopted, would make clear is that the degree to which a program now has priorities which don’t cover all of the work that they do -- and the programs typically haven’t written priorities that way because it wasn’t a statutory requirement before -- the degree to which they’re framed in a way which doesn’t cover all of the work
that they do or that they don't have an emergency
procedure, which most do not have, that they would need
to adopt new priorities to accomplish that.

But what we said in the program letter, which
I don’t believe would be changed by the adoption of an
interim reg, is that doesn’t mean you’ve got to start
over from scratch and go through a whole needs
assessment because, for the reasons that Linda stated,
it’s clearly going to be impractical and a huge burden
on programs to mandate and would really not be
appropriate use of their time unless they were already
engaged in that, as some programs may well be.

CHAIR BATTLE: I guess the question I have is
was there a need from the program’s perspective prior
to now to adjust this reg to make the priority-setting
process clearer? And if there was, then it
seems to me, since we are now placing the critical
importance of priority assessing that the statute does
on programs we may need to, because of that -- that, in
my view, then pulls this language into the interim --

MS. PERLE: That’s my point.

CHAIR BATTLE: -- responsibility for us to
make sure that it's clear and what it is is that programs
must do in order to set priorities in a way that it
covers everything that they do so that we can track it
in timekeeping and so that we can report to Congress on
a regular basis that this is what this program says
it's doing; this is what it is doing.

MR. McCALPIN: Let me make a general comment
that responds to something that John said a bit ago.
That is I can understand the time pressures that people
were under to do this in response to the legislation
that was adopted the 26th of April.

I think that we would kid ourselves by saying
that, well, since we're going to put this out for
comment, we'll have time to correct anything in the
final reg.

I will point out to you that it's two years
ago we were dealing with 1609, which still hasn't been
done. I think that if we see a problem in a reg, even
if it doesn't quite meet the requirements of the
Administrative Procedure Act, we ought to correct it
and not rely on the hope that in the next 3 months, 6
months, 12 months, 18 months we'll correct it.
I think -- I agree that there is a lot of little stuff we don’t need to mess with, but if we see a real problem with a reg, I think that we shouldn’t rely on the comment period and later address to it.

CHAIR BATTLE: Yeah. This particular one I could see a need, because of what Linda has said, to correct it because what we’re really telling programs now is you’re going to have to establish -- and I understand what John is saying.

There probably are priorities that are already set, but they’re really going to have to do a comprehensive view of what their program is actually doing in a way that may not have been envisioned in how they did their previous priority-setting. And we probably need to give clarity to how that process will need to take place.

Now, the one issue that I raised was the distinction between how the client community would interface in that process based on what’s set out in paragraphs 1 and 2.

There may be other inconsistencies. I’m not sure. Ernestine?
MS. WATLINGTON: Well, that one is I'm very concerned with because, you know, the client community, if you don't really get that input and make it so that -- and there is any way out, then that's going to be -- the first part of that is not going to be there.

If they don't have that input, they're really not addressing the needs of their community because they no idea -- what they think is and what is is two different things, because the people that comes to your door is not usually what the problems in their community is.

And then I have a problem with that emergency one when they were determining who will determine what is an emergency, because back in the days when they wanted to cut -- first started being cut in the community, the Legal Services programs could only service emergencies, and most clients don't go to their program until there is an emergency.

And if it isn't addressed then, then that will no longer address their problem. So that has caused problems within the client community for many, many years, because when you're trying to get clients
involved, it was very difficult because they weren't being serviced.

So they had a negative attitude toward the program because, as I say, most of them, without community outreach, they don't come to the program.

CHAIR BATTLE: Let me suggest something. Why don't we talk through -- this one has -- at least we've got some critical concerns about what procedures should be.

Let's walk through it so that we can, kind of, move our discussion along through this reg and make the changes as we walk through it. Bill, did you have something else?

MR. McCALPIN: Yeah. Let me ask general counsel or somebody a question. As I see it, there are two elements of the statute in this respect which will require programs to do something quite different.

One is the execution of the agreement to abide by priorities, and the other, perhaps, is the inclusion of an emergency provision.

Is there some way that we can lay that requirement on programs independently of a regulation
and take our time about reviewing this regulation and the things that we’re talking about?

In other words, can we put out some kind of a requirement with respect to that agreement and the emergency procedure and then take more time with the drafting of the regulation?

MS. GLASOW: I doubt it. Whenever you implement a new substantive requirement on our recipients, it should be done according to 10.080 of our LSC Act, which is, basically, rule-making.

The only rationale you have for doing an interim rule-making which is effective immediately upon publication is when you have an emergency situation, which brings up the point of even though we would like to, perhaps, make certain other changes, it does raise the possibility of the Corporation's rule-making being liable to suit because we have not followed requirements of the LSC Act, which is, you know, following the basic -- which is very analogous to the APA rule-making.

So I think we need to say as much as possible in making those changes that are required under the

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interim rule rationale.

Anything that's a substantive change that
would, basically, affect the recipients' funding, that
if they didn't follow it, we're going to terminate or
cut back their funding in some way.

So I think we should. And the thing is, even
if we did something else, I mean, we are in the process
of a rule making, and there will be comments. We will
have more time.

The committee always has the option of putting
off to one more meeting or, you know, having more
meeting dates or whatever to work on a particular rule
where they're really having trouble getting it right.

CHAIR BATTLE: I think, being realistic about
it, too, I'm just going to say that I don't think we're
going to make it through the 15 regs that we have
before us in three days if we aren't mindful of what
Suzanne has just put before us in terms of what our
tasking is at this point.

And that is based on the interim rule
procedure get these rules out for publication
addressing the emergency aspect of why we have to get
them out now and allowing those issues that fall outside of that to come through the regular proposed rule-making process.

This particular issue, though, I think, based on what I've heard both from John and Linda is one that we can take up. So let's just do that right now.

Let's just look at 1620.3, "Establishing Priorities," and the procedures and go through line by line and see if there are any other changes other than the ones I've pointed out that we need to make.

"The procedures adopted shall, number one, include an effective appraisal of the needs of eligible clients in the geographic areas served by the recipient and their relative importance based on information received from potential or current eligible clients solicited in a manner reasonably calculated to obtain the attitude of all significant segments of the client population."

Let me stop there. Now, is there any difference between that and the second sentence, which also talks about outreach to clients? And let me read it.
"The appraisal shall also include input from
the recipient's employees --" That's different from
the first sentence because you're talking about
employees -- "governing body members, the private bar
and other interested persons and to the extent feasible
should include outreach to potential and current
eligible clients, which may include the use of such
techniques as questionnaires and surveys."

MS. WATLINGTON: That's where I have a
problem.

CHAIR BATTLE: Okay.

MS. WATLINGTON: The others is inclusive, but
there you go "to the extent feasible should."

CHAIR BATTLE: Well, and the thing about it,
No. 1 already includes "an appraisal of the needs of
eligible clients." So paragraph 2 doesn't even need to
have it in there at all, I think.

I think you could strike "to the extent
feasible" completely because you've covered "outreach
to clients shall" in paragraph 1.

MS. WATLINGTON: Or maybe "the private bar,
eligible clients and other interested persons."
CHAIR BATTLE: Period. And take out "the eligible client" language.

MR. MCCALPIN: Just put a period after "persons."

CHAIR BATTLE: Yeah.

MS. WATLINGTON: "The private bar, eligible clients and other interested persons."

CHAIR BATTLE: "Which may include the use of such techniques as questionnaires and surveys," do we need that?

MR. MCCALPIN: No. You don't need that.

MS. WATLINGTON: No. You don't need that.

That's just a process.

MR. MCCALPIN: Because it says up there, "in a manner reasonably calculated to obtain" in the sentence preceding.

CHAIR BATTLE: Yeah.

MR. FORGER: The beginning of that sentence, "The appraisal shall also include" --

MS. WATLINGTON: "Input."

CHAIR BATTLE: "The appraisal." It relates back to the --
MR. FORGER: Yeah.

CHAIR BATTLE: Okay.

MR. FORGER: You’ve used the word "information" up above. I don’t know what "input" means, but you might use "information" instead of "input" there.

CHAIR BATTLE: Yeah.

MS. GLASOW: I don’t know why we’re adding "eligible clients" to the second sentence when they’re already in the first.

CHAIR BATTLE: That’s right.

MS. GLASOW: Especially since we took off all the other language.

CHAIR BATTLE: Yeah. That’s my point. So can’t we just strike all of that?

MR. McCALPIN: Yes.

CHAIR BATTLE: Okay. All right. We’ll strike that. "In addition to substantive legal problems, the appraisal shall address the need for outreach, training of the recipient’s employees and support services."

I ask the question why? Because is training of the recipient’s employees and support services...
anything that relate back to "cases" and "matters"?

MR. TULL: I believe that's there because it's in the Act, 1007(a)(c) 21 or whatever it is, which is the second that requires this "specifically refers to" --

CHAIR BATTLE: "Outreach training and" --

MR. TULL: "Outreach training and support services that are necessary."

CHAIR BATTLE: Okay.

MS. PERLE: But John, aren't those also things that are included within the definition of "matters"?

MR. TULL: Yes. I think that's correct.

MS. PERLE: I think that that should probably be a separate number.

CHAIR BATTLE: So you're saying that No. 2 should be, "In addition, the substantive -- the appraisal shall also address the need for outreach, training of recipient's employees and support services" as No. 2?

MS. PERLE: Yes.

CHAIR BATTLE: Okay. And take out that "in addition to substantive legal problems"? Because
that's now what we call "matters." Okay.

Then, the next sentence begins -- and it's really following, "The procedure adopted shall insure an opportunity for participation by all significant segments of the client community and the recipient's employees and the setting of priorities and in the annual review required by 1620.6 and provide an opportunity for comment by interested members of the public." Is that redundant?

MS. PERLE: Yes.

CHAIR BATTLE: In my view, I think that once you do your survey you've already covered everyone in the community of interest in paragraph 1. Can we just strike that one?

MS. WATLINGTON: Just in the one up on top --

CHAIR BATTLE: Yeah. So why don't we just strike 2. Bill?

MR. McCALPIN: The first word in the third line on that page, "attitude," I recognize it's in the current regulation, but I have a notion we could find a better word.

MS. WATLINGTON: Other than "attitude."
MR. McCALPIN: Yeah. We're not looking for an attitude. We're looking for views, requirements, needs.

CHAIR BATTLE: Views.

MS. WATLINGTON: Not attitude. I hope not.

MR. McCALPIN: I think "attitude" is a --

MR. TULL: So we don't consult with people who have an attitude?

MR. McCALPIN: Yeah. That's right.

CHAIR BATTLE: We're going to strike No. 2 completely; is that right? Any objections to that? We really are already covering it. Okay.

We're down to (b). "The following factors shall be among those considered by the recipient in establishing priorities:

"The suggested priorities promulgated by the Legal Services Corporation," which we know. I had a question just about "promulgated by."

When we sent out that suggested list of priorities, when you use the word "promulgated," is that only in the rule-making sense, or can Legal Services promulgate rules separate from those that are
contained in the Code of Federal Regulations?

MS. GLASOW: It's a term used in rule-making for something that is published publicly, and normally it's in the Federal Register.

MR. McCALPIN: Did we publish those priorities in the Federal Register?

MS. GLASOW: Yes, we did.

CHAIR BATTLE: Okay. All right. So that's promulgated. Okay.

MS. PERLE: You could use the word "adopted" instead of "promulgated," because we clearly adopted them.

CHAIR BATTLE: Yeah.

MS. PERLE: If you think that that --

CHAIR BATTLE: Okay. "The appraisal described in paragraph (a)(1) of this section," which we just talked about, "the population of eligible clients in the geographic areas served by the recipient, including all significant segments of that population with special legal problems or special difficulties of access to legal services."

"The resources of the recipient, the
availability of another source of free or low-cost
legal assistance in a particular category of cases or
matters.

"(6), the availability of other sources of
training, sort and outreach services;

"(7), the relative importance of particular
legal problems of the individual clients of the recipient;

"(8), the susceptibility of particular
problems to solutions through the legal processes;

"(9) where the legal efforts by the recipient
will complement other efforts to solve particular
problems in the area served;

"(10) whether legal efforts will result in
efficient and economic delivery of legal services;

"(11) whether there is a need to establish
different priorities in different parts of the
recipient’s service area."

Now, this list is a little bit longer than the
list that we had in our procedure before because we’ve
added the suggested priorities. And what else have we
added? We had nine before. We’ve got 11 now.

MS. WATLINGTON: I like the whole area --
CHAIR BATTLE: Yeah, it does.

MS. WATLINGTON: I like that.

CHAIR BATTLE: There is at least one more.

MS. PERLE: 11 is new.

CHAIR BATTLE: 11 is new. Okay. All right.

Okay. Are there any other questions about 1620.3, "Establishing Priorities"? Okay.

Suzanne, do you want to tell us about 1620.4, "Establishing a procedure for emergencies"?

MS. GLASOW: This, basically, sets out the requirements of allowing recipients to have emergency cases or matters, but we’re saying they have to be very specific about defining that.

And they have procedures that they have to follow to take up a cases or matter that is an emergency. Paragraph (a) requires the governing body to adopt procedures for undertaking emergency cases or matters, give guidance to a recipient of how to define an emergency and also how to set up the procedures for that.

CHAIR BATTLE: Okay. Are there any questions about 1620.4, "Establishing a procedure for
emergencies"? Alex?

MR. FORGER: Could I suggest the addition of another factor?

CHAIR BATTLE: Okay.

MR. FORGER: Which would be 7, the consequence of diverting resources from existing priority cases or matters.

CHAIR BATTLE: Okay.

MR. McCALPIN: Are you on 4 or back on 3?

CHAIR BATTLE: 4.

MR. FORGER: Adding 7. I'm just suggesting that a factor ought to be what is the consequence of taking on this emergency in respect of your existing priorities.

If you have to give up priority No. 1 in order to do this emergency, that should be the factor, the consequence of diverting resources from existing priority cases or matters.

I mean, it may have no consequence, but it may prevent you from doing your number one priority.

MS. WATLINGTON: LaVeeda?

CHAIR BATTLE: Okay. Ernestine?
MS. WATLINGTON: In the reg, the comments
defining who are the different designees to determine
this emergency.

CHAIR BATTLE: The comments?

MR. McCALPIN: That's under (b).

CHAIR BATTLE: Now, what is your concern? The
director, of course, has the authority based on the reg
to make a determination as to whether there is an
emergency, or the director can designate someone to do
that but remains ultimately responsible for how that
occurs.

MS. WATLINGTON: But if that board doesn't
set -- you know, you're putting too much on -- you
know, I -- I'm just having some problem with that, you
know, because that's always -- sometimes you have a
clerk or someone, you know, in the office making a
determination, as I say, that's a crucial point.

Because when you get down and you start --
your resources keep getting less there -- most of your
cases are emergencies. As I said, the majority of
clients don't come in until they are emergencies, and
that's very important.
I think I -- I don't know how to explain how it's going to be clear, but that is a serious point there.

CHAIR BATTLE: I think that in part -- now, let me see if I understand the concern. From the program's standpoint of view, a lot of the issues that are emergencies to clients probably are part of the general work that the program does anyway.

Even though the doesn't get there until it's an emergency to the client, the program could have identified a lot of those issues already in there in the way that they set their priorities.

MS. WATLINGTON: Right. Yes.

CHAIR BATTLE: However, there may be an issue because of a natural disaster or something that comes up that at the time the priorities were put together there was no way for the board to know that this was going to be an issue for their client community.

So they end up having to extend some resources to address that emergency that wasn't envisioned at the time that they initially set priority.

So "emergency" is really used from the
perspective of something that wasn’t envisioned at the
time we set our priorities rather than whether it’s an
emergency to the client. Is that --

MS. GLASOW: And Linda has some language that
will address that, I think.

MS. PERLE: I think that this will address it.
In 1620.4(a), it starts, "The governing body of a
recipient shall adopt procedures for undertaking
emergency cases or matters." I think you ought to add
"that are not within the recipient’s established
priorities."

MR. McCALPIN: Exactly. Exactly.

MS. WATLINGTON: Okay. That’s clear.

MR. McCALPIN: I wrote "outside of
priorities."

MS. WATLINGTON: And that’s takes away from
people having to make those decisions. It’s already
there.

MR. McCALPIN: Let me say also that I have a
feeling that the language of (a) creates a very wide
open potential for declaring emergencies.

I would think that emergencies ought to be
fairly rare. The way that (a) is worded, there are an
awful lot of things that could come on and be declared
an emergency.

And it seems to me that it suggests to boards
of recipients that they could create wide open areas to
depart from their set priorities.

CHAIR BATTLE: I don't agree. I don't agree.

MS. WATLINGTON: No, I don't agree. I agree
with what she was saying.

CHAIR BATTLE: Yeah.

MS. WATLINGTON: When I said that most of your
cases are an emergency, I'm saying it, but they're in
your priorities.

MS. BERGMARK: We tried to address that a bit
in the annual review. We tried to look at on our No.
4, consideration under 1620.5(b) is that the Board
should look at the volume of emergency cases or matters
in a particular legal area so that you are -- the board
is going to, then, take a look at whether something
that came up as an emergency in a particular year
merits ongoing attention and can consider that.

So realize it's not shrinking the discretion
of the program to deal with emergencies as they come up, but it's taking a look at that along the way to see whether that's not a legal area that needs attention.

MR. MCCALPIN: It seems to me that one of the problems that we've heard over the years is that -- the section of the Act on priorities has not really been very well observed in programs.

And I just have the feeling that the way (a) is worded it takes us back to that area where priorities will not be honored very greatly and will not be considered as strict, serious limitations to be departed from only in a real, honest-to-God emergency. A natural disaster is one you conditioning of.

CHAIR BATTLE: Yeah. Well, but the other thing is my reading of it is I guess I read it and got the exact opposite view from reading it, because it talks about issues that arise that are new and unforeseen circumstances, which really takes you back to the priority setting.

And if, during the time that you did your priority setting, you had an opportunity to look at this issue, you considered it and didn't include it in
your priorities, then it’s not new or unforeseen.

And so it seems to me that you really do have
parameters placed on what can be an emergency based on
the language that you have here. Go ahead, John.

MR. TULL: Obviously, this is a difficult
problem that this reg is trying to address, which is a
legitimate need for flexibility, that if a board does
adopt a set of priorities which, because of some change
in the law they just didn’t know about so they couldn’t
have adopted a priority to encompass that or because
some plant shuts down and it creates a whole new set of
employment problems, unemployment problems or because
of a natural disaster that we wanted to make certain
that a program would not be completely hamstrung from
responding.

But we’re also attempting to respond to the
concern that you’ve expressed, Bill, which is that that
not become a door through which programs could drive
large trucks and taking cases that the board had not
looked at and made a determination that they were
important.

That’s the reason -- I think there is two
protections against that. One is what is mandated by
the appropriations bill itself as reflected in the
regulation, and that is reporting both to the
Corporation and to the board as to any emergency cases
that are taken.

So they will get -- the board will get on a
semi-annual basis or a quarterly basis will get a
report of any emergencies, and the Corporation will get
a report on an annual basis.

The second is what Martha referred to, which
is we changed the language regarding the annual review
to say that the annual review should take place more
reflectively if there is a high volume of emergency
cases; that is, that the board -- it's a invocation to
the board, if there are a number of cases outside of
the priorities in the emergency area, to look at that
and to say, "We believe that these are cases we should
be taking, and we're going to change the priorities to
make them not emergencies anymore but to make them one
of the priorities that we now in adopt."

Or to say, "We've looked at this, and the
director made a judgment when these came in that these
were important, but the board has made a judgment that
that's not correct.

"We think we should still continue to do
housing and not do unemployment because the plant shut
down."

CHAIR BATTLE: And the other piece is the fact
that the staff has to sign off on this agreement that
they understand what the priorities are and will
implement them and are familiar with them places an
additional kind of responsibility.

It seems to me if you've signed an agreement
to take cases within a priority to examine carefully
when you have to depart from that exactly what you must
do in order to appropriately depart therefrom.

So I can see your concern, Bill, because
emergency -- especially given Ernestine's first
statement. Emergency, generally, by the time any
client makes it to a Legal Services office, in their
view, they're coming because it has gotten -- they're
in dire straights, and they need desperate help.

And it's real hard for a program in that
instance to say yea or nay to a particular case, but
given all of the strictures that we have now in how
this is going to be constructed and the specific
monitoring setup and the agreements required, it seems
to me that any time there is a departure from an
established priority that there is going to have to be
a procedure in place for some executive director to
make a judgment as to whether or not it's appropriate
or not.

MS. GLASOW: And just the requirement that the
executive director is ultimately responsible for that
decision I think is a lot chilling factor in terms of
he or she is going to be very careful about making
those decisions. CHAIR BATTLE: That's right.

Alex, I didn't mean to --

MR. FORGER: Following up on Bill's point, the
last clause in (a) may cause some concern of
"unanticipated change in the law affecting large
numbers of clients."

I mean, that is quite different than a
hurricane, I suppose, or an earthquake, although
legislatures may act that precipitously, but I assume
that a board can always modify its priorities at any
meeting at any time.

And a change in law that affects 1,000 people
or something or other is something that I think the
board should function on unless there is some
circumstance where a change in law can occur overnight
affecting the health and safety of people and the board
has not an opportunity to function on that.

I mean, this is just a very broad -- the
legislature may be considering something for a long
period of time and enact it, and it has affect on
housing that is something that concerns large numbers
of clients.

Should an executive director take that as the
opportunity of moving that to a high priority if a
board should act on that and decide whether or not it
rises to that level? That just doesn’t seem as big an
emergency as a flood.

MR. TULL: I think that’s probably more
likely -- that’s often likely to be the case, but the
reality of programs often is not every conceivable
change that a regulatory body or a housing agency or a
legislature or a city council or even like a zoning
board putting a highway into a neighborhood, for
instance, not all of those are typically monitored or
should they be monitored because it takes a lot of
resources to do that.

So some matters come to the attention of a
program only through clients coming in the door and
saying, "They've changed XY procedure down at the
housing authority, and as a result this has been
happening to me."

This is designed to provide the opportunity,
in the event that such cases come in, that the director
can say this is something that is new, unexpected.

The section in 1620 --

MR. McCALPIN: I guess my point, John, is
unless -- if it is impractical or impossible for the
board to function because of the time constraints.

Simply because this is new in '96 shouldn't be
the exception if the board as ample time to consider it
and either adopt it or reject it, I mean, if it's the
nature of the time, emergency, that the board can't
even be convened or at its next regular meeting.

CHAIR BATTLE: It seems to me that this issue
can be covered in the commentary. A board has the authority to adopt priorities and to make changes to those priorities as need be.

But we've got a specific producer for how adoption of priorities are suppose to take place, and it really becomes a judgment call and a resource call on whether it's worthwhile for the board to undergo that kind of process in order to adopt new priorities in an interim if the actual expenditure of resources to address this particular emergency situation is not going to be that great.

So it seems to me that if we address in the comments the fact that -- some examples of when it may be useful, particularly when the annual reviews show that a particular area shows up pretty frequently with a program as an emergency to the point that it ought to be a priority because it means that resources are being taken from some other priorities that are already established, then, at that point probably, rather than the executive director making a determination, it needs to be a board determination as to whether this area needs to be a priority. That's a judgment call with
shades of gray in it.

MR. FORGER: I just think, indefensibly, it would look, I think, better if it said, "and the board has not had an opportunity to" or the timing of it. But if it's in the commentary, that's okay.

MR. MCCALPIN: I have a slight language problem on the fifth line on page 5. I don't think the executive director authorizes "taking the emergency."

It's the emergency that gives rise to the case. It authorizes the taking of the case outside of normal priorities. They're not going to take the flood.

CHAIR BATTLE: Take the emergency case outside.

MR. TULL: We're mad, and we won't take it anymore.

CHAIR BATTLE: Outside the established priorities.

MS. GLASOW: I'd like to point out that on page -- well, 10. I hate to say pages. I'm not sure everybody has the exact same copy.

Section 1620.4(b)(4) appears to be redundant of (b)(1). So we are suggesting deleting (4). Section
20.4(b)(4) appears to be redundant of 4(b)(1).

MR. McCALPIN: (1) probably includes (4).

MR. TULL: (1) includes (4).

CHAIR BATTLE: (1) includes (4). Okay.

MS. GLASOW: So we'll delete (4) and add the one that Alex suggested on the consequences to the other --

CHAIR BATTLE: And that will become No. 6.

MS. GLASOW: Yeah.

CHAIR BATTLE: Okay. Anything on annual review? Linda?

MS. PERLE: Let the Board members --

CHAIR BATTLE: Okay. I hear Bill clearing his throat.

MR. McCALPIN: Well, I just raise the question whether the combination of 1620.5 and 1620.7 requires two reports, two separate reports.

One, it says, "shall submit an annual report summarizing the review of priorities the day of the most recent appraisal," and so on.

Then, 7(b), "report annually to the Corporation on a form provided -- information on all
cases or matters, including emergencies. " Are those two separate reports we’re requiring, or is it one report with two -- with separate subject matters?

MR. TULL: It’s the same report that needs to be made annually to the -- under the appropriations act, it needs to be made quarterly to the recipient board and annually --

MR. McCALPIN: I understand that. I’m just asking whether .5 .7 lay upon the programs the obligation to prepare two separate reports or whether it can be done in one.

MS. PERLE: The issue you’ve raised is part and parcel of the issue I was going to raise. 1620.5 is another one of those sections that’s lifted, I think, directly from the current reg.

And I don’t think there was an effort made to really see how -- whether or not it was consistent with the rest of the reg.

The point that I was raising -- I agree with your point. The other point that I was raising was it discusses -- it says, "the report will also include copy of the case acceptance policies and procedures
established under 1620.3 of these regulations as a result of the priority review and assessment."

1620.3 doesn't require that as part of the priority-setting process they do case acceptance policies and procedures. It might be a good idea to say that they do, but they don't.

So you're asking me to include something that you're not requiring them to do.

CHAIR BATTLE: Okay. So we really need to take a look at annual review. What I'm hearing in part was that what we did was to add to 1620 a .7 which -- we added a .7 on report which really includes part of reporting that was already in the reg under 1620.5.

And it probably makes more sense to just include or overlay the reporting requirement in 1620.5 rather than have two separate reporting requirements.

MR. TULL: They are different reports.

CHAIR BATTLE: Are they?

MR. TULL: One is a report on what the board has adopted as its priorities.

CHAIR BATTLE: Okay.

MR. TULL: And the other is a report of the
cases or matters which were taken outside the
priorities or as emergency matters. There would be a
listing of cases and a statement as to why.

    CHAIR BATTLE: But it says, "all cases,
matters, including emergencies."

    MR. TULL: We could make a judgment to ask
programs to submit those together as a matter of just
the procedure that we use, but they are -- they do
serve different purposes.

    CHAIR BATTLE: But you ask not only just for
reporting on those that fall outside. You ask for
those that fall within because you ask for all cases or
matters, including emergencies undertaken.

    MR. TULL: Undertaken that were not within the
recipient’s priorities.

    CHAIR BATTLE: That were not within the
recipient’s priorities. Okay.

    MR. TULL: I mean, one is a document -- one is
a document that we typically use priorities for
purposes of evaluation and a whole variety of things to
make a judgment about what a program is doing.

    The other is really a compliance report. We
might -- as a general rule, we've, in approaching the reporting question, have tried to shy away from prescribing a kind of report or what the contents should be because that may change over time in terms of the way we would need the information and what it would capture and display for purposes of Congress or whatever.

I'm not sure what the impact would be of joining the two together.

MR. MCCALPIN: My interest is in cutting down the paperwork and the bureaucratic requirement laid on programs. They have fewer resources, more problems. Let's not lay more paperwork on them.

MS. GLASOW: May I suggest we're in the process of working with the Office of Inspector General on the report requirements, which is why, in Section 7, we say "in a form provided by the Corporation."

What we're trying to determine at this point is what information they need we need to insure compliance with the legislation.

So why don't I suggest that we'll take whatever is in Section 5, incorporate it into Section 7
so at least all the reporting requirements are in the same section and revise the language to reflect the basic policy that we’re undergoing right now that we are working with OIG in trying to come up with language that makes a reporting requirement but doesn’t necessarily tie us in by regulation to information that we may not really need to insure compliance with the legislation.

CHAIR BATTLE: That makes sense because that addresses and satisfies a concern I think we’ve raised about how it’s set out at present. When do we expect that we’ll have that?

MS. GLASOW: We’re going to make revisions to all these rules that you work on now for the --

CHAIR BATTLE: For the next meeting next week?

Okay.

MS. GLASOW: -- 19th meeting so that the committee has one chance to look at it quickly before the Board looks at it on the 20th.

CHAIR BATTLE: Okay.

MS. PERLE: Do I understand, then, that what would be left in the annual review provision would be
the first sentence, "Priorities shall be set periodically," and then go all the way down to "The following factors shall be among those considered in determining whether the recipient's priorities should be --"

MR. McCALPIN: I can't hear you, Linda.

MS. PERLE: "The following factors shall be among those considered in determining whether recipient's priorities should be changed," and then the factors, and then everything in between those two things will be reviewed and what was appropriate would be incorporated into 1620.7, right?

CHAIR BATTLE: Yeah. Anything that has to do with reporting will go in a section called "Reporting," and then, you know, just the annual review itself will go in 1620.5. I think that makes sense. Alex.

MR. FORGER: Sort of a basic question. If a matter does not fall within the adopted priorities and it is not an emergency, can it be undertaken?

MR. McCALPIN: No.

CHAIR BATTLE: No.

MR. FORGER: Well, then, why does the language
talk about emergencies, for example, in 620.4(b),
"Director or designee shall determine whether a
particular situation constitutes an emergency case or
matter that should be undertaken by the recipient"?

MS. GLASOW: Because it's an emergency case or
an emergency matter.

MR. FORGER: Okay. So it's --

CHAIR BATTLE: Emergency case or matter.

MR. McCALPIN: It's an emergency.

MR. FORGER: Okay. Then --

CHAIR BATTLE: Emergency case or emergency.

MR. FORGER: -- when we get to the reporting,

"The recipient shall report annually on a form
information on all cases or matters, including
emergencies undertaken that were not within the
recipient's priorities."

CHAIR BATTLE: Really, it should be "on all
emergency cases or matters undertaken that were not --"

MR. FORGER: Would you restate that?

MS. BERGMARK: I would take out the comma. In
other words, the phrases "undertaken that were not
within the recipient's priorities" modifies
"emergencies."

MR. FORGER: Okay.

CHAIR BATTLE: I would put "emergencies" in front of "cases or matters," just "emergency cases or matters undertaken" --

MS. BERGMARK: They have to report on all cases or matters, and then they also have to report on emergencies.

CHAIR BATTLE: I raised that question with John, and he said no. This is just on the emergencies here.

MR. MCCALPIN: That's right. This only requires reports on cases or matters undertaken that were not within the priorities.

CHAIR BATTLE: Which would only be emergencies.

MR. MCCALPIN: Which should only be emergencies.

MR. FORGER: I thought it would only been emergencies.

CHAIR BATTLE: Yeah. So I would put the word "emergency" in front of "cases or matters."
MR. McCALPIN: Right.

CHAIR BATTLE: "Information on all emergency cases or matters undertaken that were not within the recipient's priorities."

MR. McCALPIN: Right. Exactly.

MR. FORGER: That's in (a) and (b), right.

MR. McCALPIN: Exactly.

MR. FORGER: And for the form that's going to be developed, Suzanne, I guess maybe it's implicit in this, but I would think "useful" would be the rationale for doing so, why not only reporting cases and matters undertaken that were not within the priorities, I suppose where it should be, "Why were they undertaken?" A flood. A fire. A change in law affecting whatever.

I mean, that's the purpose, I suppose, of monitoring this to see was it truly an emergency. Give us a clue as to why you undertook it.

MS. BERGMARK: And I guess that's Suzanne's point about working with IG on what should be in the report. In other words, what we want to say is -- want to be broad enough here to incorporate a form that can be used for purposes of monitoring compliance.
CHAIR BATTLE: Okay.

MR. FORGER: So I would add, "and the rationale for doing so" at the end of (b).

CHAIR BATTLE: Okay. Is there anything else that we need to cover? Signed written agreement. We really didn't talk about that. That's pretty straightforward. Linda.

MS. PERLE: I have one point which I raised with John on No. 3 in 1620.6. I think it should say, "Will not undertake any case or matter for the recipient that is not a priority or an emergency."

MR. McCALPIN: "Any case or matter" what?

MS. PERLE: "Case or matter for the recipient that is not a priority or an emergency."

CHAIR BATTLE: Yeah. You're going to need somebody to individually sign. I think you're right. Okay. Anything else on 1620.6? Okay.

We've taken about an hour and a half on our first reg. We're going to make it. What I'd like to do is just take a short five-minute break. We'll come right back.

MR. McCALPIN: Let me ask a question. Rick,
you have a bunch of intake centers which are handled by
the likes of Dick Straub and others who are not
employees. Do they make -- these are pro bono people.
Do they make decisions about intake out at the Rockhill
Center?

MR. TEITELMAN: They have the priorities, and
they would, basically, do intake there.

MR. McCALPIN: I'm talking about whether
they're going to have to sign this agreement.

CHAIR BATTLE: It says "staff." I mean, the
reg says "staff," and so a person who is not staff I
don't think has to sign this agreement.

MR. McCALPIN: But we got Dan Klagett and Dick
Straub and people like that out at the Rockhill Center,
Mark Keaney, and they are not staff.

They are pro bono, and there are a lot of
these situations around the country. Do they have to
sign these agreements?

MR. TULL: The regulation would not conflict,
if they do, and that's consistent with what the act
says, which requires that a staff of such person or
entity has signed the agreement not to undertake cases.
CHAIR BATTLE: Right. Yeah.

MR. McCALPIN: Yeah. But they may be taking matters on and handling them.

MR. FORGER: Nonlawyers handling matters?

MR. McCALPIN: No. No, they're lawyers but not staff.

MR. FORGER: But they're handling it themselves on a pro bono basis.

MR. McCALPIN: Right.

MR. FORGER: So they're outside our regs.

CHAIR BATTLE: They're outside the regs if they're pro bono.

MR. McCALPIN: Are they outside the statute?

CHAIR BATTLE: Yes. I think, from what John is saying, the statute requires that we implement a section which requires staff to sign the agreement. It does not speak to pro bono work at all, does it?

MR. TULL: It doesn't, no.

CHAIR BATTLE: So I think there will, from time to time, be an interface of pro bono with a lot of the things that we're required to do.
MR. FORGER: An LSC program can refer illegal aliens, abortion litigation, I assume, to a pro bono lawyer.

MS. PERLE: They wouldn't count it as PAI cases.

CHAIR BATTLE: It would not count as a case that would be undertaken by Legal Services.

MS. PERLE: You could make that referral.

CHAIR BATTLE: Yeah.

MR. McCALPIN: By "staff," we mean employed staff?

CHAIR BATTLE: Right.

MR. TULL: And the judgment there was one we made in other places as well, which is understanding the concern that Congress expressed seeking to propose a regulation which would implement that but would not do it in a way which would add another impediment to affect the pro bono work, asking pro bono lawyers to sign a statement pledging not to take cases outside the priorities when it's not mandated by the statute.

In our judgment, it would be yet another factor that would make recruitment difficult with --
CHAIR BATTLE: Entirely consistent with what Congress is really saying here. They’re saying we’re going to allow federal funds to be used for certain specific purposes that are tied to priorities.

The private bar is free to do all other cases, and when you do pro bono --

MR. FORGER: We’re we’re relying on them to do that.

CHAIR BATTLE: That’s right. And pro bono work is outside of the rubric of this work that is being done with federal funds, it seems to me.

MR. TULL: I think the one limitation we would -- this is not something that’s necessary to reflect on the regulation, but certainly our policy would be that a case cannot be counted as a PAI case as a part of the program if it is outside the priorities, but that’s really a different matter. That’s a matter of a program’s compliance with 1614, whether it’s a case within the program’s PAI effort or not.

CHAIR BATTLE: Okay. Is there anything else on 1620? If not, we’ll take a five-minute break.

(A brief recess was taken.)
CHAIR BATTLE: We are now back on the record after a brief five-minute break. And as I said, I hate to be such a tough taskmaster, but we've got a lot of work before us today.

I do want to allow for breaks so that our level of energy stays up, but at the same time I want us to come back quickly, if we can, to continue this process. Alex, do we have lunch here?

MR. FORGER: I do not know.

CHAIR BATTLE: Okay.

MR. FORGER: But I will assume it is.

CHAIR BATTLE: Okay. That was my assumption. I hope we're all assuming --

MR. FORGER: And we'll assume lunch, if it isn't.

CHAIR BATTLE: So that we can plan to take a lunch break, depending on where we are, in about another hour and a half, if we can complete another reg.

Let us move on to the second reg that we have on our agenda, which is 1636, "Client Identity and Statement of Facts."
This is a new reg which falls from the 1996 Appropriations Act. Suzanne, can you give us the background on this one?

MS. GLASOW: As you stated, this is a brand new regulation. We are attempting to implement a provision in the '96 Appropriations Act that requires that programs prior to filing a complaint or engaging in precomplaint settlement negotiations identify to a defendant the name of each plaintiff and that the plaintiff sign a Statement of Facts that are the basis of the complaint unless a court finds that it would be to the detriment or harm of the plaintiff to do so.

And in essence, this rule sets out that requirement and the policies and procedures and applicability of that requirement.

CHAIR BATTLE: Okay. And the rule, essentially, follows the appropriations requirement specifically.

MS. GLASOW: Yes. It's a relatively short rule.

CHAIR BATTLE: Okay. It's in Subsection 504.9(a) and (b).
MR. McCALPIN: 8.

MS. GLASOW: 504(a)(8). 8 has (a) and (b) to it.

CHAIR BATTLE: Okay. You’re right.

MR. McCALPIN: Let me raise a threshold question which relates not only to this regulation but to several others, and that is the definition of "litigation."

We have a tendency here to think of it as something in a judicial grantee entity. There is at least one regulation, and unfortunately I’m swimming in them, and I can’t put my finger on it, where we require a certain -- some action with respect to an administrative proceeding.

And while, of course, they use "litigation" in (a)(8) and others places, I think we need to have a clearer understanding of how broad or how narrow the word "litigation" -- does it involve any contested proceeding? Is that litigation? Or does it only involve a contested proceeding in a court of law?

CHAIR BATTLE: That’s a good question. I’ll give my own thoughts after we get a response.
MS. GLASOW: I believe that we mean litigation, though we have not defined it, that is true, to any -- something brought within a court of law because we so often otherwise talk about administrative proceeding, which would be something outside of a court of law, just a whole separate area of avenue of hearings for a --

CHAIR BATTLE: My reading of just the language in 504(a)(8)(a), "files a complaint or otherwise initiates or participate in litigation" led me to believe, particularly with the language "plaintiff and defendant" that we're really talking about in-court litigation.

There are so many instances in which, as a lawyer, you might send a letter lodging a complaint on behalf of a client against someone and get it resolved way before it ever goes to court.

And I think that Congress's intent here is when someone is named as a defendant in litigation that there be a procedure, at least for checks and balances from a Legal Services side, to know who the plaintiff is.
And I don't think that procedures outside of
court proceedings were envisioned by this rule, in my
view. Just reading 504(a)(8)(a) and the language
"plaintiff and defendant" leads me to that conclusion.
Is that the conclusion that the staff reached as well?

MR. TULL: That's the conclusion that we
reached. This language in -- are we speaking of
1636.2, on that page?

MS. GLASOW: No. It's a threshold issue.

MR. TULL: Oh, it's just what litigation is.

CHAIR BATTLE: Yeah.

MR. TULL: Because that next section will be
debated by the answer to this question. But we have
read and understood "litigation" to be a term of art,
which means a matter in a court of law, as opposed to
including administrative matters. And it has
significance throughout the regulations in a variety of
places.

MS. PERLE: I'd like for you to remember what
John said when we go to some of the other regulations,
because I don't think that is --

MR. MCALPIN: I wish I could find the one I
have in mind where it talks about something that had to be done in an administrative proceeding.

MS. PERLE: In prisoners, the one on prisoners.

MS. GLASOW: I would like to -- that's a good question because where we are going to suggest in Section 2 --


MR. TULL: 37.

MR. MCCALPIN: 37.

CHAIR BATTLE: No. 2, it sets out the requirements. Is that what you're saying?

MS. PERLE: Maybe I'd better let them finish this issue.

CHAIR BATTLE: Okay. All right.

MS. GLASOW: No. I'm finished.

MR. TULL: We have, in this regulation and in 1637, which Bill is looking for now regarding prisoners, interpreted the restriction or made a recommendation to the Board that the restrictions be interpreted to include certain kinds of administrative matters.
But the commentary specifically notes that what Congress limited was litigation, and we understand "litigation" to be a term of art which means a matter in a court of law.

But we believe that the intent of Congress was to include certain kinds of matters that were not encompassed within that particular word and therefore recommend to the Board that it use its power to adopt a regulation which is somewhat more expansive than --

With regard to this particularly -- statement of facts, when we get to Section 2, .2, we have a recommendation that that actually be restricted back down just to "litigation" in light of some research which was done over the weekend.

CHAIR BATTLE: Okay.

MR. TULL: But it is a -- where it does appear and includes "administration" is a conscious choice and is described as expanding the definition -- or not expanding, keeping the definition of "litigation" intact but expanding the restriction beyond that.

CHAIR BATTLE: Okay. All right. Bill, are you still looking for where it is? I think that John
has explained the distinction, because I think it is an inconsistency, as he has noted, that when we start to talking about proceedings involving prisoners that we're actually using the term "litigation" more expansively to include administrative.

MS. BERGMARK: Or more accurately, we are keeping the definition of "litigation" but creating a restriction which is slightly --

CHAIR BATTLE: Broader than that. Okay. That's probably right. Okay. So let's look at -- in light of that and how we have used the word "litigation," do we define it anywhere, or do we simply use it.

MR. MCCALPIN: No.

CHAIR BATTLE: Okay. Do we need to define it?

MR. TULL: Well, we certainly could.

MS. PERLE: We could, if you'd like. You don't actually use "litigation" in this form. You use prelitigation negotiations.

MS. GLASOW: We do in the Purpose section, but that's not --
CHAIR BATTLE: Initiate litigation or engage in precomplaint --

MR. FORGER: You don’t prepare a statement of a case when your adversary knows that you don’t intend to litigate it.

MR. TULL: Well, the adversary wouldn’t necessarily know that the statement has been prepared, but if they did, they would know that.

MR. FORGER: But if you’re telling your client you don’t have to prepare a statement, you’re saying we’re not going to litigate.

MR. TULL: Which is common. Many programs do take on matters for clients that specifically say we will --

CHAIR BATTLE: Handle it administratively but not --

MR. TULL: -- handle this or negotiating with your landlord or try to work something out, but we will not go to court for you. And it’s consistent with the Rules of Professional Ethics. It’s a limitation on the scope of representation, which is understood by both.

MR. FORGER: But in some cases where you
contemplate you may not, you would still want to retain that as a tool. Now, I don't know how this gets into the negotiating strategy.

As you say, you can say, I guess, "Sorry, we're not going to litigate," and then say to your adversary, "Well take you to the U.S. Supreme Court, if need be, to get justice in this case," although you've already committed yourself not to do it.

So I don't know whether "prelitigation" means that you have not ruled out the possibility of litigating.

MR. TULL: Obviously, the issue you raise is a very difficult problem in terms of how to craft a regulation which doesn't expand what would be an enormous administrative burden on programs and on lawyers and paralegals representing their clients and the creation of a lot of paper that will not be a part of the actual representation of the client.

It implicates a lot of thing. Obviously, one is we encourage programs to set up hotlines and to create efficient ways of providing advice and free service to large numbers of clients, and we have
sought, in drafting the regulation, to strike a balance
which is not overzealous in requiring the creation of a
lot of paper and a lot of procedures that a program has
to go through and a client has to go through before
they become -- before they get the service that they
need.

We felt -- with all these, we've been mindful
of what we understand to be the concerns expressed by
Congress both on the record and in conversations with
staff that these restrictions were designed to address.

And this particular set of restrictions
comes -- the history of it, as it comes out of migrant
representation and concerns on the part of small
farmers and large farmers that they were being pushed
into spending a large number of expenses regarding
representation of issues regarding migrants.

This particular provision comes out of an
effort to reform what was deemed to be abuses in that
area by some members of Congress.

It happens that they've expanded it to cover
all litigation. So we felt in this particular one that
it is one where because it does involve such a huge, potentially huge expenditure of resources, creating records and maintain records that are not particularly -- which are not directly responsive to a concern that Congress had, because their concern was not all litigation. It was in a very narrow part of the work that is done by programs that, in this area, we felt it was appropriate to make choices which did not expand --

CHAIR BATTLE: The administrative burden.

MR. TULL: -- the administrative burden and to interpret it as strictly as possible because it will involve a significant amount of just cost that will be of little immediate benefit even to the compliance issues that Congress was concerned about.

CHAIR BATTLE: Yeah. Well, then, in light of that background and history that John has given us, do we have any suggestions with regard to the requirements in 1636.2?

MS. GLASOW: Yes. We are suggesting striking the language "when a recipient files a complaint in a court of law," striking the language starting with the
word "or" --

MR. FORGER: Where is this?

MS. GLASOW: It's in 1636.2(a). So on the
first line, starting with the word "or," striking "or
otherwise initiates or participates in an adversarial
proceeding against a nongovernmental defendant or."

MR. MCCALPIN: You're taking that out?

MR. TULL: And that's based on -- this was one
of the sections where we were recommending to the Board
that it expand the restriction beyond what Congress
explicitly stated, which is a requirement of the
procedures in litigation.

That was based on an erroneous understanding
of the law on our part, which was that for migrant work
that the Agriculture Protection Act, which is an area
of some concern, that it involved administrative
proceedings.

And we assumed that Congress intended for each
of the restrictions, since our concern was in the
migrant area, to encompass that. It turns out that
AWPA does not involve any administrative proceedings,
and that was the sole basis for our recommendation to
the Board that they expand this beyond what Congress had asked the Corporation to do.

MR. McCALPIN: Let's back up one minute to 1636.1. I don't think you have accurately reflected the statute, which says that, "Files a complaint or otherwise initiates or participates in litigation."

And what you say is that in 1 is "to ensure that when recipients initiate litigation or engage in precomplaint settlement," and there is a whole middle area of participating in litigation without having initiated it.

CHAIR BATTLE: You mean files a complaint?

MR. McCALPIN: No. What the statute says, "files a complaint, otherwise initiates or participants." So you can engage in litigation other than simply by filing a complaint. You can otherwise initiate, or you can otherwise participate. Somebody else may file the complaint, and you come along and participate in the litigation.

CHAIR BATTLE: So would you amend this to say, "The purpose of this rule is to insure that when LSC recipients file a complaint or otherwise initiate or
participate in litigation or engage" --

MR. McCALPIN: Exactly. I would reflect the
first line in subsection 8 of the statute:

CHAIR BATTLE: Okay. All right. I think
that's consistent with what the actual language says.

MR. TULL: And would you include in that the
rest of the subsection where it says, "against a
defendant," which does --


MS. BERGMARK: 1636.2 would read, "When a
recipient files a complaint in a court of law or
otherwise initiates or participates in litigation
against a defendant" --

MR. McCALPIN: Against a defendant. "Or
generate in precomplaint settlement negotiations they
identify."

CHAIR BATTLE: Okay.

MR. McCALPIN: Now, then, now you get down to
where we were on 2(a). "When a recipient files a
complaint or otherwise initiates or participates"
that's reflective of the statute.

MS. PERLE: Well, no, because it says
"adversarial proceeding." It doesn’t say "litigation."

MR. McCALPIN: Well, I haven’t gotten that far yet.

MS. BERGMARK: We just changed it. We just changed it to "litigation," right?

MR. TULL: I don’t know.

MR. McCALPIN: And litigation.

MR. FORGER: Have we stricken "adversarial proceeding"?

CHAIR BATTLE: Well, I think what I hear Bill doing is saying this, that this language now needs to reflect what the Purpose says and what the statute requires, which is it’s not simply just a recipient filing a complaint in a course of law.

It can be "or otherwise initiates or participates in litigation."

MR. McCALPIN: Right.

MS. BERGMARK: And are we talking about 1636.1 or .2 right now?

MR. McCALPIN: .2.

CHAIR BATTLE: .2.

MS. BERGMARK: .2. Okay. That’s what I
thought. Okay.

MS. GLASOW: They both need to be fixed. I think there has been a tendency in the Purpose section, and we'll probably see it in other rules, to summarize a requirement, and sometimes important words are left out in the Purpose section. But it's especially important in the Requirements section to get it right.

CHAIR BATTLE: Okay. So can we have that language reflect precisely what the statute sets out as a preliminary matter?

MS. GLASOW: Yes.

CHAIR BATTLE: Okay. That's in (a).

MR. McCALPIN: And we have taken out the words "and adversarial proceeding against a nongovernmental defendant"; is that right?

CHAIR BATTLE: Well, you leave in "against a defendant," but you take out "a nongovernmental." And so what you have is "against a defendant."

MR. TULL: So "adversarial proceeding" is changed to "litigation"?

CHAIR BATTLE: Yeah. Okay. Anything else in (a)? Let's go on to (i). "It shall identify each
plaintiff by name." Is there any rob with (i)?

MS. PERLE: I just want to point out something.

CHAIR BATTLE: Okay.

MS. PERLE: And it's a little bit of a conundrum. I don't think that -- I'm not sure there is anything we can do about it.

This talks about prelitigation negotiations, and the only way you can protect the identity of the client in that is to get a court to issue an injunction.

No court is going to issue an injunction if you haven't already filed suit. So what this, in essence, says if you want to protect your client's identity, the only way to do it is to file suit first before you negotiate.

I don't know that there is anything we can do about that because I think the statute is clear that you have to get an injunction. But I just wanted to make sure that everybody understood what it did.

MR. TULL: The statute also raises the curious problem of a lawyer having to get an injunction against
him or herself.

CHAIR BATTLE: Not to have -- yeah.

MR. TULL: They used the word an "injunction,"
which really creates, sort of, a procedural oddity
which certainly would be noted by a --

MR. FORGER: Stop me before I do it again.

MR. TULL: Stop me.

CHAIR BATTLE: There is nothing we can do
about it, but that's the reality of it, it seems to me.

MS. PERLE: I don't know what -- do you want
to explain that in the preamble or just let people
figure it out on their own?

MS. GLASOW: I don't know how to get around
the regulatory language --

MS. PERLE: No, no. Just --

MS. GLASOW: Oh, just --

MS. PERLE: Just say in the preamble that
this -- it raises this kind of "not" that can't be
unraveled. I don't know. Maybe someone can think of a
way to deal with it in the final reg.

You might be able to get somebody who has a
suggestion on how we might deal --

CHAIR BATTLE: Well, the only way around it is it says, "precomplaint settlement negotiations." A decision, it seems to me, before 1636 becomes operative has to be made that one is going to litigate an issue if it is not resolved. And I think John brought up earlier there are instances in which part of your agreement is not to engage in litigation but to attempt to resolve something administratively by negotiations.

If you do not intend to be involved in litigation and that's part of your agreement, then I don't think that 1636 becomes operative, and that's your only way out.

But if at any point in time you, from the onset, believe that you're going to engage in litigation if you're not able to settle it otherwise, then I think 1636 takes effect.

MR. McCALPIN: Let's role play this a little.
You've got clients in a situation with a complaint against a defendant. So you go to the defendant's lawyer and say, "Look, I want to resolve this problem with you. You got this problem."
And the guy says immediately, "Who are your clients?" What are you going to say? Are you going to say, "I ain't going to sue you. Therefore, I don't have to tell you"? That puts you in a hell of a bargaining position right at the start.

Are you going to say, "I'll tell you who my clients are," and so you disclose the clients even though you have already decided you won't file suit?

MS. PERLE: And another little scenario. You haven't been authorized to file suit. You don't intend to file suit. Your agreement says you won't file suit, but you go to somebody and you say, "If you ever do this, I'm going to sue you."

I mean, I'm very uncomfortable with that, the notion that you say, "I don't have the client. I'm not going to identify my clients, and I don't have a client's statement because I don't have permission from my client to sue you, even though I'm threatening to sue you."

CHAIR BATTLE: I don't think -- yeah. Yeah, you can't threaten them unless you're going to carry it out.
MR. McCALPIN: I think as a practical matter, you’re going to have to disclose clients’ names period, if you want to get anywhere.

CHAIR BATTLE: Well, but I think I pointed out a distinction that is a real distinction. I think it depends on the circumstance.

I can envision a situation where you say, "You’ve got a problem with somebody. I’d like to see if we can work it out with this."

And if there is a demand made for the names of the clients, if you’re engaged in negotiations to resolve it but you don’t have the authority to sue, yeah, that does limit your strength in negotiations from the onset, but at least if there is a problem out there and you bring it to that person’s attention, they may be willing to resolve it not because of the threat of litigation from you but because of the exposure that they may have because now they know that there are people out there that know that they have this exposure to possible litigation around that issue.

MS. PERLE: And we’re not only dealing with that issue, we’re also dealing with the statements of
facts issue.  

MR. McCALPIN: Well, you don't have to disclose the statement of facts.

MS. PERLE: But you have to have it.

MR. McCALPIN: You have to have it, but you don't have to disclose it.

CHAIR BATTLE: And again, the point I'm raising gets to the administrative burden of it all. You've got a lot of work to do prior to filing any kind of litigation.

And I think that what this is going to do is to make clear to programs and to lawyers, staff attorneys before you start down the road toward litigation there are certain specific things that you have to do.

If you're involved solely in negotiations to try to resolve a matter where you're not going to take the litigation, then you're going down a different road in the process of doing that.

But I think, Bill, you're right. By and large, when you're in the kinds of situations that were envisioned by this particular congressional requirement and restriction N those instances, really, absent
litigation, you don’t get much results.

So in those situations, I think you’re covered. In a lot of other situations, you may not be.

MR. FORGER: Is this intended to permit retaliation? Is that its purpose? I mean, otherwise, I cannot see in any kind of a overture to a prospective defendant reciting a grievance for which you want some recognition that you must disclose who it is you’re talking about.

Otherwise, there really can’t be any serious discussion, and if someone says, "You have done this following, and I want $100,000," and said, "Well, you know, who did I do this to?" Or "Who purchased it from me?" Or, you know, "Who is alleging these things?" Or "Which tenant in the building is it now that you’re complaining about?"

I don’t see how that you can engage in that sort of a thing without identifying not generically but by, you know, closer identification who you’re talking about.

MS. PERLE: But what if you’re representing a
tenant association and you go to the manager of the
tool and you say, "Members of the association have
complained about lack of security or something, and we
need to fix these things"? Do you have to identify
each individual?

MR. FORGER: You're asking me?

MS. PERLE: No, no, no. I think there are
situations where you might want to engage in this kind
after negotiation without identifying particular
individuals.

MR. FORGER: Well, if you've got an entity,
sure, without naming the shareholders and the members
or whatever. But I think if you just went to the
landlord and said, "You have to fix up some conditions,
and I can't tell you whether anybody in the housing
project has complained or not, but I just think -- I
passed by. I think you ought to fix this place up," he's not likely to respond.

CHAIR BATTLE: Well, our requirement is --

MR. FORGER: Yes. I mean, I would disclose
simply on behalf of somebody who has an interest.

CHAIR BATTLE: Whoever the plaintiff is must
be identified. When you get ready to file a lawsuit, you’re going to have to name whatever it is that the plaintiff is, and that is --

MR. FORGER: But in advance of that, you’re going to have to do that before real negotiations unless -- that’s why I say not really facetiously, but there are some folks who would be intimidated by the fact that they are now going to be identified, and maybe that’s the purpose of the identification, although I suppose Congress is saying that there are too many frivolous actions brought.

And if the people have to stand up and identify themselves, they will be less inclined to make this kind of a complaint, and we will then get some balance, but I suppose that’s only when you’re talking about a very vulnerable group, and maybe it’s in the migrant area.

MR. TULL: I think what might help would be in the commentary we certainly can say more to cover the kinds of circumstances that Linda addressed.

Certainly, if a client has authorized suit, you have to disclose. I think even if a client hasn’t
authorized suit, if you threaten a suit and that’s explicit and you say, "You don’t fix this, and I’m going to sue you," it seems to me that --

CHAIR BATTLE: You got to do it.

MR. TULL: -- whether you’re authorized or not or whether in your mind you really think you can do it, you’re under the rule in that circumstance.

We can certainly address that in the commentary. Linda does point out a problem which has been created which I don’t think we can get around which is in the housing situation, for instance, where you very well may not want to, for the purposes of -- your client might be in jeopardy if you say, "I’m representing Mrs. Jones in Apartment 6, and Mrs. so and so in Apartment 8, and everyone in this amount is complaining about the fact that you have rats running throughout the building and there are people using drugs in the front door, and it’s a dangerous place. Fix it," that those two persons might be singled out for injury.

And you have no choice, I think, but to go immediately and file suit if you have to disclose their
identity before you negotiate.

    Now, it will change the way you represent the
clients because about it might well be better just to
call up and say, "Look, you've got to fix this, or
we're going to have to sue you."

    You may very well get a response from a
landlord with the threat of -- but I think Linda is
correct, given the requirement of having to get a court
order in order not to -- that it does hamstring
programs to a degree, which is probably not intended
but is a result.

    CHAIR BATTLE: Okay. Can we do that? Can we,
in the commentary, cover the circumstances identified
that Linda set out and as well just point out for
clarity's sake so that programs will understand that
where there is a need to protect identity that the
statutory provision requires that one must get an
injunction for that in order to come out from under
this identity requirement? Okay.

    Now, that covers those two points. Let's go
back to 1636.2, the requirements. We've made changes
to (a), (1). (ii)?
MR. MCCALPIN: Without getting into drafting here, I'd like to sit down with somebody and suggest some rearrangement of the phrases in this for clarity purposes.

MS. GLASOW: Actually, I should have said up front that we welcome any stylistic technical changes that you can provide --

CHAIR BATTLE: Sure.

MR. MCCALPIN: I don't see the point in taking everybody's time to do that. I'd like to suggest some rearrangement of phrases.

CHAIR BATTLE: Which ones?

MR. MCCALPIN: 2(a)(ii).

CHAIR BATTLE: Okay.

MS. GLASOW: I'm sure that we can do that, Bill.

CHAIR BATTLE: Okay. Anything in (2)(a)(ii)?

Prepare a date that written statements signed by each plaintiff and (b), which has to do with the statement of facts in English and, if necessary, in another language and (c), which has to do with the emergency circumstance?
MR. McCALPIN: You think that the statute really gives us that opening?

MR. TULL: The statute is silent on that issue. There is pleas dent in the regulations for -- where a retainer agreement is required by the statute where an emergency program can go --

MR. McCALPIN: We're dealing with a brand new statute now, 3019, and the question is whether 3019 gives us an opening not to follow 504(a)(8) in an emergency.

MS. GLASOW: I think it's implicit or within the spirit of the exception for going to a court and getting a court to grant protection for your client's identity.

I mean, you still have to follow -- you still have to do it. It's just a matter of timing. If it's a real emergency, you can't get to the court in time, you can't get that protection, but you still have to follow up and do the same thing.

So I think it's within the spirit of the statutory exception allowing for an emergency situation. And again, I think in monitoring, in
looking over it, if we find this happens too often, then we would question it and make whatever revisions that are necessary.

MS. PERLE: John, I wonder, is it reasonable to say that if a person is -- if there is an emergency, you have to file this immediately, this lawsuit immediately, you're not in contact face to face with the client to get him to sign it, that in order to protect their interests -- there is a professional obligation for you to go forward with this because, if you delay in order to get the signature -- say you're in Alaska, you know, and your office is in Anchorage, and they've closed all offices, you know, thousands of miles away and you really can't get back to the person to sign, if you're jeopardizing by not filing it quickly, that would violate -- for us to not provide for emergency?

MR. TULL: Well, that certainly is the issue it raises is that professional obligation may require taking an action which can't be taken in a timely way. And we are required under the Act to operate in a way which insures that representation is
consistent with professional obligations. So I assume
that's probably correct.

MS. GLASOW: We can discuss it more fully in
the preamble.

MR. FORGER: Do you have a commentary from
those who will be monitoring this provision?

MS. GLASOW: We've had no comment from the
Inspector General's Office that this provides is a
problem, that it's outside the spirit of the statute.

MR. TULL: I met with Renee and Laurie over at
the IG's Office and specifically alerted them to the
fact that we were recommending this proceeding because
it was not in the original draft.

And as we worked through it, we realized that
we had a problem which was -- they can certainly speaks
for themselves, but --

CHAIR BATTLE: Yeah. I'd just like to say
because we didn't, as we began, which is recognize that
the Inspector General is represented here today by
Laurie.

And at any point -- I know that the Inspector
General did submit copies of comments to the committee
and also to the staff on all of these regulations.

So if there are any concerns as we go through
our review that you, please, are welcome to come do the

table and express those concerns so that we may address
them prior to our implementation of the interim regs.

MS. TARANTOWICZ: Thank you. But as to this

particular provision, I don’t think that we’ve

expressed any thought on the --

CHAIR BATTLE: Okay.

MS. TARANTOWICZ: I mean, the statement still

has to be done. It’s just a question of timing in a

limited emergency situation.

MR. McCALPIN: Could I address a couple of

comments to the last paragraph on page 3?

CHAIR BATTLE: Okay.

MR. McCALPIN: In view of what we struck out

before, are we going to leave the "nongovernmental"

phrase in the last paragraph on page 3?

MR. TULL: No. That would be changed.

MR. McCALPIN: You would take out "believes it

appropriate to apply the restriction to cases filed in

adversarial" and take out "nongovernment"?
MS. GLASOW: Yes. We will be fixing a preamble --

MR. TULL: We think that whole paragraph would be --

MR. McCALPIN: What?

MR. TULL: That whole paragraph really would no longer be appropriate. That explained why that phrase was in there, which is now out.

MR. McCALPIN: So you're no longer going to require this in an adversarial administrative proceeding?

MR. TULL: That would be the effect of the change, yes.

MR. McCALPIN: Then, you're going to take the whole paragraph out?

CHAIR BATTLE: Because it says, "litigation," I think you can, yeah.

MR. TULL: And that's the recommendation that I started with that --

CHAIR BATTLE: Yeah. I agree.

MR. TULL: -- that was an expansion for a specific reason which, upon research of the law, turns
out not to be a proceeding which is administratively
followed, and therefore we can take it out.

MR. McCALPIN: So you eliminate the whole
paragraph but the bottom of page 3?

MS. GLASOW: Basically, any change we’ve made
in the text we will have to go back and revise the ream
able to reflect that.

CHAIR BATTLE: Okay.

MS. GLASOW: We may, for instance, need to
expand on the preamble to reflect adding language to
Purpose in Section 2, but I’ll have to go back and look
at that. But we’ll make sure that --

CHAIR BATTLE: If you go back and make the
appropriate changes to the commentary.

MS. GLASOW: Right.

CHAIR BATTLE: Okay.

MS. GLASOW: John was just pointing out to me
that in paragraph (c) of Section 2 on emergency
situation that we probably need to work on that
language a little bit to reflect what it is we’re
actually trying to say so that we --

CHAIR BATTLE: You’ll do that --
MR. TULL: We don't say -- we just say you may proceed with the litigation or negotiation. What we don't say is the key language which is "without preparation of the signed statement," or "preparation and signing of the required statement."

CHAIR BATTLE: We say "provided that the statement is signed as soon as thereafter." I caught it. All three of us caught it. That means everybody else is going to catch it. Okay.

MR. FORGER: So it's all right as it is?

MR. TULL: I would recommend we add language which would say specifically you can proceed without preparation of the statement so long as it's signed as soon as possible.

MS. PERLE: I was going to make that suggestion, but I thought that that came under -- from my perspective, kind of, came under the category of things that were too picky to raise with you, but as long as you raise it, I agree.

MS. GLASOW: So we'll fix that.

CHAIR BATTLE: Okay. 1636.3, "Access to Written Statement." And this really tracks, again, the...
language in the statute, doesn't it? "Available to any
federal department or agency that’s monitoring the
activities of the Corporation, any auditor."

MS. GLASOW: This also, I believe, takes into
account some of the provisions in Section 509 that
talks about certain information to be made available to
auditors, and so that incorporates sections of that.

CHAIR BATTLE: I think that Section (b) makes
it clear that though the statute seems to indicate that
possibly the other side could get this information --
and I'm just doing this by memory -- that it doesn't
give any additional right other than what would be
normally available through discovery to acquiring the
information. Is that correct?

MR. TULL: That's right.

MS. GLASOW: Section 509 of the Appropriations
Act gives access to certain types of information to
certain types of categories of people, auditors and
whatever.

And so we're saying that we're not going
beyond that, and we're protecting the information,
access to that information to anyone else, and that
would only be covered by the discovery rules of the court.

MR. McCALPIN: Let me ask you would this statement fall within the attorney work product exception, therefore it would not be available on discovery? Is this attorney work product?

MR. TULL: I think, in many jurisdictions, it would not be. That's correct.

CHAIR BATTLE: Statement by the plaintiff of the facts based upon which the plaintiff has filed a complaint in court.

MR. McCALPIN: Based on the interrogation between the attorney and the client, presumably. So I would think it's part of the work product which, basically, would mean it's not going to be available.

MR. FORGER: So under the discovery rules, it would not be available, presumably.

MR. McCALPIN: I would think likely.

MR. TULL: And our understanding of the language in the Act in 504(a)(8), which says, "Litigation insure have access to the statement of facts only through the discovery process after
litigation has begun" is intended to make clear that
they are not seeking to create a new right to have
defendants who are being sued by programs have access
to information they do not otherwise have.

MR. FORGER: If you get it at all, it has to
be through a process --

MR. TULL: It’s got to be under some rule that
would have permitted you to have it already. And your
read may well be correct, that they can’t get it, but
that’s what Congress intended.

MS. PERLE: And if they complain to the
Corporation, the Corporation’s response would be, "Yes,
they’ve done it."

MR. TULL: Yeah, because the Corporation can
see it, but we can’t disclose the information in it to
any other party, including the defendant.

CHAIR BATTLE: Yeah. I think that (b) tracks
with what the statute says, "only through the discovery
process after litigation has begun."

MR. FORGER: We can’t change the statute.

CHAIR BATTLE: Now, I did raise a question
with, now we’ve got applicability, and it applies to
PAI cases. We don't have a time frame for how recipients must assure us that they have adopted procedures to comply with all of these new regulations.

And I think we at some point, either in the commentary or somewhere, need to address how that's going to occur.

MR. MCCALPIN: Well, that really gets to .5, and I have registered a general objection to laying for bureaucratic requirements on these programs in the field.

Isn't it enough that eventually we'll have an auditor go out and say, "Do you have these? Have you disclosed clients?"

What good does it do to have a written policy and procedure, if an auditor can go out and say, "Do you have a written policy and procedure?" "Yes, we do." "Okay."

The real thrust is have they followed it. So what we're really going to be requiring is the underlying thing. Have they obtained these statements? Have they disclosed clients?
And I think to lay upon the programs more and more and more bureaucratic obligations of draft and follow-up policies and procedures is just loading too much on.

MR. TULL: Actually, the thought behind this was, and an important level, is really to save programs time and money rather than cause them time and money.

We've been in conversations with the Inspector General on this issue and had reached a similar conclusion when we were responsible for monitoring that a significant cost of compliance monitoring, whether done by an auditor or as we did it involves, first, determining what is the policy of the program.

And in areas where the regulations have required a written policy, that's a very short, quick process. You read it. Where there is no reason policy, it involves having to ask people to describe it and to verify, in fact, that that's the policy that is followed.

The Inspector General has strongly encouraged this so that auditors, as a part of their audit, don't have to spend time and money identifying what the
program deems to be its policy regarding this or any other particular --

MR. McCALPIN: My point, John, is that the policy doesn’t make any difference. It’s the practice.

CHAIR BATTLE: I have a question about this. Would the policy be just to adopt this reg locally?

MR. TULL: That’s what I would do if I were a board. It’s a matter of --

CHAIR BATTLE: Just say this reg is now in effect, or is there something more that we’re requiring the programs to do?

MR. TULL: What an auditor needs to do is determine if the practice is consistent with the policy. So it is the practice, that is correct. But compliance oversight involves first determining what’s the program policy, one, and two, does the program follow it in practice.

The first step is a necessary condition to determining whether the practice is consistent --

MR. McCALPIN: What they have to determine is whether they are following this regulation, not some
policy, with this regulation.

CHAIR BATTLE: Linda?

MS. PERLE: I agree absolutely with Bill. I mean, I think that there are certain of these regulations, 1609, for example, where the programs really do have to develop some policies, a policy on referral, a policy on -- I mean, a whole bunch of things.

But for this rule, you're right. What they have to do is follow the rule.

MR. MCCALPIN: Follow the reg.

MS. PERLE: And so the policy of the program is this regulation, and why do they have to go through this extra step, which John says most programs would just simply adopt as their policy, why should they be required to do that and to be potentially sanctioned for failure to do that?

CHAIR BATTLE: What are we getting back, John? Did you hear the concern Linda raised? And that's why I raise the question what is the policy?

If the policy is to take this reg and say, okay, now we have adopted this, I'm pretty sure all the
programs, once these regs are implemented, are going to say, "We've adopted all of these."

MR. McCALPIN: We're following.

CHAIR BATTLE: Yeah. "This is our obligation to do all of these things." Now, is that -- I'm just wondering if the board hasn't met and they're in the midst of a monitoring but the practice is, of course, to follow the regs, would the program be in violation of this reg because they don't have a specific board action adopting a policy to adopt the reg?

MR. TULL: Well, there are two issues. One is the language "recipient shall adopt written policies" is deliberate and doesn't involve necessarily the governing body.

And that was based on some concerns expressed that given the fact that this is an interim reg and we need immediate action on it that we shouldn't require there be -- the underlying notion, however, that it will facilitate the review by auditors if there are written policies and procedures as to how their program is suppose to proceed I think is a different issue.

It's really a matter of -- I'm certainly
speaking based on my experience as the -- when we were
involved in compliance reviews, we found that in areas
where programs don’t have written policies and
procedures because they weren’t required, it made more
difficult our compliance oversight because we had --
because it is an issue of making certain that they’re
in compliance with the reg.

But if you look at the policy to determine if
the policy, in fact, is consistent with the reg, then,
when an auditor or a compliance reviewer looks and sees
if the papers which are deemed to be appropriate to
comply with the procedures, the program is adopted,
it’s a much quicker procedure to just check that
against what the program says it’s going to do than to
have to, for an auditor, a monitor to look at the
procedure and to compare it against the reg without
that intervening step of what is the best review. So
the Board certainly -- I understand the concern about
not laying more on programs than they already have.
Certainly, my strong counsel, based on my experience
with the monitoring, would be this doesn’t lay more.

It lays less because it really short circuits
that intervening step of having to, in a review, interview a whole number of persons to find out what your procedures are and then make a judgment as to whether the procedures do, in fact, comply with the regulation, which is a necessary part of monitoring.

We, I know, in the process of designing the system we had, came to feel very strongly that we were hamstrung, and it cost us and programs money where we were monitoring regulations that didn’t have this provision in it.

CHAIR BATTLE: Laurie. I’m sorry. I see Laurie’s hand, and then Linda.

MS. TARANTOWICZ: Well, I was, of course, just going to -- I’d like to part what John said, and I guess before he said his last comment I was going to add that as far as expense is concerned it may be a case it will cost either way because the compliance monitoring will be more expensive, could be more expensive if these procedures aren’t in place to make the monitoring simpler and easier for the auditors.

CHAIR BATTLE: Linda.

MS. PERLE: Would you be willing to put in the
preamble a statement that says, "In most cases, programs can fulfill this requirement by simply adopting the regulation as their own policy"?

CHAIR BATTLE: I think that's probably a fair way. If what John is saying is that if we were the recipient, that did what he would do, I think --

MS. PERLE: I think in some situations that's not appropriate.

CHAIR BATTLE: Yeah. But it just gives guidance -- when we drop 15 regs on a program as to what it is they must do, I think it is helpful for them to have guidance as to how they could fulfill their obligation --

MR. TULL: As a matter of management of a program, if I were a project director, now, and I were implementing this regulation, I would want to have written procedures which go -- which are far more descriptive than the regulation, and I don't quarterly with your suggestion in terms of what we would require.

But as far as of sound management, this is a very intrusive requirement that's going to affect every
piece of work that a program does, and someone has got
to make a judgment, "Have we made a decision that we
are going to represent this person in litigation."

A judgment has to be made as to whether, in
fact -- if a matter falls within the reg or not, as a
matter of having people be clear about what they would
want to do, I can't imagine going into this particular
one without developing procedures which clarify that
for people.

This is going to affect virtually everyone in
the program. So I don't --

MS. PERLE: Well, I'm not suggesting that we
necessarily give that as advice as to what you should
do. My concern is the concern I raised before, which
is if you fail to do this, what are the consequences?
Does that constitute a violation of these regulations?

If the answer is yes, then, you need to give
some guidance as to what would constitute the minimal
compliance.

MR. McCALPIN: John, you know, I remember when
months ago I was given a bunch of outlines of
compliance monitoring regulation by regulation.
And under each one, there were questions to be asked of the program with respect to the requirements of the particular regulation.

And it seems to me that's all they have to do. You send out for the monitors questions to be asked with respect to 1636. "Have you taken -- have you disclosed the clients' names in complaint filed and in presettlement negotiations?

"Have you taken written statements of fact on which complaints are based? Yes or no? Okay. Let's see a representative sample."

I think that's all that's required, and you go through a lot of -- you become a bureaucrat in the process.

MR. FORGER: Well, if I were a program director, I suppose I would want to give my staff some guidance in regards of, for example, in the event of an emergency where the recipient reasonably believes -- I've gotten lawyers on staff. Who is the recipient? Is it the board of directors? Is it the particular lawyer who gets the case?

How does one follow that through rather than
just tacking this up on the wall? And then, when the
monitor comes in, "Well, who decided that was an
emergency and on what basis?"

So I think just sound management, Bill, if you
got a program of just one later you don't need to adopt
policies and procedures.

MR. McCALPIN: I think it's sound management,
Alex, but I don't think we need to get into the
business of telling each program director how to run
his program.

MR. FORGER: Well, that's what Congress has us
doing.

CHAIR BATTLE: Well, there are two issues, it
seems to me, and one has to do -- and this is why my
first concern had to do with time frame.

Once this is done -- I mean, this is not a
situation where you've got to draft a policy every year
on how to do this.

You've got a new regulation in a new area with
new requirements and new restrictions, and what we're
attempting to do is to figure out a way to get the
information out, number one, by doing a regulation, and
number two, assure its implementation.

And one way to assure it is to have some action that the program has to take once they receive this so it's not just read but they also have to do something.

And it's a one-time thing. My question is does it need to be in the regulation, or can it be in the commentary? I mean, can it be that one way to fulfill the obligation under this is to establish a policy and say that in the commentary and not make it a regulatory requirement? Because it will come up one time and one time only at the onset.

If you're setting up a new program, it will come up then, or it comes up when you first get this regulation, and you do it, and it's in place. And then, from then on, what you do is monitor its application.

MR. McCALPIN: And the fact that the program sets up a policy or procedure doesn't guarantee that it's going to be followed.

CHAIR BATTLE: Well, the following is a separate issue. All I'm trying to get at is --
MR. McCALPIN: The following is what is important.

CHAIR BATTLE: It’s a monitoring issue. I mean, it means that we have to go out to make sure that it’s done. What we’re trying to do is figure out the most effective way to communicate that it must be done.

MR. McCALPIN: Every year the IPAs are going to be investigating compliance with this and every other regulation.

CHAIR BATTLE: Exactly. That’s true.

MR. TULL: Suzanne was suggesting that the OIG has, obviously, got a serious interest in this question, since they’re --

CHAIR BATTLE: Well, let’s hear from Laurie. My question is -- I’m with Linda -- does this need to be a requirement itself that can then hamstring a program, not that you’re not actually doing it but that you forgot to adopt a policy that this is what you’re doing, and therefore you’re in violation of the regs for that purpose?

MR. TULL: Can I speak to the issue that --
and then, perhaps, Laurie can jump in with the IG piece of this. The reason this is of some moment to the way the Corporation will carry out its business is what we have contemplated as the way to go forward under Section 509 of the Appropriation, in terms of assignment of responsibilities is -- there are two pieces of it which are going to be significant.

The first is that it will be auditors who will be the principal on-site monitors of programs. They are persons who don't come into the compliance process with a deep understanding and engagement in these issues.

They're folks who may do two programs a year or only one. So a piece of what we're concerned about and I understand the IG to be concerned about is it is that there are two steps in determining whether or not a program is in compliance with restriction.

One is does it have a procedure, whether it's written or not, a policy or procedure, whether it's written or not, which it uses to implement the restriction? And is that procedure consistent with the restrictions or not?
For an auditor to make that judgment, an
auditor has to develop an understanding of the
regulation, all the nuance that we’re talking about,
read the procedure or talk to people about what the
procedure is to determine if, in fact, it is consistent
with the Act, one.

And then two, determine if it’s followed in
practice. The design of the monitoring process under
509 is one in which what has been commonplace in our
conversations with the Inspector General is that the
management side of the Corporation would do a desk
review of programs to make a determination if their
procedures are consistent with the regulation so that
an auditor would not have to make a determination about
that.

So that all the auditor has to do, then, is
look and see if the procedures the program has adopted
has been followed, and that’s a matter of checking two
or three or five or six transactions.

If that intervening step is missing, they have
to make a judgment about whether or not not only is the
piece of paper in the file, but is the piece of paper

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in the file consistent with what the regulation
requires.

And it will significantly increase the amount
of time that they need to take --

CHAIR BATTLE: Okay. I'm finally
understanding. In part, what you're saying is part of
what the procedure being in place does is to
communicate to us whether the programs understand and
have adopted something in place that is reflective of
the intent in the statute and the regulation.

And then, once you have that, then, from an
auditor's standpoint of view, all they do is take a
representative sample, take the policy and see whether
or not that representative sample is in compliance with
the policy.

If you don't have that policy, they've got to
do something else.

MR. TULL: Correct.

CHAIR BATTLE: And you're saying the policy,
then, is what makes that process of auditing work, of
going in, looking at a policy and seeing whether it's
implemented in a way that having just a regulation
without that policy will not necessarily deal with, because you don't know what it is you need to go look for; whereas, a policy may say our Form A-6 is what you will record the plaintiff's statement on, or whatever it is.

I, at least understand that now. For auditing purposes and requirements, do we have -- this is my question. Do we have regulations which set out of the policies that must be in place for purposes of audits?

MR. TULL: No.

CHAIR BATTLE: No.

MR. TULL: Now do we have?

CHAIR BATTLE: Yeah. Do we? Do we need them? And if we don't need them, do we need this one? Is circuitous, but it gets back to the point that I'm concerned about here.

MS. GLASOW: I guess another way of putting that is saying the purpose of this section is to make sure recipients are ready for the auditors.

And either that's going to have to be spelled out at length in the commentary and then we hope they read it, say, "This is why we're asking you to do this
because this is what the auditors are going to want to know," or make the requirement in each of the rules.

MR. McCALPIN: My point is that if the policies or procedures are consistent with the regulation, they are an unnecessary piece of paper.

CHAIR BATTLE: No. I don't agree from this standpoint of view: If they're consistent, then, from an auditor's standpoint of view, that means that the program has read the reg, adopted a policy, and all they have to do is a sample to see whether or not they're conforming with the policy?

MR. McCALPIN: They could do the same thing to see whether they're conforming with the reg.

CHAIR BATTLE: Well, yes and no. I can see the point in having to have the recipient adopt something that says, "I know that this exists, and this is how I do it."

Now, how you go about figuring out how it's being done in a particular program is going to require some work, if you don't have a local policy setting out what it is.

So I'm at the point where I at least
understand the point that John is raising and the concern that the OIG has. My concern becomes whether that overlays into a regulatory concern or whether that’s a concern that can be addressed at some other level. Linda.

MS. PERLE: I think consistent with that point what if a program does take seriously an obligation to write written policies and procedures and then do a lot of very complicated and, you know, requirements within their own procedures?

The auditor looks at those procedures and finds that they haven’t followed them, that the staff doesn’t follow them, but what the staff has done is perfectly consistent with this regulation.

What does that do? Does that say -- does the auditor then say there has been a violation?

MR. ASKEW: That’s a management issue, not a regulatory issue.

MS. PERLE: Well, that’s right. That’s exactly right. I think that’s the point that LaVeeda was making.

MR. MCCALPIN: What we’re after is compliance
with this regulation, not whether there is a policy which reflects the regulation.

MS. PERLE: Right. I mean, it strikes me that something I thought Suzanne was suggesting before or maybe --

CHAIR BATTLE: I suggested.

MS. PERLE: You suggested it, which is that we put a provision -- a section in the preamble that says the Corporation recommendation that programs adopt policies with respect to these issues to guide their staff and to insure that they do comply, or something like that.

MOTION

MR. McCALPIN: Let me see if we can bring this to a head. I move that we eliminate 1636.5 and include in the commentary the suggestion that there is a recommendation that the program, in the exercise of good management practice, will adopt procedures to assure compliance with the Act.

CHAIR BATTLE: Okay. Is there a second to that motion?

MS. WATLINGTON: Second.
CHAIR BATTLE: Okay. Let's have some
discussion on that. Laurie, I just want to make sure
that from the Inspector General's standpoint of view --
it seems to me you can still do the audits.

There is a recommendation to the programs as
to how they can assure that that audit will go smoothly
without it being an audit requirement being raised to
the level of a regulatory requirement, which would
carry, in my view, different sanctions for
noncompliance.

You've got an audit requirement which can come
out in the Audit Guide, and we will here, in the
regulations, say our recommendation is you that adopt a
policy.

In your Audit Guide, you may say you should
have a policy on this, but it's not a regulatory
requirement which may carry a different view of, if you
haven't done this, where the program really is. Does
that satisfy the concern?

MS. TARANTOWICZ: I understand what you're
saying. I think we all might benefit from hearing from
one of our audit staff, and I'm trying to get him up
here, because they certainly would be better able to
speak to this than I would, having no expertise.

And I don't think that right now I'm in a
position to add anything beyond what John, I think, has
forcefully argued. I think you might benefit from
hearing from them, and I'm trying to get them up here
now, if you would wait for that.

MS. GLASOW: LaVeeda, we have this provision
in almost every rule we have before you.

MR. McCALPIN: That's my complaint.

MS. GLASOW: So we don't necessarily have to
resolve it with this rule. We can --

CHAIR BATTLE: Resolve it as we go through.

MS. GLASOW: -- resolve it as applied to --

CHAIR BATTLE: Is that fair, Bill? I would
like to certainly hear from the Inspector General about
their concern before we make a final decision, but I'm
inclined to go along and make it unanimous, unless I
hear that there is some reason this ought to be
regulatory, as opposed to an audit requirement exactly
why we have it in each of the regulations that we have
before us.

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MS. GLASOW: Okay.

CHAIR BATTLE: All right. So can we table consideration of this motion until --

MR. McCALPIN: Well, to table takes a two-thirds vote to take it off the table.

CHAIR BATTLE: Well, that's not going to be hard. Just one other thing, 1636.4, I don't think you need the (a) if you don't have a (b) or (c).

MS. GLASOW: Thank you.

CHAIR BATTLE: Okay. Now --

MR. McCALPIN: Is that the end of 1636?

CHAIR BATTLE: Yeah. That's the end of 1636 for now. Class actions. Okay. The food has been here for about an hour and a half. Would you all be inclined to take a break now and start up with class actions after lunch so it won't be too, too cold.

MR. FORGER: Hot food or cold food?

CHAIR BATTLE: It's cold now.


CHAIR BATTLE: I didn't think we'd finish it in 15 minutes, but I had minimally set 12:30 at the time, but we actually got --
AFTERNOON SESSION

CHAIR BATTLE: We are continuing our meeting to discuss the interim regs that have been noticed. The next reg which we noticed for review today is 1617, and it pertains to class actions. I believe John Tull is now joining us. Okay.

Essentially, there are just, really, two provisions in the definitions section and a prohibition in the rule at present. But Suzanne, will you give us some of the background contained in the commentary on class actions and from whence the provisions that we now have in the rule have come?

MS. GLASOW: Okay. This is an amended rule. The prior rule, basically, allowed recipients to take class action cases if they followed certain procedures.

This rule absolutely prohibits involvement in class action suits. So it's one of those rules that Bill pointed out we need to point out in the commentary that it has been almost completely revised, although there are certainly some similarities to the prior rule, especially in the definition of "class action,"
which has stayed pretty much the same.

CHAIR BATTLE: Okay.

MS. GLASOW: And the legislative prohibition, as I point out in Section 504 of our Appropriations Act, basically, prohibits our recipients from engaging in class action suits.

CHAIR BATTLE: Okay. I just have one editing change in the comments, and this is -- we're generally kind of puffering editing changes in the comments before we go section by section in the rule.

We're on 1617, page 4, the second full paragraph you say, "Certain types of situations are not within the definition and are thus not prohibited by this rule." "Certain situations" are not within the definition, it seems to me, as clear.

MS. GLASOW: "Certain situations," get rid of "types of"?

CHAIR BATTLE: Yeah.

MS. GLASOW: Okay.

CHAIR BATTLE: There is also -- I had a note to myself on page 2, really, I guess, stemming from the language in the statute, which probably doesn't mean
that we have to make any adjustments, actually. We can just continue. Were there any other just editing changes to the comments by anyone? Then let’s -- go ahead.

MR. McCALPIN: I think we got to come to grips with the real problem, and it will lapse over into the comments, and that is I just frankly disagree flatly with .2(b). I think you’re wrong.

CHAIR BATTLE: Okay. We will --

MR. McCALPIN: And that relates to the comment as well.

CHAIR BATTLE: Yeah.

MR. McCALPIN: I think that when you say "maintaining involvement prior to the final judgment," well, I think that what you have said here in .2, page 4 would prevent you to advise a client whether to opt in or opt out of the class.

And I think that’s participating in the -- particularly if you advise them to opt in. Then, you are participating. You are advising participation in the class action.

But much more seriously, I don’t think that
you can have anything to do with the judgment in the class action. Class actions ordinarily terminate in one of two ways, a settlement agreement or a judgment.

In either case, what you will have is likely litigation over the terms of the settlement or the terms of the judgment, and I can't imagine, for instance, that it would be permissible to have 10, 15, 20 or 100 members of the class come to the program to seek enforcement of the final judgment against the defendant.

That's indistinguishable, virtually, from the class action. I don't think that you can take on any client who says, "I am the beneficiary of this," and then you get into look at it, and you have to determine whether he really is a member of the class, whether the terms of the settlement or the judgment really apply to that particular client.

You may have to go back and negotiate with the defendant, and all of that, it seems to me, is participation in the class action.

MR. TULL: What this was aimed as trying to address was -- the first example you gave of seeking to
enforce a judgment, there is no question that that
would be participation. We agree.

I mean, the regulation should, and the
language maybe doesn't accomplish that, but the extent
is to say that that would be participation and would
not be permitted.

There is a narrow set of circumstances where
if a court enters an order creating, for instance, a
referee to administer persons who have beneficiaries of
the class coming in and applying for benefits, let's
say, which is an example that comes to mine where
precisely that arrangement is set up and where an
individual, as a beneficiary of the class, is entitled
to apply for a benefit which the Social Security
Administration or a local agency is supposed to provide
to persons who fit in that contained of -- in the
class.

What this would -- what this is designed to do
is distinguish between where an individual comes to a
program and says, "I think I'm entitled to benefits
under that, and I'd like you to represent me before the
referee" -- of course, really akin to an administrative
procedure.

It's like going to a welfare department that happens to be one created under the order that, in that circumstance, that a person could represent an individual, and that wouldn't be participation is the intent.

MR. McCALPIN: I think that's participating in a class action. Certainly, it's participate in the proceeds or benefits of a class action, and I think -- I guess I'm fixed on -- I was involved in one where we settled it in six weeks and litigated the settlement for five years.

Because there are all kinds of issues that arise as to whether a particular claim fits within the settlement or the judgment involved, and I just don't think that you can get involved in a class action. I think it's a flat prohibition. Stay out.

CHAIR BATTLE: I understand the dilemma that we faced particularly on this issue of class actions because, on the one hand, I think that what Congress is specifically initiating or participates in a class action lawsuit saying there is, "We don't want Legal
Services programs to be the driving force in bringing
class action lawsuits against defendants."

And by using the language "initiates or
participates in class actions," my view is that being
the driving force, being adversarial, bringing massive
lawsuits using government funds is something that
Congress was looking to prohibit.

I think that what John is getting at is -- and
let me say this: I think it’s a very difficult issue
to address and to get your hands around for the very
same reason that Bill pointed out, because I’m involved
in class action litigation as well, and I understand
how it works -- is a situation where you are not
adversarial, where all you’re doing is assisting
someone with getting access to benefits to which they
may be entitled, through assisting them in going
through some sort of administrative procedure or some
sort of compliance with getting the word out to people
that may be clients, which is not adversarial, which is
not participating in litigating to the point of
judgment but participating in the implementation of the
remedy, which comes after all of the adversarial piece
I can give you an example. I've involved in the Firefighters' litigation in Birmingham, and that case was initiated in 1976. There was some litigation.

There was a settlement agreement reached in 1981, and we are still yet, in 1996, modifying that decree after it has been up to the Eleventh Circuit and the Supreme Court twice.

So the question is, in a situation like that, at what point are you simply monitoring and nonadversarial? With class action litigation, oftentimes you don't know.

And if you're to construct some sort of exception which will allow Legal Services programs to participate in the nonadversarial monitoring aspect of it, it would have to be extremely narrow and specific, because I really think that this language "initiates or participates" says at any point that there is anything adversarial about it or if there is any driving force to keeping the litigation going or being involved in it, then we're out of it.
And I don't know exactly how -- you know, I had questions when you say it does not include monitoring a final order, what about appeals? We've got a final order. It has not been appealed, but yet, in the whole area of compliance, if there is a problem with compliance, you may have to litigate the compliance and not the final order itself.

So it's difficult to draw a line wherein you have a point at which you say and there is no longer any adversarial potential in this case, and therefore we can be involved administratively.

And unless we can get to that, then I think there is some real difficulty with drawing a line to allow for some sort of participation beyond what we know is to be prohibited by the statute.

MR. TULL: This is, obviously, a difficult problem to define, the point at which a matter and the remedy which flows from it ceases to be the class action and becomes something else.

We, sort of, came at it, I think, in terms of trying to respond to some issues that were raised by programs that call us up and said, "We have XYZ
situation. Is this going to be covered?" And then, sort of, wrestling with the, sort of, circumstances that they encountered.

The most extreme example of what I presume would be permitted, although I think the way you stated it, Bill, even this would not be permitted, is where as a result of an order, a court creates some system -- it enters an order creating some right, and then it's out of it.

It has no more jurisdiction, and an agency is administering it or someone that -- an entity which is created by the court as a referee is administering a program created by a court order.

And the class action, in terms of jurisdiction, is gone and over. Now, somebody might go in and challenge whether or not the order is being complied with, that's correct.

But just a person going and seeking the benefits of that order would, in our judgment, in looking at that, was that that is not a class action and not participation any more than if a class action were -- or a current class action where an order has
gone to a welfare department that they have to change their rule.

And that is now over. Persons who go to the welfare department to get those benefits are beneficiaries of that order, but they're certainly not participating in the class. They're just applying for the benefits that the judge has ruled are required.

MR. McCALPIN: Let me give you an example from Missouri where the welfare department was ordered to process claims in a certain period of time.

They didn't do it. A second action held the welfare department in contempt. Now, wouldn't that be a continuation of the class action?

MR. TULL: Would I think isn't the question. Would the action seeking them, if they're found to be in contempt of the order?

MR. McCALPIN: Yeah.

MR. TULL: I would presume it would be and that a program couldn't do that.

CHAIR BATTLE: See, at any point that it's adversarial then I think that this statute is saying "initiates and participating in the class action" is
out.

MR. TULL: But saying that, Bill, doesn’t really answer the question, does it, as to whether or not an individual seeking the benefits created by an order can ask for those benefits?

MR. McCALPIN: Well, the problem is I don’t think there is a fine line as to when it’s adversarial or not. I’ve participated in settlements where a sum of money was put in and the court appoints a retired judge to do it.

But there get to be questions about eligibility, and the retired judge may have to go back to the court that entered the order and get a clarification of the order.

I think that’s participating in a class action, and I don’t know whether that’s adversarial or not. It might be but not necessarily.

But if you have to get a clarification of the judgment of the settlement, you’re participating in the class action.

MR. TULL: I mean, that’s -- with all these, we’re, obviously, trying to find a balance which
relates to the reality of the practices that programs
have and being mindful of the wrong which Congress was
seeking to correct.

I think our judgment on this one was that
where a remedy has been created by a class action --
and, in the future will, obviously, be a class action
filed by someone else -- that where a remedy is created
by a court that -- you are correct that it is not a
fine -- it is not a bright line when you are a distance
from when it is a class action or not.

But our judgment, I think, in recommending the
regulation that you have before you is that an
individual who is an individual as an individual
seeking the benefits of an order is not an evil, if you
will, that Congress was seeking to put a stop to.

CHAIR BATTLE: What about this --

MR. TULL: What Congress is concerned about is
class actions that are, sort of, full representation in
order to --

CHAIR BATTLE: Let me make a suggestion. It
does not include nonadversarial monitoring of a final
order entered by a court or involved in the enforcement
of a final order as long as the recipient represents an
individual client and not the class.

In my view, the key thing is not adversarial,
just compliance. If what you're trying to do is assure
that someone who is coming to the office who is
qualified for benefits under a class action can make
their proper application to get it in a nonadversarial
way, then I think that that doesn't go against the
grain of what Congress is attempting to make us do,
which is no not initiate and participate in the
litigation of a class action.

MR. McCALPIN: You know, I think it's worth
recounting for a moment the legislative history of this
provision.

It all started in the migrant workers and in
the McCollum bills that were filed over the years, and
it was limited then to nongovernmental --
nongovernmental.

And what he was doing was protecting the
growers. The real impetus for the present provision
came from the Senate and particularly from Senator
Domenici.
It has never been quite clear what was
motivating him, but it's unlikely that it was the
migrant motivation that gave rise to McCollum.

And I think it's worth recalling that Domenici
is somebody who we don't want to get crosswise with.

CHAIR BATTLE: Okay. I've got the language
right here.

MR. MCCALPIN: In what?

CHAIR BATTLE: The Senate debate on class
actions, the text and some of the background and some
of the statements by Senator Domenici on this whole
issue.

He says, "No class action lawsuits, no class
action lawsuits can be filed." And he goes on to say,
"My closing remarks are if you're worried about the
abuses about class actions, about suits against
legislators or governors or welfares, those are gone in
the Domenici amendment, finished. They are not around
anymore."

MS. GLASOW: Read the second sentence of the
first part you read.

CHAIR BATTLE: Okay. "Individual legal
staffed by volunteers where individuals who help
persons who may be eligible for that to process their
claim to determine if they fit into the requirements,
if they meet the standard, and, if so, to file a
petition on their behalf before whoever the court has
created as the person to hear these issues.

And then a determination is made whether they
qualify or not. That is an unusual case in that it's
an order which has created a whole, sort of, dynamic of
its own within the state and within the program.

But it's not unusual in the sense that the
difficulty of determining what the dividing line is
between simply being a beneficiary and looking for your
benefits as an individual and what you are concerned
about, which is, as you enforce that, if at the point
at which, in enforcing that, you then intrude into the
actual order and seek to have the court change the
order as it affects the entire class.

Now, I think where we want to -- I mean, as a
matter of what is a legitimate need of clients, to not
over extend this, but being mindful of what Congress is
concerned about that the line needs to be drawn where,
in seeking to represent that individual, there would be
a crossing into the court's jurisdiction and seeking to
have them enforce the order as to everybody.

If the interpretation is that virtually any
benefit which flows from that remedy is one that a
program can't even advise a client about, it will have
a significant impact on an area of work that, as we
look at this in our judgment, Congress would not say,
"Boy, we want to put a stop to
that" --

CHAIR BATTLE: Yeah. I tend to think --

MR. TULL: -- definition of what Linda said,
which is individual representation to get people what
they have a right to.

CHAIR BATTLE: Having read what Senator
Domenici said in September of 1995 and his distinction
in class actions from representation of many to
individual representation, I would suggest that we just
reorder this sentence to say, "It does not include the
recipient's individual representation of a client in
the nonadversarial monitoring of a final order entered
by the court or involved in enforcement of the final
order."

So that you're making it clear that you're talking about individual representation only.

MR. McCALPIN: But there is many settled not by a court order but by a settlement agreement.

CHAIR BATTLE: But as a final order, the final order -- usually, when you got a settlement decree entered, you get it approved. And so you have a final order that's approved by the court, even though the parties have agreed to it.

So, in any instance -- generally, in any instance, you're going to have some sort of final order entered by the court entered on that settlement agreement.

What we're doing is we're drawing two lines, one to show that you're not involved in the litigation of the class action issues but only after the final order has been entered and only on behalf of an individual client.

MS. PERLE: There are other examples that programs have raised with us, situations where there have been class actions that have gone on for many
years where they’re the recipients of reports from the
defendant. They’re not taking any action. They’re
just --

CHAIR BATTLE: Compliance reports of some
sort.

MS. PERLE: Just receiving reports, reading
them, and if they are to get -- and the fact that the
reports are sent to them, kind of, keeps the
defendants, basically, acting consistent with what the
order is.

Their concern, then, if they’re not even
allowed to get those reports any more to do that kind
of monitoring not on behalf of an individual client --

CHAIR BATTLE: I think, again, the cut that I
see at least on class actions is if they’re receiving
that report on behalf of the class, then that’s going
to have to go to somebody else.

If they’re receiving it on behalf of an
individual client, maybe they intervened on behalf of
an individual client in a class action lawsuit, then I
think they can continue to receive it.

But if they’re receiving that report pursuant
to their class representation, I think they're going to have to wind that down. That's my view of the cut.

If you look at what Senator Domenici said during the debate on this issue, it was a question of individual representation, as opposed to group representation.

MR. FORGER: He was not opposed to all class actions either.

CHAIR BATTLE: Yeah.

MS. PERLE: He wasn't?

MR. FORGER: No.

MR. McCALPIN: He was dead set against all of them. MR. FORGER: Not for me. I had a specific conversation with him.

MR. McCALPIN: Really?

MR. FORGER: I did, indeed.

MR. McCALPIN: What would he permit?

MR. FORGER: I beg your pardon?

MR. McCALPIN: What would he permit?

MR. FORGER: He went to the total -- it was a distinction between class actions against government or class actions against individuals.
He concluded, in the elevator where we had our
discussion on class actions, that it would be wiser in
order to achieve his objective to ban all class
actions, although he did not think that was essential.

I think his objection was the impact case
where we were seeking to change the world by bringing
on -- I would be surprised if he would object to our
representing an individual who is seeking to obtain the
benefit of an action that was instituted by others or
carried on by others.

CHAIR BATTLE: I think the slice --

MR. FORGER: I don't know how you phrase it.

CHAIR BATTLE: I think the slice that I'm
suggesting that we do to this is consistent with at
least part of the Senate debate that Domenici entered
into which would allow us to continue to monitor on
behalf of individuals' compliance and benefits under a
class action so long as it is not as a class
representative and it is not on behalf of a group.

MR. FORGER: Why do you need to put -- just a
point of information. Why do you need to put "monitor
on behalf of an individual" if what we're, basically,
seeking to do is make certain the individual has the benefit of it?

CHAIR BATTLE: Because generally, what you have in a class action litigation is some sort of final order that's entered, and then the implementation of that order is where you get into monitoring.

MR. FORGER: But isn't it only for my -- if we're representing individuals and I want to come in under the umbrella of what's decided, I don't know as I need to have the word "monitoring" --

CHAIR BATTLE: Monitoring, which seems to --

MR. FORGER: -- as distinct from obtaining the benefit of that.

CHAIR BATTLE: Okay. Obtaining the benefits?

MR. FORGER: Monitor looks like a more official activity and overseeing this and enforcing it for the world.

CHAIR BATTLE: Obtaining the benefits for that individual client?

MR. FORGER: Yes.

CHAIR BATTLE: Okay.

MR. FORGER: However it could best be --
CHAIR BATTLE: That's a good point, because monitoring generally is on behalf of a class. I mean, you have some party, as Linda pointed out, who is receiving reports showing that certain class relief is being implemented appropriately.

MR. FORGER: It sounds like being the enforcer, and we don't want --

CHAIR BATTLE: Okay. "It does not include the recipient's individual representation of a client in efforts to obtain the benefits of a final order entered by the court or involvement in enforcement of the final order," it seems to me.

MR. McCALPIN: Let me go back to the earlier one. Do you think a program can advise a client to opt into a class or opt out?

CHAIR BATTLE: The opting in or out comes before the final judgment.

MR. McCALPIN: Well, of course.

CHAIR BATTLE: So we're talking about post judgment decisions.

MR. McCALPIN: No, no. No.

CHAIR BATTLE: Final order.
MR. McCALPIN: Look on page 4. "May advise clients about the pendency of a class action or its effect on the client and what the client would need to do to benefit from the case."

CHAIR BATTLE: That goes --

MS. PERLE: I actually had some -- there was some discussion -- and I haven't shared this with John and Suzanne because it, kind of, came up after we discussed this.

There were several people who said that they weren't sure what it meant to say that it does not -- "You may not provide legal assistance to an individual who is involved in a suit but is not a member of the class" and suggested that we change it to clarify that it says, "You're not to provide legal assistance to an individual client to seeks to withdraw from, intervene in or modify the class."

In other words, taking into account the kinds of situations that you were talking about so that the person who wants to opt out -- in order to opt out, you have to be part of the class, and so you're, obviously, participating.
may have passed away. I don’t know where I file -- I
mean, what we get is the reports.

We just get the reports. We look them over
and then maybe go to the court somewhere, but I’m not
sure where they file them.

But the government, state government, feels an
obligation to continue to make these reports showing
they’re in compliance with what the court thought they
were out of compliance with before. We’re just a
depository.

CHAIR BATTLE: Yeah. I understand that.

MR. FORGER: So you’re a beneficiary of this
order.           MR. TEITELMAN: I don’t know.

I got to file these things.

MR. McCALPIN: Can’t you withdraw?

MR. TEITELMAN: Pardon me?

MR. McCALPIN: Can’t you withdraw?

MR. TEITELMAN: The case is closed. There is
no jurisdiction in the court. Whatever file might be
microfiched somewhere --

CHAIR BATTLE: Reports come to Legal Services?
MR. TEITELMAN: Yes, on a regular basis, every
quarter, every six months. For the past 15 years,
they've been sending these reports in.

CHAIR BATTLE: What is the Legal Services
obligation once you receive that report? Let's say you
receive --

MR. TEITELMAN: We have no obligation.

CHAIR BATTLE: Just to receive the report.

MR. TEITELMAN: The report gave us no -- they
don't want to pay us fees, so I don't think they want
us to have a monitoring obligation. It's just that we
get the reports.

At this point, when a case is closed -- well,
we had -- individual clients backed out. It was a
class action. It was clearly a class action.

CHAIR BATTLE: It just seems to me under that
circumstance, particularly where you have no
monitoring, I don't know what your -- the court doesn't
maintain jurisdiction. Your clients are no longer your
clients.

MR. FORGER: Must be a recycling program.

MR. TEITELMAN: We may get some money for

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recycling -- that's an example of what goes on in a
number --

CHAIR BATTLE: You know, that's why I started out with nonadversarial
monitoring, because I'm familiar with just this being a
repository of reports, being a part of how class
actions ultimately end up operating.

MR. TEITELMAN: We feel no obligation --
clearly, it would be against the law to represent the
class in contempt, and I don't know who would file the
contempt motion. All the same, we're getting these
reports.

Now, the state doesn't want to file these
reports anymore, but I don't know why they do. I mean,
there is no one going to -- a federal judge speaks even
15 years ago, even from the grave at this point they
still follow the orders of the federal judge.

CHAIR BATTLE: And there was no time frame for
this to end?

MR. TEITELMAN: None. They could have called
in and asked for a modification and said, "We've been
doing it 15 years." They've never done that. I'd
suggest that to them.
MR. TULL: That's really a good fundraising thing.

MS. PERLE: I think that's an extreme example of what I was talking about before, but I mean, I think there are other examples where the monitoring does serve some function, but they're not participating -- there is nothing happening in the class action.

The monitoring serves the function of, kind of, ensuring that nothing happens, in a sense. I think that the notion of nonadversarial monitoring is okay as long as you don't tie it to representation of an individual client in that situation.

In other words, that monitoring is going on. The class action is not really going on anymore. There are no issues necessarily to be decided.

CHAIR BATTLE: Nonadversarial monitoring I don't think was --

MR. FORGER: What is that?

CHAIR BATTLE: Nonadversarial monitoring?

MR. FORGER: Yeah.

CHAIR BATTLE: We're going to have to pay for that in Birmingham pretty soon to the white
firefighters.

MR. FORGER: What is nonadversarial monitoring?

CHAIR BATTLE: It just means there is an order put in place, and the parties are instructed to do certain things, and there is reporting that goes from the party who has to do the work to the other people to let them know that it's going on, and they receive those reports.

MR. FORGER: But do nothing with it.

CHAIR BATTLE: But do nothing.

MR. FORGER: Because they can't.

CHAIR BATTLE: Well, in some instances, if you're not doing what you're supposed to do, you can go back into court --

MR. FORGER: It becomes adversarial then.

CHAIR BATTLE: -- if the judge is still alive and say, "They're not doing what they're supposed to do." At that point it becomes adversarial.

And once it becomes adversarial, what we're saying, "You can't do that." But if what you're doing is nonadversarial monitoring, receiving reports, right
now I don't envision from what I read in both the debate that took place on this and in the statutory language that there is any real problem with that.

But that does go on. I mean, I can understand, based on what Rick said, what Linda has said and what my own experience has been that, in class action litigation, you do have nonadversarial monitoring.

My concern was this, and the question that I raised when I first read this is the potential that you just raised, Alex, which is at any point this nonadversarial monitoring could become adversarial.

So you're going to have to cut at some point and give this reporting function to someone else who can challenge those things.

Because otherwise, what happens is you've got a program who has this monitoring function, and they cannot become adversarial with it, but if there is a problem with it, it's going to have to be handed off to someone else to raise those issues at some point, I don't know who, but somebody, it seems to me.

Well, we've got two things. One, I think we
have resolved the question of the recipient being able
to represent an individual in their efforts to obtain
relief under an order granting relief, and that has
nothing to do with the actual litigation in the class
action.

Then, we've got this issue of the
nonadversarial monitoring.

MR. FORGER: It sounds good.

CHAIR BATTLE: Yeah. Nonadversarial
monitoring. And if it becomes adversarial, you can't
do it, and maybe we need to just construct some
language around both of those issues to resolve this
very limited scope of how and if programs can
participate in class actions.

MS. GLASOW: Can you repeat that first one
again?

MS. BERGMARK: It seems to me that the first
issue is unrepresented to the issue of pending class
actions. The way a program is going to wind up in the
second box is because they handled the class action to
begin with. It's, sort of, a pending case issue.

Now, whether there is a distinction there and
this off.

If you've got a case like this, you can only have it so long as it is not adversarial. Once there is any issue, it's going to have to be handed off. So it's really time now to start looking.

MS. PERLE: And I think programs do understand that part of it. I think that you can handle that by putting that in the preamble.

CHAIR BATTLE: Okay. And I think the other question you asked, Martha, was how were we going to word the first. "It does not include the recipient's individual representation of a client in the client's effort to obtain the benefits of an order granting relief entered by the court or involvement in the enforcement of an order granting relief."

That's consistent with the language we discussed a moment ago.

MS. BERGMARK: I don't even think you need the "or involvement in the enforcement." That's redundant.

CHAIR BATTLE: Okay.

MS. GLASOW: Could you repeat that?
CHAIR BATTLE: "It does not include the recipient's individual representation of a client in the client's efforts to obtain the benefits of an order granting relief entered by the court."

And Martha is suggesting that we strike the rest, "or involvement in the enforcement of an order."

MS. PERLE: What about the monitoring?

CHAIR BATTLE: The second one, I haven't really worded it, but it does not include nonadversarial monitoring of a class action so long as -- and I haven't really put any language to that.

MS. PERLE: John was talking before about a situation where there is a special master that's appointed to administer something.

I've been informed about situations where the recipient was appointed by the court to administer the class action. Say that there was a fund created by the litigation and that the program was appointed to administer that fund.

CHAIR BATTLE: I think there is going to have to be a handoff to someone else, if it's still class representation is my view.
And I have an appreciation for what you're saying. Hand off to whom? To where?

MS. PERLE: Well, and also, I mean, you're really in a situation where the administration of it consists of making a determination about whether individual members of the class are entitled to relief.

So it, sort of, fits -- maybe we could, sort of, fold that in under your individual representation.

Not exactly.

CHAIR BATTLE: No.

MR. TULL: They might become a defendant.

CHAIR BATTLE: They could become a defendant.

I think that's a handoff situation where someone else is going to have to do that.

Sometimes federal courts don't agree. We can have a statute -- we can have a regulation that says, "You've got to get out of this," and you can make an application and fight that statute and the judge say, "I don't have anybody else to give this to. You got to stay in this, because who else am I going to give this responsibility to? Request to withdraw denied," and
then you've got a program that's stuck. MS. PERLE: The Corporation is stuck.

CHAIR BATTLE: And the Corporation is --

MR. FORGER: It's no longer a program, LSC. It's a pro bono effort.

MR. TULL: Isn't this an area that -- what Linda has said, I think is probably instructive to us, which is the variations of issues that may come up in this area are probably much greater than any of us can foresee.

I can imagine a class action where a court, as a part of an order, gives money to a program to create a program to represent battered women.

I mean, it's out of punitive damages to a defendant, and there are simply putting the money somewhere to be spent, and they're out of it and gone and, basically, has funded an office that has done a particular kind of work, and the class is all gone, and the case is gone.

I don't know whether such a thing exists, but it's certainly possible that it is.

MS. PERLE: I think it does. I've heard of
MR. TULL: Those kinds of things, I assume, are going to have to come to general counsel for a review and set of opinions because we can't draft a reg which will -- we can draft a reg which sets the principles, which I think are ones which are -- it's important to do what I think has been done, which is to be very clear that this has to do with drawing a very sharp line between work which involves the class and any activity which will affect the class and work which involves an individual in his or her capacity as a beneficiary and only affect's that individual's rights.

It's not an easy draw to make because the circumstances are so varied, but I think that is the principle which --

MS. PERLE: But I think that you're right. There are going to have to be lots of situations where the General Counsel's Office is going to have to really look at a situation and determine which side of that line it goes on.

There are so many myriad variations in terms
of the way these cases have played out and the role that the recipients are playing in them in this, sort of, post judgment period.

CHAIR BATTLE: If it's post judgment, "initiate and participate," which is the language in the statutes, seems to indicate prejudgment.

And post judgment I think we are going to have to use some judgment calls on, but I think clearly part of what this is about is what Senator Domenici said, "Individual legal services for individual Americans in need for their cases and their causes" is going to end up being the bottom line.

And the closer the situation comes to meeting that, the greater the likelihood that can continue, and the further away from that, whatever that function is, the more apt it is to be found not to be within the scope of what would be allowed.

And we'll just have to use that as, probably, part of the dividing line post judgment for determining what programs can do.

MS. PERLE: I think we also ought to put in the preamble to this interim reg to the extent it's
being used as a proposed reg -- we should really ask
for -- the Corporation should really ask for comments.

CHAIR BATTLE: Comments on this area so we
will understand.

MS. PERLE: Because there will be lots of -- I
think you need more input in terms of what's going to
work and what's not going to work in real life.

CHAIR BATTLE: Inspector General, there were
some comments on this. Have we satisfied those,
Laurie?

MS. TARANTOWICZ: Oh, yes.

CHAIR BATTLE: Okay. All right. In the
prohibition section, 1617.3, Prohibition, I think that
comes straight out of the set, and I don't think there
is any reason for us to discuss that.

Anything else on class actions, 1617? It's
pretty clear. Okay. The next regulation that we have
is 1638.

MS. PERLE: I want to get Alan Houseman in
here for that.

CHAIR BATTLE: Okay. All right. Thanks for
joining us, Alan.
MR. HOUSEMAN: Thank you.

CHAIR BATTLE: We are about to undertake 1638, Restrictions on Solicitation, the interim proposed rule. Suzanne, do you want to give us some background on this one?

MS. GLASOW: This is a brand new rule, and it is an attempt to implement a new statutory restriction on staff of Legal Services programs taking on clients where there has been in-person unsolicited advice given.

CHAIR BATTLE: Okay. Why don't we take a look at the actual -- are there any comments about the comments? I did have a couple.

"Unsolicited advice" is defined, and in part, it includes the prospect of a discussion with an individual where there is not an attorney-client relationship.

And so the question that I had was at what point does that relationship begin? So often you have brief contact with clients, and you give them brief advice, and you send them on their way.

Have you established an attorney-client
relationship so that that brief advice or contact is
covered, or would it be unsolicited to go beyond the
scope of why someone has contacted you about some sort
of brief advice issue?

If the advice given that’s brief doesn’t
really resolve the problem and the person returns to
you, is that return the formation of a new relationship
so that it’s not solicited, based on what you said last
time? This is a muddy, to me, area.

MR. TULL: The distinction here -- in both
elements you gave, this regulation would not prevent
the program from advising the client that she or he
should do something even if it was not precisely within
the parameters of what the person described.

And that’s based on the responsibility any
lawyer has to a client, which is once the attorney-
client relationship is established -- and it is
established even when just advice is given -- the
lawyer has a duty of loyalty to that client and a duty
to protect the client’s interest.

And if that means saying that here is a matter
which I’m aware of because of the facts you’ve given to
me because you've come to me that the lawyer can't
withhold that information because it would be somehow
unsolicited and improper.

That would be not only proper but would be
expected as a part of the attorney-client relationship,
including, as we would understand this, to be if the
client had left the program and then your --

CHAIR BATTLE: Right.

MR. TULL: -- which is coming back a second
time, sort of, lost the thread on what the -- but I
heard you say it. I think we were clear, as we thought
about this, that that would not be covered.

The concern that this is aimed at is programs
going out and appearing to someone who he is not a
client of theirs, has established no relationship with
them and volunteering advice to them, "You should see a
lawyer," and "We'll be your lawyer" --

CHAIR BATTLE: Right. Yeah. I think that the
last thing that you said, John, points out the clear
issue, which is going out to people that are not
clients, who are not within the rubric of having a
relationship with a program and giving them advice.
The question I had was since it really hinges on this attorney-client relationship, when does that begin? And what you're saying is if somebody comes in the door to ask for advice, once they come into the door -- which means we haven't solicited them; they have come to us -- can we give talk to them and give them advice is the basic question that I'm asking.

And whether or not we form an attorney-client privileged relationship by actually taking a case or not, can we give them a full scope of advice because they have come to us?

Which gets to breaking out "unsolicited" from "advice" a little bit, at least in my thinking.

MS. GLASOW: I think maybe part of the problem -- I was just asking Alan -- in the definition of "unsolicited advice" is we say "does not have an attorney-client relationship and who did not seek legal advice."

I think it should be "or," because if someone calls in to your hotline or even just to your program and says, "I have a problem. I need help," they are the ones who are seeking the legal advice.
So in that case, it's not unsolicited. If you already have an attorney-client relationship with a particular person, that's not unsolicited if you happen to call that client and say, "There is this new issue I want you to be aware of. It has to do with your interests."

CHAIR BATTLE: I think "or" does it.

MS. GLASOW: Because of our attorney-client relationship --

CHAIR BATTLE: Because it provides the alternative there of someone -- as long as that person has sought the program out, once they get there, they with give them whatever advice they need whether we've formed that relationship or not, and I think that's the point that I was getting at.

I would edit, in 1638, in the commentary under prohibition -- it's no big deal -- it's the next to the last line. "It also prohibits recipients and their employees who have given," strike "such" to "unsolicited advice from referring the person receiving the advice to another LSC recipient."

MR. McCALPIN: Let me raise a question on that
point. Do you mean to leave open that they could refer them to a PAI adjunct of the program?

MS. GLASOW: Are we talking about the definition of "unsolicited" again?

MR. McCALPIN: No. We’re talking about the same sentence that LaVeeda read.

CHAIR BATTLE: I just read the last sentence in 1638.3 in the commentary under Prohibition.

MR. McCALPIN: It says here that they prohibited "from referring the person receiving the advice to another LSC recipient," but did you intend specifically to leave open referral to a PAI adjunct of the program?

MR. TULL: The answer is did we do anything regarding that deliberately is no.

MR. ASKEW: The PAI adjunct is the program, right?

MR. TULL: Yeah. I think if we get back to this distinction can you refer someone to a private lawyer who is going to take it as a volunteer case, you’ve just referred it, and that’s what you’re doing, you know, you’re, basically, ridding yourself of the
case.

The answer to that, I assume, would be yes. But referring it to a PAI program set up by the program, run and then -- then the answer to that would be no.

MR. McCALPIN: Rick has 1,700 lawyers signed up, volunteer lawyer program, which is an adjunct of Legal Services of Eastern Missouri. Can he refer it to one of those 1,700 lawyers?

CHAIR BATTLE: Yes, if it's pro bono.

MR. McCALPIN: Sure it's pro bono.

CHAIR BATTLE: If it's pro bono, yes. That's what it's all about. I mean, when people come to you and you can't take their case, then you can refer that matter, whatever it is, to a private attorney.

MR. McCALPIN: I'm not sure that's what they were thinking.

MR. TEITELMAN: We also have in-house volunteer programs.

MR. TULL: What we're talking about here -- let's get clear what we're talking about is unsolicited -- everything has to follow from the fact
the reg.

MR. McCALPIN: So that we did leave it open, what we said was not reference to another LSC recipient. We meant another LSC recipient.

MR. TULL: And "recipient" is a term of art throughout the regs.

MR. McCALPIN: Yeah. So you, in effect, can look locally by sending him out to a PAI attorney.

MR. TULL: Well, by sending it out to a private attorney, if you sent it out to a PAI attorney as a part of your PAI program, that is a part of the --

MR. McCALPIN: I don’t know what’s part of a PAI program. You’ve got 1,700 lawyers that signed up. Is that --

CHAIR BATTLE: This is what the statute actually says: "Unless such person or entity agrees that the person and the employees of the person or entity will not accept employment resulting from in-person unsolicited advice to a nonattorney."

Now, it seems to me -- "and," it goes further, "will not refer such nonattorney to another person or
entity or employee of the person that is receiving Corporation funds."

So really, the way that this is drafted is specific to the two things that are mentioned in the statute, unsolicited advice, that no employee of a recipient will take a case that was brought to it from in-person unsolicited advice -- that's number one -- nor will they refer it to another program that is receiving LSC funds.

That is all that is proscribed by the statute. Any referrals to private attorneys in private practice who have the option of taking or not taking the case, of forming an attorney-client relationship or not are free to do that.

This statute really speaks to what it is one may do with federal funds, and one may not in-person unsolicited give advice and then take the case or refer it to another program.

MR. FORGER: A variation. Legal Aid Society of New York has a volunteer division that is funded by the PAI, and they have pro bono attorneys that function. I would suppose they are prohibited in that
context --

CHAIR BATTLE: Yes.

MR. FORGER: Even though it's pro bono attorneys working --

CHAIR BATTLE: With LSC funds, yeah. As long as you're working with LSC funds, it's prohibited.

Once you're completely in the private sector, you're --

MR. McCALPIN: How are they working with LSC funds? If they're sitting in your law firm and they get a phone call, "Will you take this case?"

MR. FORGER: I mean, it's processed through the volunteer division with oversight and all that sort of stuff. I think if they're simply sending paper airplanes out to the world at large or faxes, "Will anybody take this case?" it's different.

MR. McCALPIN: But then you're saying they can't send it to one of Rick's 1,700 lawyers.

MR. FORGER: No. My distinction, volunteer division, is somewhat different in New York, I guess, where it is there. It exists, and it's helping the attorneys with the assignments and the follow-through and the oversight and all of that junk, as distinct

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from calling you on the phone saying, "Here is a case. Would you like to take it? Talk to the client." But that's a distinction.

CHAIR BATTLE: Rick, I see your hand up. I'm sorry.

MR. TEITELMAN: When you're talking about solicited or unsolicited, I think that's a distinction of note because even the outreach center, if we're at a church in Webster Groves and those attorneys who were mentioned earlier are at this church, and they're sitting there waiting for people to come in and ask for advice, that's solicited.

So under almost every circumstance we have, there are 1,700 volunteer lawyers. If there is 1,500 outreach centers -- I mean, 15 outreach centers, every time they walk into a shelter and ask for advice and they say, "Oh, there are the lawyers here today. We're going to ask them for advice," they're soliciting the advice.

I can't imagine, given the number of cases we have, go out and say, "Here, we want to give you advice."
MR. TEITELMAN: It's not.

MR. HOUSEMAN: Okay.

CHAIR BATTLE: He's saying it's not. He's saying they come and ask you. You're the lawyer on site, but people are coming to you saying --

MR. ASKEW: The clients are soliciting the lawyer.

MR. HOUSEMAN: That's fine. That's not prohibited by anything.

CHAIR BATTLE: Ernestine?

MS. WATLINGTON: I think clearly addresses the issue where the Legal Services attorneys had been accused of going out soliciting doing their on clients. I think this clearly addresses that and put it in the rule. I think it's understandable. It's understandable to me.

CHAIR BATTLE: Okay. Alex?

MR. FORGER: Just a point of information. I'll get Alan to counsel me here. The definition of "advice" is quite narrow. The statute talks about not discussing the merits of a case or the causes of action or the pros and cons, but it is simply advice, if you
call it advice, a suggestion that you obtain counsel or
actually take legal action.

Whereas, if I'm discussing with you the
circumstances of what is a habitable place or what's a
minimum wage and that 3.50 is below a minimum wage, da-
da-da-da-da-da-da-da, that, by this definition, is not giving
unsolicited level advice. Legal advice, but the state,
is saying get a lawyer.

MR. HOUSEMAN: Right. I agree with that
completely.

MR. FORGER: Not that, "You've got a good case
here, Mac, and your rights have been violated." That's
not legal advice.

So if that be literally so, the phrase
"unsolicited advice" as defined as advice given, I
would modify that as you have in 1638.3, advice to take
legal action or obtain counsel.

I mean, it is a very narrow kind of advice.
It isn't advice generally about your rights and
remedies. So I would insert that after that word is
defined as "advice" to take legal action or to counsel
to make it consistent with what you've got in the
prohibition, at least make the definition -- you've got
a definition that is very broad, and then your
prohibition is very narrow.

MR. HOUSEMAN: Right.

MR. FORGER: It ought to be -- certainly, they
ought to be consistently narrow.

CHAIR BATTLE: I agree. And what can you do
is 1638.2, Definitions (b), change that to say,
"Unsolicited advice means," and then I don't know how
it needs to be edited, but --

MS. GLASOW: "Advice to obtain counsel or take
legal action."

CHAIR BATTLE: Yeah. "Advice to take --"
yeah, "to contain counsel or to take legal action."

MR. HOUSEMAN: To an individual, I guess.

CHAIR BATTLE: "Advice to an individual to
take legal action or to obtain counsel given by a
recipient" --

MR. TULL: That solves a problem that we've
been struggling with here.

CHAIR BATTLE: Is that right? Okay.

MR. TULL: When I wasn't paying attention to
Alex.

CHAIR BATTLE: But Alex raised the problem, and he solved it.

MR. HOUSEMAN: Alex solved it better. My deal was worse.

MR. McCALPIN: Well, I'll keep talking, then, Alan.

MR. HOUSEMAN: Evening that would take care of the concerns that --

MR. ASKEW: Let me ask this: If there is a tenants association meeting and a staff attorney from the Legal Aid program speaks to the tenants and says, "These are your rights as public housing tenants," and then a tenant walks up to a Legal Aid lawyer after the meeting is over and says, "I heard what you said. I think I fall within one of those categories. I'd like for you to represent me." That's perfectly fine under this regulation?

CHAIR BATTLE: Yeah.

MR. ASKEW: Okay.

MR. HOUSEMAN: The way we read it.

CHAIR BATTLE: Okay. So we've amended the language in 1638.2 (b). I have some concerns. This,
kind of, follows what Bucky has raised. "Not sought."
Later on in (b) we talk about "advice given by a
recipient not sought."

And I thought about scope because it could be
that you're there talking about a tenant problem, and
they walk up and say, "Can you help me with a divorce,"
or walk up to you --

MR. ASKEW: That's even cleaner, I would
think, than it would be if they came up and asked you
about a tenancy problem.

CHAIR BATTLE: Yeah.

MR. ASKEW: But can the staff attorney say,
"And we are here to represent you if you have these
problems"?

MR. FORGER: I would think not.

MR. ASKEW: So that's where you stop.

MR. HOUSEMAN: That is right.

MR. ASKEW: Right.

MR. HOUSEMAN: Yeah. There is a line here.

CHAIR BATTLE: Okay. Laurie, did you have a -

MS. TARANTOWICZ: I was just going to address
a similar issue. By adding "to an individual" into the
definition," to me it makes it a bit confusing, because
if you're giving a presentation to a group, you're not
directly talking to one person, but you can tell the
group, and properly, I think, under this regulation,
"And if you have this problem, come and see me. If any
of you here who are similarly situated have this
problem, come and see me."

That's not directed to an individual, but I
think that's what --

CHAIR BATTLE: So you would take out "to an
individual" and just simply say "unsolicited advice
means advice to obtain counsel or to take legal action
given by a recipient that's not sought"?

MS. TARANTOWICZ: Right.

MR. HOUSEMAN: There may be a better way to do
it, which is to use the statutory term "nonattorney."
I'm not sure that solves the problem completely, but at
least it uses the statutory term, "that is given to a
nonattorney."

CHAIR BATTLE: Yeah. That's almost like using
"mutually exclusively worlds" to define it.
MR. HOUSEMAN: Okay.

CHAIR BATTLE: Anything else in (b)?

Anything -- I'm sorry. 1638.1, the Purpose, any
problem with the Purpose? And then let's move on to
Definitions. We, kind of, skipped over that part.

Anything in (a)?

We just covered (b). 1638.3, Prohibition.

MR. FORGER: How does (b) now read?

CHAIR BATTLE: (b) should read, "Unsolicited
advice means advice to obtain counsel or to take legal
action given by a recipient or its employees not sought
by --" we talked about the nonattorney but just the
individual or "an individual."

MR. FORGER: Well, Laurie's point.

MS. TARANTOWICZ: I'm sorry. I understand
this definition -- I don't know -- why can't you just
define "unsolicited" and take out the "advice" part,
because you use advice to obtain counsel, blah, blah,
blah, in the reg.

So if you just define "unsolicited" -- just
because -- as you're reading, I'm getting -- I know
what it says, but it's getting very long.
I'm just suggesting -- and I'm not -- I don't feel strongly about this. I'm just suggesting that perhaps it might be clearer if you just defined "unsolicited" and then, in the reg, use "advice to obtain counsel or take legal action" in the prohibition --

CHAIR BATTLE: Do we ever use -- you're saying we never use the term "unsolicited advice" anywhere in the reg other than the definition?

MR. TEITELMAN: No. I'm saying that you use it, but every time you use "advice," if you say "advice to obtain --" in other words, in the Prohibition, if you say, "In-person unsolicited advice to obtain counsel or take legal action." So therefore -- I don't know why "advice" needs to be in.

MS. GLASOW: I think we're trying to talk about there are different kind of advice, and one is unsolicited advice, "and unsolicited advice is the type of advice," et cetera, et cetera.

So I think it's legitimate to have them both in. I think it makes it easier for the reader of this rule to know -- if we do word by word, I think it's
going to get somewhat -- I mean, I can see her point, but I think in this case it's better to keep the --

MS. TARANTOWICZ: I didn't mean that needed to define "advice" in the Definitions.

MS. GLASOW: No. I understand that, but in this case I would recommend --

CHAIR BATTLE: Laurie, do you have an alternative proposal that you'd like for (b) in terms of how it ought to be set out?

MS. TARANTOWICZ: I was just suggesting you just define "unsolicited." "Unsolicited means not sought by an individual." Oh, I see, but then you have the attorney-client -- I see.

MR. HOUSEMAN: I think -- we've been through this, some of us, thinking about this. My own sense is this is a better way -- to keep "unsolicited advice" together is a better approach than trying to go any further in segmenting the definitions.

CHAIR BATTLE: Okay. There are three terms used --

MR. HOUSEMAN: John and I have been over this 100 times.
CHAIR BATTLE: Yeah. There are three terms used in the statute, "in person" "unsolicited" and "advice." In "unsolicited advice," rather than breaking out "advice" and defining it separate from "unsolicited" kind of makes sense.

But I think what I’m hearing Laurie say is that the real key and pivotal part of it is not so much the "advice" part as it is "unsolicited."

And in our definition, we need to make sure that people understand what the difference is between "solicited advice" and "unsolicited advice" and how we set it out.

Does that get at the point?

MS. TARANTOWICZ: That’s fine. I was just trying to make a suggestion so that you didn’t try to include too many things in this definition.

But I see as you try to break it out you do need some follow-up for that.

CHAIR BATTLE: Maybe in the commentary we could, as Bucky’s suggest that he pointed out, the example that he used, distinguish "solicited" from "unsolicited," because that’s really the key, the
question of whether it's solicited or not.

MS. GLASOW: And I think most attorneys have a
general idea of what solicitation is of a client
anyway. I mean, we've had professional rules on it
historically. So I think this definition is probably
going to give the most comfort to the reader.

CHAIR BATTLE: Okay. Taking that into
account, where are we now? Do we need to make any
additional adjustments other than the ones we've talked
about so far?

We want to be able to make it clear that it's
not just to an individual but also to a group somehow,
and we also want to clarify the distinction between
"solicited" and "unsolicited." Okay. Let's give it to
the masters to do and move on.

MR. FORGER: Can I just make one grammatical
observation? There is the phrase, which to me is
durational, "so long as," and it's always used in the
context of "conditional."

I mean, you may do this if, and there is this
"as long as" as if at some duration it may shift. I
mean, in this instance, it's at the end of (b). "You
can accept as long as --" or "so long as" here "the
request does not --" I guess it's "if."

But it runs through most of the regs. I just
reached my tilting point.

CHAIR BATTLE: Where is that?

MR. TULL: It actually means you can just have
a real short relationship with a person --

MR. FORGER: I realize it's three words
instead of one, but even so.

MS. GLASOW: Linda and I had a long discussion
one day whether we should say "as long as" or "so long
as." How about "if"?

MR. TULL: I think we should say, "For the
period that the request does not result in" --

CHAIR BATTLE: We're, kind of, jumping ahead.

Let's look at 1638.3 Prohibition, (a) and (b).

MS. GLASOW: I already have some suggested
changes.

CHAIR BATTLE: Okay.

MS. GLASOW: For (a), we take out "as defined
in this part," which is in the parentheses.

CHAIR BATTLE: Okay.

MS. GLASOW: And in (b), after the word
"unsolicited advice" we add the language "to obtain counsel or take legal action," and we take out "as defined in this part."

MR. TULL: Although, by defining it up here --

MS. GLASOW: Maybe we don’t need to do that where we --

MR. TULL: Yeah, it’s better. It’s better.

MR. HOUSEMAN: Stylistically, it may be right, but I think you got to say it again.

MR. ASKEW: Why do you use the term "from accepting employment"?

MR. HOUSEMAN: Linda just mentioned that.

MR. McCALPIN: I would much prefer "from representing of client as a result of in-person unsolicited advice."

CHAIR BATTLE: That language comes out of the statute. It says, "will not accept employment resulting from in-person unsolicited advice."

MS. PERLE: Doesn’t that suggest that you’re paying somebody?

MR. McCALPIN: Let us now write the statute.

MR. HOUSEMAN: I mean, it seems to me Bill’s
suggestion doesn't -- the fact that we track the statutory language, either we can explain what this means in the commentary, or we could write it into the -- we have the power to interpret it, you do, at least. You could put in Bill's suggestion --

CHAIR BATTLE: From accepting -- what did you say, Bill?

MR. McCALPIN: Representing a client as a result of in-person unsolicited advice.

MR. HOUSEMAN: Representing --

MR. McCALPIN: A client.

MR. HOUSEMAN: As a result of.

MR. ASKEW: So long as.

MR. HOUSEMAN: I mean, we could say why we use this language in the commentary and then explain it. It's a simple point.

MS. GLASOW: We all agree.

CHAIR BATTLE: Anything else? We've got some changes to (a) and (b). Anything else in (a) and (b)? Let's move on down to 1638.4, Permissible Activities. "This part does not prohibit recipients or their employees from providing information regarding
legal rights and responsibilities, intake procedures, community legal education activities such as outreach, public service announcements."

MR. McCALPIN: Is there any real practice of "presence in a courthouse to provide advice at the invitation of the court"?

MR. TULL: Yeah. It’s not uncommon to have a --

MR. McCALPIN: Really?

MR. TULL: -- in a housing court -- where a court is dedicated just to housing law, they often ask a Legal Services program to have a lawyer there, and they will refer people back to them.

CHAIR BATTLE: Almost like a public defender.

MR. McCALPIN: That’s what, in Canada, they refer to as "duty counsel."

MR. TULL: It probably feels like that to the folks --

CHAIR BATTLE: Okay. Any questions about (a) and how it’s drafted, (b)? We took the "so long as" out and put "if."

MS. GLASOW: We probably want to change
"employment" in this one, too.

MR. FORGER: Like representation.

MR. ASKEW: May represent client.

CHAIR BATTLE: Or may represent --

MR. HOUSEMAN: Provide representation, too.

CHAIR BATTLE: Provide -- may represent.

MR. HOUSEMAN: It's three words where one would do.

CHAIR BATTLE: May represent.

MR. HOUSEMAN: Recipient may represent an otherwise eligible individual seeking legal assistance.

CHAIR BATTLE: "May represent" is fine.

MR. FORGER: But can he accept employment?

CHAIR BATTLE: "May represent" I think is fine.

MR. ASKEW: Continue to get those high wages.

CHAIR BATTLE: Now, we've got "Recipients shall adopt written policies and procedures to insure compliance." Do we have --

MR. McCALPIN: In my view, totally unnecessary.

MR. TULL: Didn't we agree to have -- when we
have the whole issue of reporting was the Inspector
General to visit this as to all regs?

    CHAIR BATTLE: Yeah, we will. This goes under
the tabled motion on this.

    MR. McCALPIN: Special order of business.

    CHAIR BATTLE: Yeah. We'll take that up at
the same time. Anything else on solicitation?

    MR. McCALPIN: Well, it seems to me you'd
better keep track of what regulations you're talking
about, because I'm not sure we ought to have the same
answer on every one.

    CHAIR BATTLE: This solicitation one, to me,
is a hard one to track. I mean, if you're not supposed
to take solicitation, then how are you going to have --
all you do is tell your people don't take unsolicited
cases.

    MR. McCALPIN: Another way you might do it is
abide by the model Rules of Professional Conduct.

    CHAIR BATTLE: Right. I just think this one
is going to be -- I can understand you wanting to have
a policy, a local policy so that everybody is on the
same sheet the music about not taking unsolicited
cases, but I just don't see what else you can do.

You're not going to have people keep records
of times they had the opportunity to give unsolicited
advice.

MR. TULL: A list of all the cases you didn't
take because they were --

CHAIR BATTLE: Anything from the OIG on this
one that we haven't covered, Laurie?

MS. TARANTOWICZ: No.

CHAIR BATTLE: No? All right. Okay. I am
astounded as we move to our No. 5 for the day. Thank
you so much for joining us on this, Alex.

1610. Do you guys really want to take up 1610
today? 1610 pertains to the use of nonLSC funds, and
it provides the listing of all of the examples where we
now are prohibited from engaging in certain restricted
conduct based on our statutes and appropriation law in
the use of what we do with funds other than LSC funds
by this regulation.

Suzanne, do you want to give us the background
on it?

MS. GLASOW: This is another rule that has
been completely revised. We've also made -- there are two definitions -- there used to be one -- "Purposes prohibited by the LSC Act."

We've made revisions to that in a couple of ways. One, technical revisions for sections referred to in the LSC Act that no longer exist, so we corrected it to -- we updated it to the law.

And we took out restrictions that now belong under the second definition, which are those activities prohibited by Section 504 of the Appropriations Act, because what that restriction largely does is prohibit the activity regardless of what funds you're using.

So we moved some of the restrictions that were formerly under just the LSC Act. Now they're under the definition of restrictions under 504.

And one other change in the first definition, "Purposes prohibited by the LSC Act" is we took out fee-generating cases because those are not prohibited by the LSC Act. You can take those cases as long as you follow certain procedures.

And this committee had discussed that issue under the prior consideration of Part 1609, which you
will be discussing in one of the next two days.

So we've left that there to see if that is still what you want to do. Of course, now, as you know, even if you take fee-generating cases, you can't keep attorneys fees. So the attorney fees restriction is under the second definition in this part.

CHAIR BATTLE: Okay.

MR. McCALPIN: Can I raise a general question that I should have raised sooner? Is there something in the Administrative Procedure Act that says that we have to have 30 days for comments on all of these interim rules?

You remember we early on gave 60 days on many of them at the request of the ABA so the bars could comment, but I just wondered is there something that requires us to stick to 30 days in an interim rule?

CHAIR BATTLE: Suzanne?

MS. GLASOW: Our LSC Act requires 30 days at a minimum. We put 30 days in each of these rules with the understanding that we were going to try to get all of them back before the Board for the October meeting.
CHAIR BATTLE: Yeah.

MS. GLASOW: Which we would need to do. But I had a discussion with LaVeeda earlier that -- you know, we can change that number.

CHAIR BATTLE: My view is this: I think what we ought to do is stagger them. And there are some that are just the extension of an already existing prohibition to private funds that I think we can request back some comment in 30 days.

I would prefer to see us go 60 on others because of the fact that we’ve got so many that we’re going to be putting out, and programs are really going to need time to be able to respond to them.

And as we go through this process, we may be able to identify those that really -- you know, the restriction is straightforward.

There is very little room for comment or change, and all we’re doing is either taking an existing restriction for which we’ve already gotten comments from the field and from other interested parties already and we’re applying it to private funds or nonLSC funds as well.
So we really don't need the additional time. So I would stagger them, and we may go through and identify them as we look at them today. Linda.

MS. PERLE: I just want to note that if you think about the time line, these will probably be published -- August 1st. And I know in Washington and some other places, but August is have very difficult time for people to, kind of, get together and make any judgments on these things.

But I think that you ought to, at least for those that do have --

CHAIR BATTLE: That's my suggestion. We can have some work to do in October but not this whole move. So Bill, in response to your question, if the statute has a minimum time frame of 30 days --

MR. McCALPIN: I was not thinking of reducing it at all. I just wonder if the Administrative Procedure Act required a flat 30 days.

MS. PERLE: Well, first of all, the Administrative Procedure Act allows you to do interim regs, and there is no period.

MS. GLASOW: That was going to be a caution I
was going to add that you could extend the comment period, but I think to be an interim where you can’t let it go on forever. You have to be showing that you’re making the effort to --

CHAIR BATTLE: To work on a proposed rule, yeah.

MS. GLASOW: -- follow a normal process and get a final rule back in. So you have to -- you can’t go too far either way in that sense.

MS. PERLE: Well, of course, the normal process at this point is you give 60 days.

CHAIR BATTLE: So what we’ll do is we’ll stagger. We’ll take a few at 30 that don’t require a lot of work and comment, and then we’ll put the rest on a 60-day time frame, I think.

MR. McCALPIN: Recognizing that we won’t get to those in October.

CHAIR BATTLE: Yes. Yes, we won’t. We won’t be able to get to the ones put out for 60 days in October for sure.

MS. GLASOW: That’s right.

CHAIR BATTLE: Okay. Now, are there any other
MR. TULL: Can I just make one comment, which is -- this isn’t at all to say that the suggestion of extending some to 60 is wrong, but it does also implicate -- there is a second wave of regulations that we contemplate that have to do with enforcement of -- with Section 509.

We’ve been in conversations with the Inspector General’s Office about a set of regulations to implement that, changing that -- or at least addressing a question whether we should change 1630, which is the cost procedures, and 1627, a small portion of which is changed here, but there is a much larger body of 1627 that was not touched in this round.

So it will have a ripple effect. That’s not to say it’s a bad decision --

CHAIR BATTLE: It will never be over.

MR. TULL: That is a consequence.

CHAIR BATTLE: We know. Taking into account you’re right, we do have some additional regulations that we’ll have to take through this process as well.

Can we walk through 1610? Okay.
MR. ASKEW: You've been confirmed for another three years. We can work on this for three more years.


MR. TULL: Full-time job processing regs.

CHAIR BATTLE: Are there any questions about 1610.1, the Purpose?

MR. McCALPIN: I wonder if we should define "nonLSC funds" as "all funds received by a recipient from sources other than the LSC."

Maybe it's self-explanatory. I don't know. It's intended to include private funds, public funds, everything, and I -- when I looked on the use of nonLSC funds, I wondered if we needed to be more expansive about what we were talking about.

CHAIR BATTLE: I think that a definition would be helpful. I think that's a good suggestion. I notice that we don't actually define "nonLSC funds, and I think it would be helpful." Okay. Can we do that?

MS. GLASOW: Sure.

CHAIR BATTLE: Okay. All right. And that's really 1610.2, which brings us to 1610.2, if there are
no other --

MR. FORGER: 1610.1, "The purpose of this rule," is that where we are?

MS. GLASOW: Yes.

MR. FORGER: "-- is to implement statutory restrictions on a recipient’s activities." I think it's in the use of nonLSC funds. This isn’t a two-pronged regulation, one to restrict a recipient’s activities and then also restrict the use of nonLSC funds.

CHAIR BATTLE: How would you state it?

MR. FORGER: I’d just strike the "and" because it’s not a conjunctive, a two-prong, "on a recipient’s activities in the use" --

MR. McCALPIN: Alex, what page are you on?

CHAIR BATTLE: It’s actually in the commentary instead of the rule.

MR. FORGER: You skipped to the --

CHAIR BATTLE: Yeah. What we’ve been doing really is going through the actual rule, but let me just do this because, in all fairness, Alex, you’re right.
What I’ve been doing is if there are any editing changes to the commentary, I’ve generally taken that up first. So I think that’s fair. We can make that change now. MR. FORGER: It’s the restriction on the use of nonLSC money is, basically, what we’re talking about.

CHAIR BATTLE: Yeah.

MR. FORGER: So if you just struck the word "and" and say "in the."

MS. PERLE: Or just restrict -- just take out "activities" --

MR. FORGER: Sure.

MR. McCALPIN: If you’re looking at that, then I would look at the second line on page 2 and the words "directly from LSC." To any person or entity receiving LSC funds, doesn’t this apply to subgrants as well? And they would not get them directly from the LSC.

CHAIR BATTLE: A subgrant is only of the LSC funds.

MR. McCALPIN: Yeah, but they’re not directly from LSC.

MR. TULL: I’m sorry, Bill. Which line are you on?

CHAIR BATTLE: Why do we need
"directly from LSC"?

MR. McCALPIN: I don't think we do.

MS. PERLE: But if you do --

CHAIR BATTLE: Let's go back -- I'm sorry.

And that was my error.

MR. McCALPIN: Page 2, second line.

CHAIR BATTLE: Let's go back and edit the commentary first. No. That's fine. Can you take out the "directly from LSC" completely?

MR. McCALPIN: Yes.

CHAIR BATTLE: "If you receive LSC funds."


CHAIR BATTLE: Okay.

MR. McCALPIN: Further down the page, I don't know why we have to wear a sack cloth and ashes by pointing out that it was in 1977 that we last did this, well, or the Congress. I don't know why we need to put the 1977 in there. It's not our doing.

CHAIR BATTLE: Sometimes that history is wonderful to know.

MR. ASKEW: Just say 20 years ago.
CHAIR BATTLE: When we get into this second one, I just -- it's an editing change. "Second, it incorporates the restrictions imposed by the 1996 Appropriations Bill," which are is fine, "which apply to" take out "both" "a recipient's nonLSC funds and its LSC funds." The word "both" is unnecessary.

MR. McCALPIN: I would convert those. "Both LSC funds and nonLSC funds."

CHAIR BATTLE: I was doing a lot of flipping in this because, really, my view was the reason for this interim reg really, number one, is to implement the Corporation's FY 1996 Appropriations Act, and then, two, to make technical corrections.

And that flips the stated intention at the beginning, as opposed to saying the reason we're doing this interim reg is to make this difficult, because that's not really the primary reason. I would flip that to make that -- and then, once you flip that, I think it reoccurs later on down in here somewhere.

MR. McCALPIN: I think we got the word "directly" in the second to the last line on that page again.
MS. GLASOW: Okay. Got it.

CHAIR BATTLE: And then that flip that I'm talking about comes up in that last paragraph, "Generally, this interim rule serves two purposes. First, the technical --" make that the second, and make the first thing the restrictions, because that's the purpose for the interim rule.

I would take out the word "it." "The language has also been revised to make clear that the restrictions on private funds apply only to those specified --"

MR. McCALPIN: Where are you reading?

CHAIR BATTLE: I'm in the middle 1610.2(a), "purposes prohibited by the LSC Act."

MR. McCALPIN: Oh, you're way ahead of us.

You're way ahead of us.

CHAIR BATTLE: Oh, I'm sorry. A whole page ahead, okay.

MS. GLASOW: Language has been revised to what?

CHAIR BATTLE: "The language has also been revised to make clear that the restrictions on private
funds apply only to those specified," instead of "make it clear."

MR. McCALPIN: I agree with you, but again, why use "private funds"? Why not use "nonLSC funds, which we have defined above"?

MS. PERLE: Because this one applies to private funds. The restrictions that are in the LSC Act only apply to private funds. They don’t apply to nonLSC --

MR. McCALPIN: Oh, the Act. You’re right.

You’re right. You’re right.

CHAIR BATTLE: Okay.

MR. McCALPIN: Back up to 1610.1, I think it might be useful to put the citation of the LSC Act --

CHAIR BATTLE: I said that, too. Yeah, you’re right.

MR. McCALPIN: I would cite the LSC Act in 1610.1, 42 U.S.C. 2996 --

MS. GLASOW: In the commentary?

MR. McCALPIN: Yeah.

CHAIR BATTLE: In the commentary.

MR. McCALPIN: We’re on page 3.
CHAIR BATTLE: Yeah. Anything else on page 3? I had a little note to myself as I read this at the bottom of page 3. "Account the references to legislative and administrative representation and to advocacy training were deleted from the definition and moved because the restrictions in the appropriations act regarding these activities are broader than those in the LSC Act."

If, for any reason, the appropriations restrictions are later stricken, then where are we by doing this?

MR. McCALPIN: Where are you, LaVeeda?

CHAIR BATTLE: I'm at the bottom of page 3, the last sentence, the top of page 4. What we're doing is since the LSC restrictions are a subset of the appropriations restrictions, which are a larger set, we are just consuming or subsuming the act restrictions into the appropriations restrictions.

And my question is if the appropriations restrictions for some reason dissolve, then where are we?

MS. GLASOW: We will have to revise this rule.
We found that, really, that was true for most of these regulations.

We first started off trying to find language, where the appropriations language disappeared, the rule, by itself, would no longer be applicable.

But we just ran into so many problems doing that it just wasn't working, and it also began to look like it was kind of an effort to say, well, I'm doing this because --

CHAIR BATTLE: Yeah. Well, all I would like for us to do is to preserve this history so that if that occurs we have someplace keynoted how to at that point go back and address all of this.

MS. GLASOW: We can be more specific in the preamble what restrictions are carried over into 504.

CHAIR BATTLE: Yeah. I think that's important. I think that's important. Okay.

MS. PERLE: Originally, there was an effort in each reg to make a distinction what was nonLSC, and then we thought it would be better to do it simply here in one place, and that way we could revise this reg and would take care of many of the problems.
CHAIR BATTLE: Yeah. It does.

MS. PERLE: Rather than having to necessarily go back -- we still may have to make some changes in some of them, like 1612, because there are differences in how LSC funds are handled within that.

CHAIR BATTLE: Okay. Anything else on page 4? I had one suggestion. In 1610.2(b), when we speak of Inspection 504(a) of the, I think we ought to say 1996 Appropriations Act throughout any time we mentioned it.

In 1610.2(c), IOLTA funds, "This definition is added to conform with the term as it is used in the revised section," rather than using "This definition is added to define."

MR. MCCALPIN: Can we back up --

MS. PERLE: No, no. This is defining the term that's used. It's not conforming.

CHAIR BATTLE: "As it is used in the revised section on authorized uses of nonLSC funds"?

MS. PERLE: We've used IOLTA in this -- we specified IOLTA funds in this rule. It wasn't before. So this is defining what IOLTA funds means.
CHAIR BATTLE: Okay. It's not anywhere else?

I -- okay.

MS. GLASOW: We did intend to define IOLTA funds.

CHAIR BATTLE: Okay.

MS. GLASOW: To provide a definition --

CHAIR BATTLE: Used in the revised section --

MS. PERLE: There was no definition of IOLTA before.

MS. GLASOW: So it's a brand new definition in the rule.

CHAIR BATTLE: Define. Okay.

MR. McCALPIN: Let's go back up to the sentence that immediately precedes 2(b). Now, without prejudging where we're going to get with that, in the parenthesis, I think it's "for cases or claims under the statute."

And then, since you have referred to 1609 in the first part of the sentence, it seems to me in the prohibition part you ought to refer to 1642.

In other words, you say "attorneys fees, which are also dealt with under the current version of 1609
but are prohibited (for cases not pending on April 26) under Part 1642 under the appropriations act are dealt with in 1610.2(b)(9.) 

In other words, having referred to 1609, it seems to me it was only appropriate to refer to 1642.

CHAIR BATTLE: Yeah. That makes sense.

Anything else?

MR. FORGER: Right back to 1610.2(a)? We're past that?

CHAIR BATTLE: No. You can. You can back up to that.

MR. FORGER: "The reference to fee-generating cases," four lines from the top, "was deleted because neither the LSC Act nor appropriations bill "prohibits" rather than "prohibits."

MR. McCALPIN: Then go another line, Alex --

MR. FORGER: And I got a "so long as."

MS. PERLE: Where are you? I'm sorry.

MR. FORGER: I was on the fifth line, one, two, three, four, fifth line of page 4, the third word would make it a singular.

MR. McCALPIN: Right.
CHAIR BATTLE: "Prohibit" with an "s."

MR. McCALPIN: "Neither the Act nor the bill prohibits."

MR. FORGER: And the next line I would strike another --

CHAIR BATTLE: "So long as." You're here to make sure we have no "so long as" in here.

MR. McCALPIN: Alex, you're feeling about "so long as" is the way mine is about split infinitives.

MR. FORGER: Yes, I know, except when they're more graphic.

MS. PERLE: Did Suzanne and I ever tell you the story about the time that we tried to, in an effort to accommodate your concern about split infinitives, we decided to take one of these regulations and put it through Grammatik, which is one of these programs, so it would pick up all the split infinitives?

It picked up everything, and it took us about three hours to get through about one page. It kept telling us the sentences were too -- this is a passive line. We were going crazy. We never did that again.

It was really funny, though.
MR. TULL: We did end -- we answered a report that we did in two Commentaries with a preposition.

MR. McCALPIN: One ends with "i-n." I circled that.

MR. TULL: We remembered you never end a regulation with a preposition. That's the way I think of them.

MR. McCALPIN: You don't end a sentence with -

CHAIR BATTLE: A sentence or a regulation.

MR. TULL: I know we've gotten into editing the commentary. Is that a conscious choice because this is such an integral part of the reg?

CHAIR BATTLE: It was just -- we started doing that and --

MS. BERGMARK: In sort of a lapse?

CHAIR BATTLE: It was a lapse. But actually, I think it was a healthy one because --

MS. GLASOW: In an interest of saving time --

CHAIR BATTLE: Do you want to handle the same sections together and go back and forth or finish this editing?
MS. GLASOW: Yeah.

CHAIR BATTLE: Okay. All right.

MS. GLASOW: We had made a decision earlier that for, you know, just stylistic changes we might have them passed on to us.

So I'm just concerned if we spend too much time on that we may lose --

MR. FORGER: I think so long as we're referring to --

CHAIR BATTLE: We're down to 1610.2(b), which will take us into it. Do we have -- are there any just straight editing changes, any other editing changes?

MS. PERLE: Are we still -- are we talking about the --

CHAIR BATTLE: Commentary, yeah. While we're here, let's finish the sweep. Do you see anything else?

MR. MCCALPIN: Let me raise something that's not exactly that. You have defined "private attorney" as "one engaged in the private practice of law on a for-profit basis." What does that do to house counsel or government attorneys?
MR. TULL: Well, house counsel --

MR. McCALPIN: Are they in the private practice maybe?

MR. TULL: I don't think they would be.

CHAIR BATTLE: They're still for-profit. It's government attorneys that are not-for-profit.

MR. TULL: Not-for-profit. Yeah, which is on -- where is that

MR. McCALPIN: I don't know where we use it.

CHAIR BATTLE: What page are we on, 5? 4 and 5, page 4 and 5.

MS. PERLE: I honestly think that's something that we could deal with if the issue were ever really to arise that the General Counsel's Office could deal with that through interpretation.

MR. TULL: What's the import of that? I can't remember what the impart on that is.

MS. PERLE: It's in the applicability --

MR. TULL: I think that for purposes of this regulation that appears not to be a problem, but the degree to which we use the term "private attorney" elsewhere and refer to pro bono lawyers there is an
effort underway to encourage government lawyers to participate in pro bono programs.

MR. McCALPIN: And they're doing it.

MR. TULL: Exactly. So this particular one has to do where there is a contract with a private attorney and then, sort of, a follow-up from that, which I presume you would never contract with a government lawyer to carry out one of these functions.

So it may not be a problem here, but the degree to which this definition becomes something which is referred to elsewhere we need to probably address that in the commentary and say specifically that this has to do with a very specific application.

CHAIR BATTLE: Is there anything else?

MR. FORGER: On page 6, you refer -- I think the first time I recall that the committee had a particular view. Is that something that's proper in the commentary, I mean, as distinct from Legal Services Corporation?

CHAIR BATTLE: Yeah. We do that from time to time.  

MR. FORGER: Do you?  

CHAIR BATTLE: Yeah.
MR. FORGER: Okay.

MS. GLASOW: There are some places where I've used the term "committee" where I should have said "board," and I have to go through and check that. Because if it's going to be an interim regular --

CHAIR BATTLE: It needs to be "board" as opposed to "proposed reg."

MS. GLASOW: Right.

MR. FORGER: I don't care for any of that sentence --

CHAIR BATTLE: "The board felt."

MS. PERLE: Or "decided" I think is what --

CHAIR BATTLE: That was one of those 9 p.m. kind of statements.

MR. FORGER: In view of the fact that the board --

MR. McCALPIN: I think it's also kind of clumsy to talk about "an entity of attorneys."

MS. PERLE: Well, that's, again, the statutory language.

MR. McCALPIN: Huh?

MS. PERLE: That's statutory language.
MR. McCALPIN: That's statutory? Is it?
CHAIR BATTLE: Yeah, it is.
MS. PERLE: From the LSC Act.
MR. McCALPIN: The LSC Act?
MS. PERLE: Yes.
CHAIR BATTLE: Okay. We're getting down to 1610.6.
MR. McCALPIN: .6?
MR. FORGER: Right.
CHAIR BATTLE: That's on page 7.
MR. FORGER: What's a self-execution exception as distinct from an exception?
MS. PERLE: Where are we?
CHAIR BATTLE: 1610.6. And it gets to something Alex is raising. I didn't understand this self-executing exception and why it's a grant of a self-execution exception and then later "without affirmatively granting waivers."

I guess what we're trying to get at, and this we'll look at when we get to the statute, is the fact that what we're saying is that this applies -- these restrictions apply, and exceptions are not something that one seeks a waiver for. Is that the point that
we're making?

MS. GLASOW: We can take out "self-execution."

CHAIR BATTLE: There might be some way to word this that doesn't get into double --

MS. PERLE: The point was that the old rule had a waiver. We had to seek a waiver.

CHAIR BATTLE: Okay.

MS. PERLE: And we didn't think there was really a need to seek a waiver, and, in fact, waivers have never been sought.

The Corporation just made its decisions about these grants without going through any kind of a process of waiver, and they took into consideration these issues and requirements or exceptions to the requirements as they were making their decisions about to whom the grants were going to be made.

That's why I said it was self-executing in the sense that there wasn't any necessity to go through a process which was required under this -- under the previous rule but never really followed.

MR. FORGER: But since we're addressing
current stuff, I guess --

MS. GLASOW: We can fix this.

CHAIR BATTLE: Can we fix that?

MS. GLASOW: Sure.

MR. FORGER: Just say "grants on" --

MS. GLASOW: Rewriting.

MR. FORGER: Because I then would have to know how I go about getting a self-executing exception, and that might take --

MS. GLASOW: Actually, I thought about taking that out before. I must have missed it.

CHAIR BATTLE: Okay. When we get down to about, one, two, three, four lines from the bottom where we start -- "This subsection makes it clear that the appropriations act restrictions or representation of prisoners does not apply to such lawyers," there are so many different types of lawyers.

You’ve got private attorneys, law firms, legal aid programs. Are we talking about that same group, or are we just talking about private attorneys?

If we’re talking about private attorneys, we say it earlier. Why don’t we just say "private
attorneys, law firms and legal aid organizations." And why do we say "legal aid organizations" down here and then "legal aid programs" up a little bit earlier.

MR. McCALPIN: Let me back up even beyond that. If you look over on page 12 at the actual provision of the regulation, "If the Corporation makes a contract with" and 2 is "a legal aid organization that provides criminal -- legal aid organization accept criminal related cases -- don't apply."

So really, in 1, what we're talking about is a private attorney, law firm, state or local entity of attorneys which represent clients in criminal cases.

In other words, aren't all the of these relating to representation in criminal cases?

CHAIR BATTLE: Yeah. Yeah.

MR. McCALPIN: So 1, stated as it is, is too broad. MS. PERLE: So you're suggesting adding before the comma "that represents clients of criminal cases"?

MR. McCALPIN: Yeah. Now, if you go back to where you were, LaVeeda --

CHAIR BATTLE: Yeah.
MS. PERLE: And that is stated in the -- in
the preamble, it does say "which handle criminal cases
in their nonLSC" --

CHAIR BATTLE: Right. But all I want to do is
just be consistent in our language using. If we're
going to talk about private attorneys, let's say that
in both places. If we're going to talk about law
firms, say that, and legal aid organizations, say that
instead of programs and then organizations. Okay.

Anything else in the commentary? We were in
Definitions. There is nothing else in the commentary,
when we leapt back into the commentary and began to do
our editing.

So let's just go back through Definitions and
see if there anything else, other than what Bill has
already pointed out that we need to define "nonLSC
funds" under Definitions.

MS. PERLE: I have a question. If we define
"nonLSC funds," do we have to define "private funds"
and "public funds" separately?

CHAIR BATTLE: There are instances where
nonLSC funds are -- where we've got an appropriations
law that says you cannot use nonLSC funds for certain
things, but our act says private funds.

So I think that those definitions --

MS. PERLE: And there is a difference?

CHAIR BATTLE: Yeah. I think those
definitions are still useful.

MS. PERLE: Well, my question was do we have
to define "private funds" and "public funds" in
addition to "nonLSC funds" and "IOLTA funds" and
"travel funds"? Do we have to define all of those
things?

MR. McCALPIN: We may have to.

CHAIR BATTLE: Yeah, I think so. We have
IOLTA funds already in the definitions. We need to add
private funds and nonLSC funds to the definitions.

MS. PERLE: And public funds.

CHAIR BATTLE: And public funds.

MS. PERLE: Okay.

MR. FORGER: And nonLSC embraces everything
except LSC.

CHAIR BATTLE: Yeah.

MR. McCALPIN: LaVeeda, where are you now?
CHAIR BATTLE: We are in the Definitions section in the actual rule 1610.2.


CHAIR BATTLE: Page 9.

MR. McCALPIN: Okay. Let me suggest that we have regularly -- it says here, "'Purpose prohibited by act' means any activity prohibited by the following sections of the LSC Act," and we list all those down and those provisions of the regulations that implement that section.

Here I think we ought to refer to those. In other words, I think we ought to say Part 1608 after line 1, Part 1613 after line 3. In other words, if we're citing to the statute, if we say "Pursuant to the statute and regulations," and we cite to the statute, then I think we ought to cite to the regulation as well.

CHAIR BATTLE: Okay.

MR. McCALPIN: This is not in the --

MS. PERLE: Some of them we don't have regulations for them.

CHAIR BATTLE: Some there are not --

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MS. PERLE: Some there are no regulations.

MR. McCALPIN: What?

MS. PERLE: Some there are no regulations.

MR. McCALPIN: Yes, No. 2. No. 2 there is none.

MS. PERLE: 6 --

CHAIR BATTLE: 6, 7, 8.

MR. McCALPIN: And the same is true under subsection (b).

CHAIR BATTLE: Well, and subsection (b) --

MR. McCALPIN: We have part 1617 on class actions, 32 on redistricting, 20 on priorities, 42 on attorneys fees.

MS. GLASOW: All the new regs would be under that. All the brand new regulations --

MR. McCALPIN: Well, no.

CHAIR BATTLE: But we don't have rates for all of these sections.

MR. McCALPIN: 17 and 20 --

MS. GLASOW: In addition to all the new ones.

CHAIR BATTLE: Anything else in Definitions?

MR. McCALPIN: Yeah. Under (f), "State or
local entity of attorneys' means involuntary or mandatory bar association, pro bono program, private not-for-profit organization."

It seems to me you may have private not-for-profit organizations which are not entities of attorneys, or you may have private not-for-profit corporation, including attorneys, which are not what you're talking about here.

CHAIR BATTLE: Legal organizations, private not-for-profit legal organizations?

MR. McCALPIN: I don't know, but it just seemed to me that the private not-for-profit organization was not consistent with what we were talking about.

MS. PERLE: Well, you know, Congress didn't define what they meant by "state or local entity of attorneys" --

MR. McCALPIN: Where is that?

MS. PERLE: It's in Section 1010(c) of the Act.

MR. McCALPIN: 1010(c)?

CHAIR BATTLE: I can think of a private
nonprofit legal organization in Alabama. The Southern Poverty Law Center is a nonprofit organization. It's organized as a not-for-profit organization.

It is not a -- it's not public. It's not a private attorney organization for profit. But the question is a private not-for-profit organization, corporation or similar entity of attorneys.

MR. McCALPIN: Yeah. We're not talking about every private not-for-profit organization, but since it's part of a definition of an entity of attorneys, maybe it's assumed that --

CHAIR BATTLE: Yeah.

MS. PERLE: Well, we could add "of attorneys" at the end.

CHAIR BATTLE: Yeah. That's my suggestion.

MS. PERLE: Or we could put "private nonprofit legal organizations, corporation or similar entities of attorneys."

CHAIR BATTLE: But what we're really doing is we're defining "entity of attorneys." We're defining "entity" by saying "private not-for-profit organization, corporation or similar entity of
attorneys."

But you are defining an entity of attorneys by saying it’s an entity of attorneys, defining the term by --

MS. PERLE: Well, do you want to say "legal organization, corporation or other similar entity"? Does that do it?

CHAIR BATTLE: We can. But I don’t know if there is such a thing as a nonprofit legal organization, is there?

MS. PERLE: Yeah, the Southern Poverty Law Center.

CHAIR BATTLE: Lawyers committee is a not-for-profit organization --

MR. McCALPIN: Or your reference service might be.

CHAIR BATTLE: Okay.

MS. PERLE: Yeah, lawyer referral service.

MR. McCALPIN: Legal Aid Society.

CHAIR BATTLE: Okay. Anything else in Definition? Prohibition, 1610.3.

MR. McCALPIN: Why do we not include the
prohibition contained in Section 506?

MS. PERLE: What's 506?

MR. McCALPIN: Suits against the Corporation.

MS. PERLE: Because that's only with LSC funds.

MS. BERGMARK: That's an LSC funds restriction.

MS. PERLE: We didn't include any of the restrictions that are only LSC fund restrictions except for those that are, sort of, exceptions to the other ones, like on legislative --

CHAIR BATTLE: I wondered why we didn't have a reg on Section 506.

MS. PERLE: There is no reg.

CHAIR BATTLE: I know.

MS. PERLE: I don't think you need a reg.

MS. BERGMARK: Yeah. We're going to have time for it, it looks like.

CHAIR BATTLE: This isn't enough work for us.

MS. PERLE: I don't think you need a reg. I mean, I think --

CHAIR BATTLE: It's pretty straightforward.
MS. PERLE: One of the OMB circulares that provide guidance to the Corporation prohibit the use of --

CHAIR BATTLE: LSC funds.

MS. PERLE: -- federal funds to sue the -- to sue the federal government, and I think it's sort of a similar thing here. That's the reason that that's not included because this is only nonLSC funds.

MR. McCALPIN: Okay.

CHAIR BATTLE: Okay. 1610.4, Authorized use of other funds." This is a section with three subsections, subsets. Any questions about the three of them?

MR. McCALPIN: I don't see why you say "may receive public or IOLTA." Why don't you say "A recipient may receive public funds, including IOLTA," and use them in accordance --

CHAIR BATTLE: Is IOLTA just defined as public? How do we define IOLTA?

MR. McCALPIN: Well, we've always held --

CHAIR BATTLE: We define IOLTA as "fund derived from programs established by state court
rules," and we don't even mention the fact that they're public funds.

    MS. GLASOW: We never have defined them clearly as public funds. In an earlier version of 1610, I think we were talking about treating them like public funds, but we never have done a formal definition of them.

    MS. PERLE: Well, the Corporation has always treated IOLTA funds as public after that first set of opinions that were several years ago.

    Some states, for a variety of reasons, within the state don't treat them -- they may be public for certain purposes and not public for other purposes, but for purposes of LSC, we want to be consistent in terms of the way IOLTA funds work.

    CHAIR BATTLE: But the definition of IOLTA funds doesn't mention that they're public funds.

    That's the point that I'm raising.

    MS. GLASOW: Right. So either when we define "public funds" for this rule, we can include them in that, or we can add language to the IOLTA definition that defines them as public.
CHAIR BATTLE: We just need to make it clear.

MS. PERLE: Well, I think by changing the way
that Bill suggested, it says that for purposes of this
rule we're going to treat them in the same way we're
treating public funds, and I think that's the best way
to handle that.

Excuse me. Now I remember. That's why the
"or" was in there instead of "including," because some
of the IOLTA providers were perfectly happy to say that
for purposes of LSC IOLTA should be treated as public
funds, but they didn't want it to be defined --

CHAIR BATTLE: As public funds.

MS. PERLE: Because in their states, for a
variety of reasons --

CHAIR BATTLE: They're not.

MS. PERLE: They're not.

CHAIR BATTLE: Okay. So public or IOLTA
serves that purpose.

MS. PERLE: So I would suggest that we leave
it the way it's written.

CHAIR BATTLE: Okay.

MR. FORGER: How do you exclude private
contributions?

MS. PERLE: Pardon me?

MR. FORGER: Unless that's public funds. How broad is -- if I contribute $5, is that public funds?

MS. PERLE: No. That's private.

MR. FORGER: And is that excluded? I can't use it for the purpose given?

MS. PERLE: That's right.

MS. GLASOW: Correct.

MS. PERLE: Under the LSC Act provisions.

MR. FORGER: But can I use it if it's not consistent with 504?

MS. PERLE: No. The LSC Act -- 1050 of the LSC Act restricts private funds to the same degree that LSC funds are restricted. There is an exception for public funds in the LSC Act restriction.

MR. FORGER: Not with 504.

MS. PERLE: Not with 504. There is no exception for private funds -- for public funds.

Excuse me.

MR. FORGER: I mean, for me, being naive, just
reading (b), it says to me that I can't accept private funds even if they're not used for an activity prohibited by 504.

MS. PERLE: I'm sorry. I'm confused.

MR. FORGER: That's probably me, Linda. On (b) --

MS. PERLE: 1610.4(b)?

MR. FORGER: Yes. When I read this, I can receive public and IOLTA funds, but I can't receive any private funds.

MR. TULL: Because this is written as an authorization to (c), as opposed to an authorization to spend inconsistent with the Act so long as used for purposes for which they were granted.

MS. GLASOW: I think (b) was written, the first long clause, allows you to receive public or IOLTA funds and use them in accordance with the purpose they're provided, which would allow you to use them for purposes prohibited by the LSC Act.

But then you hit the 504 restrictions that say you can't do that activity regardless of what funds you're using. So that's we added "so long as they're
not used for anything prohibited by Section 504."

MR. McCALPIN: So long as.

CHAIR BATTLE: But he’s saying private, public
or IOLTA.

MS. PERLE: But I think that what Alex is
suggesting, and I don’t think it will hurt, would be to
add another --

CHAIR BATTLE: Yeah, private.

MS. PERLE: "Recipient may use private funds
only --"

MR. McCALPIN: "Consistent with the LSC Act."

MS. PERLE: "Consistent with the LSC Act and
Section 504."

MR. McCALPIN: You’re adding another provision
to it.


MS. BERGMARK: And then you’ve covered every
category of nonLSC funds that you’ve defined.

MS. PERLE: Right.

MS. BERGMARK: Right?

MS. PERLE: Right.

CHAIR BATTLE: We’ve got another "so long as"
MR. FORGER: Yeah, I know.

MS. GLASOW: I've circled it.

CHAIR BATTLE: Any changes to (c)? Laurie?

MS. TARANTOWICZ: I just have a question.

1610.4 (a) (b) and (c) use -- (a) uses "in accordance with the specific purposes for which funds are provided," (b) says that "in accordance with the purposes for which they were provided," and (c) says, "funds used for specific purposes for which they were received." Is there a reason that it's three different formulations?

MS. PERLE: There is a reason why one is specific and one is not specific. The LSC Act doesn't have the word "specific" in it.

MS. TARANTOWICZ: Right.

MS. PERLE: There was some confusion on the tribal, because the LSC Act says -- doesn't say "specific," and in 504, I think it does. We could at "specific" for all of them. I don't really think that there is any significant difference.

MR. TULL: Does "specific" mean that the grant
states the purpose, as opposed to, sort of, a broader -

MS. PERLE: Well, of course, if you get a
general assistance grant, that means you can do
anything with it. In other words, if you get -- if a
recipient gets a grant from a foundation which says,
"Here, you can use this money for whatever you want to
use it for" --

MS. GLASOW: For legal services to the poor.

MS. PERLE: For legal services to the poor.

MS. GLASOW: As long as you’re within the
grant terms. It does not mean that you can only use it
for housing cases, only if the grant says specifically
you can use it for housing cases.

If the grant allows you within broad terms to
do a variety of legal assistance cases, it would
include housing. It doesn’t have to be that specific
to allow you to use them for the purposes --

CHAIR BATTLE: Okay. Can we edit the "so long
as(s) in (b) and (c)?

MS. GLASOW: Yes.

CHAIR BATTLE: The other point that I think --
well, Laurie raised a point that Linda addressed in part why we have "specific purposes" in (a) and just "purposes" in (b). And then, in (c), we have "specific purposes."

MS. TARANTOWICZ: And then, in (c), you have "received," and in (b) and (a) you have "provided."

CHAIR BATTLE: We could just make that language. If it's specific, then we will use one methodology for clarifying that, and if it's not specific, I think we can -- we can make that editing change in (c).

Anything in 1610.5, Notification? Anything in 1610 -- I'm sorry. Rick?

MR. TEITELMAN: There is an inconsistency in the preamble that talks about the IRS requiring notification of donations of more than $250, and it's in the preamble -- want to be consistent with the Internal Revenue Code.

This says less than $250, which makes a big difference if you're the person setting up notifications.

MS. PERLE: Right.
CHAIR BATTLE: More than.

MR. McCALPIN: If it's $250, you have to notify the IRS.

MS. PERLE: I think that's right, yes.

MR. TEITELMAN: It says more than $250, but I'm just saying --

MR. McCALPIN: 250 or more.

MR. TEITELMAN: This says less than 250.

MS. GLASOW: We will check that and make it consistent.

CHAIR BATTLE: It should be -- so should it be $250 or less? Is that what you're?

MS. PERLE: No, no. In the preamble, it should be $250 or more.

MR. FORGER: The reg is correct, right? It says less than 250.

CHAIR BATTLE: Okay. And there is this -- you know, I've raised a question, when I read 1610.5, if you've got a banquet and you're getting lawyers to buy tables for the banquet and that's a donation to a Legal Services program and you're going to have to send out, as people make donations for their tables, a list of
the restrictions to everybody saying, "Thank you for your donation, and by the way, we can't use this money for these purposes."

MS. PERLE: I don't think that LSC is -- I think in the program letter it didn't list all the specific restrictions. It just said that the money has to be used consistent with the restrictions in the Act.

CHAIR BATTLE: But you've got to send a thank you letter with a little --

MS. PERLE: With a little tab note.

CHAIR BATTLE: At the bottom saying, but this money cannot be used in a manner inconsistent with the Act or the regulations or the law.

MR. TULL: Correct, and not specifically listing all those.

CHAIR BATTLE: Okay.

MR. MccALPIN: Just like the other -- the IRS notice says that no consideration was received.

CHAIR BATTLE: Yeah. But that's -- that adds another administrative burden.

MR. MccALPIN: Yeah.
CHAIR BATTLE: You can't just call people up and thank them for the donation anymore.

MS. PERLE: Well, but the point is we put in the $250 threshold specifically so that you could for those people just call them up and say thanks you.

Since you have --

MR. McCALPIN: Not for 250.

MS. PERLE: No, under 250. But since -- we assumed that since, under the IRS rules, you have some obligation of providing acknowledgment anyway, if it's 250 or above.

CHAIR BATTLE: Then you'll provide that acknowledge with a caveat -- okay.

MR. FORGER: Suppose you're eating a roast beef dinner for your 250.

MS. PERLE: Well, you subtract the cost of the dinner, and it is less than 250.

MR. FORGER: So maybe one simply interprets this -- this is for the on-site monitors -- that the contribution means that amount which exceeds the value of that which you have consumed.

If you paid 250 for a ticket to the dinner,
they are required to tell you that the dinner cost
$23.08. So your contribution is not 250.

MR. TULL: What is the -- and that's, I'm
sure, stated precisely in the IRS regulations on it.

MS. PERLE: And I read it, but I honestly
don't remember --

MR. TULL: We should have brought that.

MS. BERGMARK: It should be the same as the
IRS requirements.

MR. TULL: The triggering mechanism, whether
the triggering mechanism is the gross amount --

MR. McCALPIN: Gross.

MR. TULL: -- or the actual value of the
contribution.

MR. McCALPIN: Gross.

MR. TULL: The gross amount?

MR. McCALPIN: Gross.

MS. GLASOW: We could cite the IRA regulation
in the preamble so that people --

MS. PERLE: I think we did --

CHAIR BATTLE: That's helpful. I think that
would be helpful if you did.
MS. PERLE: We cited the IRS, the code section.

MR. FORGER: So that's a gross figure? And if you're giving him a good dinner, you know, they still have to -- I mean, then it's not --

CHAIR BATTLE: If it's chicken, you don't have to report it.

MR. TULL: But the theory being that under IRS regulation you already got -- so it's just adding one sentence to it.

So if the IRS says it's the gross figure,

then --

MR. FORGER: Even if you get a gross dinner.

MS. BERGMARK: And you probably did.

CHAIR BATTLE: Applicability, 1610.6. We've, kind of, covered this in part just a moment ago, (a)(1), we made a change to (1).

MR. McCALPIN: I think we take a period out after "appointment" because the thing runs on.

CHAIR BATTLE: Yeah.

MS. PERLE: It's not -- it's a comma.

MR. McCALPIN: Looks like a period on mine.
CHAIR BATTLE: Anything else on (a) Applicability, (b) or (c)? And 1610.7, Accounting, "Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements" in a manner that we prescribe. Anything else? Okay. We have just covered 1610, the Use of nonLSC funds with 30 minutes to spare on the day.

Let's take a break. Let's take a break.

Let's look at what else we got. We got a real short one on redistricting. We might be able to get it done.

MR. McCALPIN: Oh, I think so.

CHAIR BATTLE: Let's take a five-minute break.

(A brief recess was taken.)

CHAIR BATTLE: We will, following our brief five-minute break now, entertaining discussion on 1632 on Redistricting.

This is a very short reg, and it simply is an interim reg which will allow us to now apply the existing restriction which we have with regard to
redistricting to funds that were formerly
unredistricted in the past based on language in 504.
Can you give us the background on this,
Suzanne?
MS. GLASOW: Basically, we fundamentally
changed this rule to comply with the new requirement
that the restriction apply regardless of what funds are
being used. It's what we call in-house an entity
restriction.
However, in the process, we did make a few
other changes just to clarify some terms. It was
pointed out to us by several, including your IG, that
some of the definitions were redundant in language that
made it confusing that suggested, perhaps, that we were
saying something else or meaning more than the
definition was meant to say.
CHAIR BATTLE: Okay.
MS. GLASOW: So we really just revised a
couple of sections in this rule.
CHAIR BATTLE: Okay. We aren't publishing
the full --
MR. McCALPIN: The document that I have does
not have a 1632.1. Now, does that mean that you are not amending it?

MS. GLASOW: Yes. I only put in this rule -- this is one of the first ones I did, and because we were making so few revisions, I was only printing the sections that we were actually amending.

When you're only amending a few provisions in a rule and it goes to the Federal Register, you don't print the whole rule normally. So that was my intention here.

We had comments, I think, in your memo and several others that it would be preferable to publish the whole rule and just point out which sections were being amended.

And we can do that very easily, and we can put that in for the next meeting, if you like.

MR. McCALPIN: The Federal Register is one thing. The people that have to live with these rules are something else.

I think that if this goes out like this, a program is not going to realize that there is another section which is apart of this rule which isn't here.
MS. PERLE: And I also think that it's very difficult for you, as a Board, to understand exactly what you're doing if you don't see it in the context of the rest of the rule.

MR. McCALPIN: That's right.

MS. PERLE: That's was the objection that I had to it.

MR. McCALPIN: I'm sensitive to your cost problem, but this is a relatively minor cost. It's one paragraph. When we get to aliens, that's a very big one.

CHAIR BATTLE: Yeah.

MR. McCALPIN: But I still think it's important to do it.

CHAIR BATTLE: How much is missing?

MR. McCALPIN: One paragraph.

CHAIR BATTLE: Just one paragraph? Okay. Well, then, that's not a major cost factor, it seems to me. That's 1632.

Then, when we print out 1632, why don't we just include the Purpose section, 1632, the Purpose section, now reads, "This part is intended to insure
that funds available to recipients will be utilized to
the maximum extent for the delivery of basic day-to-day
legal services to eligible poor clients.

"Involvement in redistricting activities does
not constitute the provision of basic day-to-day legal
services and is prohibited by this part."

So it did not need to be amended to include
the issue of nonLSC funds, but when we print this out,
we'll include that language.

Okay. 1632.2, Definitions. Pretty much these
definitions do track the existing rule. Is that
correct? Are there any specific changes to this?

MR. McCALPIN: No. There is no change to the
first one, is there?

MS. GLASOW: No.

CHAIR BATTLE: To the advocating or opposing
any plan is the same. Recipient --

MS. GLASOW: There is no change to these.

CHAIR BATTLE: To recipient -- redistricting
is changed, right?

MS. GLASOW: That is correct.

CHAIR BATTLE: Okay. Tell us about the
changes in redistricting.

MS. GLASOW: What we did is we took some of the language from the prohibition and added it to the term "redistricting" -- I would have to, actually, have --

MR. McCALPIN: What you're doing, you took it out of .4. Let me suggest to you that's an inappropriate way of doing it.

I would suggest that you eliminate the last sentence under (c) at the top of page 5 and that you include a new paragraph 2 under 1632.3, which would read, "This part does not prohibit service to an eligible client under the Voting Right Act of 1965, as amended," with the cite, "which does not involve redistricting as herein above defined."

MS. PERLE: Because otherwise, you're defining "redistricting," and then you're saying so long as it doesn't involve redistricting.

MR. McCALPIN: Well, it seems to me you put the prohibition and the exception from the prohibition right at the same place so that you see the full parameter of what you can do or not do in one
paragraph.

    CHAIR BATTLE: You’re suggesting, Bill, that we have a separate section (d)?

    MR. McCALPIN: No. No. I’m suggesting that you have a separate section sub 2 under 1632.3.

    CHAIR BATTLE: Okay. So you say (a) for neither and then (b).

    MR. McCALPIN: Is it (a) or (1)?

    CHAIR BATTLE: It would be (a).

    MR. McCALPIN: Okay. Whatever. That becomes (a) or (1), and then, what I just read becomes (b) or (2).

    CHAIR BATTLE: Okay.

    MR. McCALPIN: And that takes out that sentence in (c).

    CHAIR BATTLE: Okay. Any other changes to 1632.3? We have stricken the previous existing Permissible Activities section in favor of including under the prohibition of subsection (b), which pulls part of what was contained in 1632.4(a) up.

    MR. McCALPIN: Well, except that we haven’t said yea or nay as to whether we’ve rescinded .4.
MS. PERLE: Well, it says --
MS. GLASOW: You mean in the preamble?
MS. PERLE: Well, I don't know about the
preamble, but it says on page 5 --
CHAIR BATTLE: 3, that it's deleted.
MS. PERLE: Section 1632.4 is deleted.
CHAIR BATTLE: A new section becomes --
MR. McCALPIN: Well, then, I would delete the
new section 4 also.
CHAIR BATTLE: The written policy.
MR. ASKEW: I move to table. Oh, I'm not on
the committee.
MS. GLASOW: Actually, this section 4, again,
was one of your earlier regulations we did we changed
"governing body" to "recipient policies and
procedures," and that's not reflected in your copy.
CHAIR BATTLE: Okay. All right. And this is,
again, the table on -- John, maybe you can help me.
How is this monitored now? Are there written
procedures?
We did not previously have a provision in the
redistricting regulation that addressed this adoption
of written procedures. So how does the monitoring take
place now?

MR. TULL: Well, immediately right now we're
in the process of figuring that out with the inspector
general in terms of how this will be looked at by
auditors.

I'd have to look, to be honest with you, and
see what questions we --

CHAIR BATTLE: Okay. Can we do that before we
meet tomorrow?

MR. TULL: Sure.

CHAIR BATTLE: Because my thinking is there
are several regulations that are just an extension of
the present application of prohibitions on the use of
LSC funds to private funds, and with that we're adding
this requirement of a policy.

And I'd like to know what used to take place,
how we handled it, how we monitored it so that we can
assess whether or not there is this need to implement a
requirement on programs to have a written policy in
each of these areas. Okay?

MR. TULL: Okay.
CHAIR BATTLE: Okay. All right. Is there anything else that we need to look at on redistricting?

MS. PERLE: I have a question.

CHAIR BATTLE: Okay.

MS. PERLE: When you took out 1632.4(c) and (d), are you taking those out because you think they're unnecessary, or does that suggest that this activity is no longer permitted?

MR. TULL: No, because they're unnecessary.

MS. GLASOW: Unnecessary.

MS. PERLE: I think you ought to make that statement, if you haven't done that, in the preamble, because I don't want to suggest --

MR. TULL: Right, that somehow this is a change of policy.

MS. PERLE: That it's a change of policy.

CHAIR BATTLE: Well taken. Well taken, because there were two other aspects to that. Is there anything else on 1634 -- I'm sorry, 1632.4? Anything else? Okay. Ernestine?

MS. WATLINGTON: Since we have a full copy of
these minutes, do you want to address that?

CHAIR BATTLE: Yeah, I can. Let me do that.

MR. McCALPIN: Are relieving (d) out also deliberately?

MS. GLASOW: (c) and (d) and, of course, (b), travel funds, you still can use travel funds for this.

MR. McCALPIN: That's right.

MR. TULL: The thought was that 1610 addresses what is now covered in (b). So it's really redundant about that, but (c) is the policy of the Corporation with regard to everything. And we, sort of, singled out this one particular one to say you can do this under these circumstances.

And (d) is explicitly permitted under 1604, and that would be a part of it.

MS. PERLE: I think you need to make that --

MR. TULL: Clear in the commentary.

MS. PERLE: -- clear in the commentary.

MR. TULL: What we didn't want to do is to have a statement of a prohibition and then a listing of ways that looks like it was advice to programs as to how to go ahead and do it.
It's an issue of topics, among other things, and this is here because of the sensitivity when this regulation was first adopted initially because -- I mean, this would be fixed by the fact that we don't have to republish the whole reg, but the initial rendition of this the only thing changed was 1632.4.

So the actual reg that we would have sent over to the Federal Register just had a listing of things you could do and took out the section (b), which didn't appear to be precisely the message we wanted to send. So that's the reason.

CHAIR BATTLE: Okay. Are there any other suggested changes? I don't see anyone from the OIG's office, but we had comments, suggestions for typos, clarity. Have we already taken those into account and had some discussion?

The copy I have is dated June 19th, so I'm assuming the staff -- well, this was to Victor Fortuno. So you've taken these into account. Okay.

And Ernestine has brought up a good point. We have now passed around to all the Board members the final page to the February 23, 1996, minutes.
And I'm hoping that each of you have had an opportunity to review those minutes and, in doing so --

MR. McCALPIN: What have we got?

CHAIR BATTLE: Bucky passed you --

MR. McCALPIN: I got a new set of May 19th.

CHAIR BATTLE: No. You should have gotten February 23rd.

MR. ASKEW: I slid it over here to you this morning.

MR. McCALPIN: Well, this is what I got, and this is May 19th, which used to be two pages, and now it's three.

CHAIR BATTLE: No. You should have gotten this.

MS. WATLINGTON: You should have got this one.

CHAIR BATTLE: Because we had only gotten pages 1 and 2 and not -- that's my only copy, Bill.

MR. McCALPIN: Okay. I'll give it back to you.

MS. WATLINGTON: I think I got two. So they gave me yours, probably. I just noticed that.
CHAIR BATTLE: Okay. Well, then, I'll take this one. You can keep that.

MR. McCALPIN: I'll give it back to you, but let me show you here is February 23, which I've gotten just now for the first time from you. Here is the May 19th that I was operating on this morning. No. Here is the one I was operating on this morning. These are just two pages.

CHAIR BATTLE: Well, there was a front and a back to the pages this morning.

MR. McCALPIN: This is it.

CHAIR BATTLE: Yeah. The copy that I have was much like -- this is Ernestine's copy. I had May 19th like this, front, back and then this.

MR. McCALPIN: I had nothing on the back.

CHAIR BATTLE: Oh, okay. Well, there was a problem.

MR. McCALPIN: We approved those this morning. Okay.

CHAIR BATTLE: So now what we have is February 23rd, this one, which has page 2. That was the page that was missing.
Okay. Let me just say now that both of my Board members have had an opportunity to review the draft minutes for February 23, 1996, I will entertain a motion to approve these minutes.

**MOTION**

**MS. WATLINGTON:** I move.

**MR. McCALPIN:** Second.

**CHAIR BATTLE:** Okay. It has been properly moved and seconded. All in favor?

(A chorus of ayes.)

**CHAIR BATTLE:** Okay. Motion carries. Just as a matter of process, at this point, though we have gone over, to my glee and surprise, six regulations at this point in time, out of the 15 that we have on our agenda for this meeting, we are not at a point that we need to move anything, because we've got substantial revisions that will need to be made to these.

And we will get an opportunity to look at those revisions when we meet again just before the board meeting, and at that point in time I think we can entertain a motion from the committee members to adopt a resolution or make a recommendation -- well, but even
so, what we normally do is send them out for
publication.

So we would adopt a motion that they go out
for publication, because this interim rule -- now, tell
me, Suzanne, does this go to the Board?

MS. GLASOW: This? Yes.

CHAIR BATTLE: Okay.

MS. GLASOW: Because it's an interim rule, it
is effective. In other words, it's not --

CHAIR BATTLE: So we should make our
presentation -

MS. GLASOW: The day that it
becomes effective it's a requirement on our recipients.

CHAIR BATTLE: So we have to, then, adopt --
we have to do a resolution to the Board to adopt these
as at our next meeting?

MS. GLASOW: That's correct.

CHAIR BATTLE: So as we do these --

MR. McCALPIN: We would adopt --

CHAIR BATTLE: -- editing changes --

MR. McCALPIN: We would adopt a resolution on
the 19th recommending that the Board adopt them on the
20th as interim rules.

CHAIR BATTLE: That's right. Exactly. So we need to have that drafted along with what we're doing, those resolutions, so we can present them at the Board meeting on the 20th.

MS. GLASOW: All right.

CHAIR BATTLE: Okay.

MR. McCALPIN: Maybe we can just have one resolution listing all the --

CHAIR BATTLE: Yeah, but I think we've included in the past just the substance of the rule for the Board members that are not part of this committee.

I mean, it's just a word processing trick, but we've got some work to do on that. Alex, did you have anything you wanted to add?

MR. FORGER: Are you going to review once again the revisions of those that we've just looked at?

CHAIR BATTLE: No.

MR. McCALPIN: We're going to look at those on the 19th.

CHAIR BATTLE: We look at them on the 19th.
MR. FORGER: Okay. We’re going to send it out to the Board this week, I assume.

CHAIR BATTLE: Well, what we will do, the Board will receive these prior to the board meeting, and we will receive them prior to the board meeting for next week. Right?

MS. GLASOW: As quickly -- we only have about a week to do this. I can’t promise how quickly we will get them out.

MR. FORGER: Presumably, the Board has got to rely, in large measure, on the recommendation of the Ops & Regs.

CHAIR BATTLE: Yes.

MR. FORGER: You can point out policy issues that are implicit, but probably the language and editing can await the public comment. So I suppose it can be a fairly narrow focus for the Board as a whole rather than go through what you have --

CHAIR BATTLE: Oh, yeah. We have always just simply --

MR. McCALPIN: I don’t think there have been any instances where we have recommended to the Board
adoption of something as final that it was even debated.

MR. FORGER: Well, I remember on our evictions, you know, we got into the issue should it be prisoners or convictions within a year and the like.

I mean, that still could be reserved for public --

MR. MCCALPIN: I wasn’t here for --

CHAIR BATTLE: Yeah. That was one.

MS. WATLINGTON: That was the only one --

CHAIR BATTLE: That was the only one out of all the ones that we’ve done so far.

MS. WATLINGTON: Downstairs I just told him about that.

CHAIR BATTLE: But in any event, I just wanted to mention that because, as a point of process, when we get our next packet, it should have these provisions, and we should be prepared at our next meeting to also have that resolution that we adopt for the Board, that we recommended to the Board for adoption.

We will continue it seems to me. I’m going to entertain a motion that we recess in just a moment, but
what we will do is, so that people can prepare for
tomorrow, we're going to continue as we have with the
regulations as they are set out on our agenda.

So if you want to just go forward from where
we are to preparing yourself, you may. My thought is
that we're going to cover as much as we can tomorrow.

I don't expect that we're going to cover all
of them. If we do, then we won't need our third day.
If we don't, then we've got a third day to cover
whatever is remaining after we complete tomorrow's
task.

MS. WATLINGTON: What time are we convening?
CHAIR BATTLE: 9 o'clock.

MOTION
MR. McCALPIN: I move that we stand in recess
until 9 o'clock tomorrow morning.

MS. WATLINGTON: I second it.
CHAIR BATTLE: Okay. It has been properly
moved and seconded that we stand in recess until
tomorrow morning at 9 o'clock. All in favor?

(A chorus of ayes.)

CHAIR BATTLE: All opposed?