

ORIGINAL



LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS
COMMITTEE MEETING

OPEN SESSION

October 27, 1994

10:27 a.m.

The Marriott at Metro Center
775 12th Street, Northwest
Washington, D.C.

BOARD MEMBERS PRESENT:

Maria L. Mercado
Thomas Smegal, Jr.
Edna Fairbanks-Williams

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
F. William McCalpin
John Brooks
Ernestine P. Watlington

STAFF PRESENT:

Martha Bergmark, Executive Vice President
Victor Fortuno, General Counsel
Suzanne Glasow
Renee Szybala
Laurie Tarantowicz
JoAnn Gretch
Patricia Batie, Corporate Secretary

OTHER:

Linda Perle
De Miller
Rosie Newsome

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P R O C E E D I N G S

1
2 CHAIR BATTLE: Since we are now all basically in
3 place, I would like to say good morning to you this morning.
4 It's October 27th. And I would like to call the meeting to
5 order of the Operations and Regulations Committee of the
6 Board of Directors of the Legal Services Corporation.

7 We have before us an agenda that we need to
8 consider. I think we have got several members that have
9 indicated that they're going to be here that have not yet
10 made it, but we hope that they'll be able to join us as the
11 meeting progresses.

12 On our agenda, I would like to offer a suggested
13 amendment. 1611 was a section that we discussed and had
14 considered at our last meeting and in our minutes indicated
15 that we intended to discuss it today. It is not mentioned on
16 the agenda, but we do have a provision for consider and act
17 on other business, and I would like for us to take up 1611
18 possibly tomorrow. And I would entertain a motion to that
19 effect to amend what we have on our agenda.

M O T I O N

20
21 MR. McCALPIN: So moved.

22 MS. WATLINGTON: Second.

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1 CHAIR BATTLE: It has been properly moved and
2 seconded that we consider tomorrow 1611, along with the other
3 regulations that we will consider tomorrow. Are there any
4 objections to that?

5 (No response.)

6 CHAIR BATTLE: All in favor, say, "Aye."

7 (Chorus of ayes.)

8 CHAIR BATTLE: Opposed?

9 (No response.)

10 CHAIR BATTLE: Motion carries. So we will consider
11 1611. Are there any other amendments that anyone would like
12 to suggest to the agenda?

13 (No response.)

14 CHAIR BATTLE: What I would like to also suggest is
15 that -- we're going to take up the items that we have our on
16 agenda, not necessarily in the order in which they fall, for
17 this reason: We mentioned that we were going to consider
18 both 1610 and 1609 together.

19 So depending on how our schedule goes today, we may
20 leap over consideration of 1609 and 1610 so that we can
21 consider them in tandem in our discussion either this
22 afternoon or tomorrow morning, depending on how ambitious we

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1 are in finishing what we have got on our agenda today.

2 Are there any other questions about the agenda this
3 morning?

4 (No response.)

5 CHAIR BATTLE: If there are none, then I would
6 entertain a motion for approval of the minutes of the
7 September 30th meeting. I've got one suggested amendment to
8 those minutes. As I understand it, we had a significant and
9 spirited debate around 1607 in our last meeting. We didn't
10 actually vote on what it is that we wanted proposed today,
11 but we did reach a general consensus as to what we wanted.

12 And if you've had a chance to review the materials,
13 I think it substantially reflects that consensus. So I would
14 amend the minutes under the section that reads, "Ms. Battle
15 called for a committee debate on Part 1607 at the next
16 meeting" to essentially say, "Ms. Battle called for a
17 committee debate, and a general consensus was reached with
18 regard to 1607. And amendment will be considered at the next
19 meeting." And I would entertain a motion to that effect.

20 M O T I O N

21 MS. WATLINGTON: I so move.

22 MR. McCALPIN: Read that again.

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1 MS. WATLINGTON: I've gotten a little lost.

2 CHAIR BATTLE: Okay. "Ms Battle called for a
3 committee debate on Part 1607, and a general consensus was
4 reached, so that an amendment can be considered at the next
5 meeting." And I think we have that amendment to 1607 as
6 part of the materials for our consideration at this meeting.

7 I'll entertain a motion to accept that amendment.
8 Did you move that, Ernestine?

9 MS. WATLINGTON: Yes, but I don't -- but you said
10 that this was correct -- or an amendment to the minutes?

11 CHAIR BATTLE: To 1607, yes. I just want the
12 minutes to reflect that we're considering an amendment.
13 We're not going to further debate 1607. We reached a
14 consensus. We have got an amendment before us to consider
15 today.

16 MR. BROOKS: Why don't we defer consideration of
17 that until we have had a chance to think about it a little
18 bit?

19 MR. McCALPIN: 1607 is going to require more than a
20 single consideration of an amendment.

21 CHAIR BATTLE: Okay. We'll continue our spirited
22 debate today.

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1 I'll entertain a motion, then, to accept the
2 minutes as written.

3 M O T I O N

4 MS. WATLINGTON: I move that we accept the minutes
5 as written.

6 MR. McCALPIN: Second.

7 CHAIR BATTLE: Okay. It has been properly moved
8 and seconded that the minutes be accepted as written. All in
9 favor?

10 (Chorus of ayes.)

11 CHAIR BATTLE: All opposed?

12 (No response.)

13 CHAIR BATTLE: Motion carries. We have got a
14 provision on our agenda for president's report. And we'll
15 now hear from Martha.

16 MR. McCALPIN: Did you ask for a motion to approve
17 the agenda?

18 CHAIR BATTLE: I'm sorry. Motion to approve the
19 agenda as amended.

20 MR. McCALPIN: Did we act on that?

21 CHAIR BATTLE: Yes, I did that. Keep us straight,
22 Pat. I thought we did.

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1 MS. WATLINGTON: You did that. You did.

2 CHAIR BATTLE: I thought we did.

3 MR. MCCALPIN: Okay. Sorry.

4 CHAIR BATTLE: Now, the president's report.

5 MS. BERGMARK: I thought I would give a very brief
6 update to this committee, since people are gathered. It's an
7 opportunity to communicate some developments that have been
8 going on. It's not specifically with Ops and Regs focus, but
9 it's intended to bring people sort of current on what has
10 been happening in the last three weeks since we last met.

11 Our last meeting, as you know, followed on the
12 heels of the White House event. And Alex has focused a great
13 deal of his attention in the last three weeks to a necessary
14 follow-up to that event in order to look toward Law Day of
15 next year.

16 He has been working with the Bar Associations and
17 others to try to carry the momentum of the White House event
18 forward to make Legal Services a prominently featured part of
19 Law Day observation next spring, and he has been making
20 contacts and working on that. So you'll be hearing more from
21 him next week in Boston about his plans for that.

22 Internally at the Corporation, we have continued in

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1 our sort of capacity-building mode. As I reported to you at
2 your last meeting and then at the last Board meeting, we are
3 listing, as you know -- for both government relations and
4 communications positions, we have made an offer on our
5 government relations position, someone who will be informing
6 us within the next few days as to whether an acceptance will
7 be forthcoming.

8 I believe that it will and am very excited about
9 that offer and about what this person will bring to us. She
10 is in the process of checking us out for a couple of days,
11 although she had done some of that, as well, before. So I'm
12 going to go ahead and say who it is, at this point, since
13 it's out. From her perspective, she's considering it. Gail
14 Laster has worked for the last several years on --

15 MR. MCCALPIN: What's her name?

16 MS. BERGMARK: Laster, L-a-s-t-e-r has worked for
17 the last several years on Senator Metzenbaum's committee
18 staff, both on his Judiciary and on his Senate Labor and
19 Human Resources Committees. She has served stints on both
20 and prior to that was with the Washington, D.C. Public
21 Defender Service for five years, with district and appellate
22 court federal clerkships prior to that.

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1 So she comes with both a strong legal background
2 and some history in legal services to indigents, as well as
3 very strong Hill experience, very highly regarded in all
4 circles. And I have spent an enormous amount of time in
5 recent weeks pursuing this issue and making sure that we did
6 a conscientious job in checking out our candidates.

7 We had a very good pool of candidates. And if Gail
8 should happen to turn us down, I think we won't be left
9 completely bereft, given the pool that we have. So I'm quite
10 pleased about how that process has developed and both the
11 pool of candidates that we have and the offer that we have
12 made. So hopefully by next week, I'll be able to report that
13 we have landed a big one. We'll see.

14 On communications, we have begun our interview
15 process on that. We will have some more interviews next
16 week. Again, we have got some strong candidates for that.
17 I'm pleased with who we have got in the pool. Again, I've
18 done a lot of homework and extra calling around to make sure
19 that we have got a pool that we're happy with.

20 So we're hopeful that on this one, too, this one's
21 going to move a little faster, I think, to completion with
22 interviews next weekend. If necessary, the following one, as

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1 well. But we're closing in on that one.

2 We completed our administrative interviews. James
3 Head, John Tull, and I got around to our staff. Our OPS and
4 OPEAR staff were all interviewed in the spring, as you know.
5 We have followed that up within the last month with
6 interviews with now everyone in the Corporation except the
7 Office of General Counsel. And I see a number of those folks
8 in the room. And we're intending to get to that, too.

9 So we're sort of completing our information-
10 gathering cycle to be able to make whatever adjustments might
11 be necessary in internal administrative operations to be able
12 to carry out the mission of the Corporation.

13 We feel like we have played a role for the last
14 nine months in taking a ship that is the facility over there
15 at 750 First Street and looking to turn it in quite a new
16 direction, pursuant to the Board's adopted principles last
17 December and its expressed preferences in its presidential
18 search. We have had a big job to do internally, so we're
19 doing that.

20 We're also listing, as you know, for the OPS
21 directorship and program officers. Those listings have not
22 yet closed, so we're still anxious to make sure that word is

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1 out. I think the listings went out both in the LSC News that
2 came out the day of the last Board meeting, I think, as well
3 as separate mailings to all programs went out about 10 days
4 later. So we have listed that widely and encourage you to
5 help us with any candidates you might have that ought to have
6 their hats in the ring. We would like to get them there.

7 The other key activity of the last few weeks has
8 been delivery working group meetings and our meetings with
9 those. The support working group met for three days the week
10 after the Board meeting, preceded by a day-long meeting of
11 the umbrella working group Chairs. The Chairs of all the
12 working groups met.

13 And John Tull, Gary Singsen, Alex, and I, all of
14 us, have participated in various of those meetings. And
15 really all of the meetings, we have had very substantial
16 participation in. And you will see and hear about some of
17 the product of the delivery working group on support meeting
18 at your Board meeting next week in Boston.

19 We will be spending most of that meeting -- from a
20 substantive perspective, that meeting will really be focused
21 strongly on support, both at the committee level, the joint
22 committee of the ANA Committee and the Provisions Committee

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1 will consider what remaining questions we have for allocation
2 of '95 funds.

3 And those relate prominently to support issues, as
4 well as looking at the full Board level on Saturday to a
5 presentation from the delivery working group and from us on
6 where we are with respect to support. We will complement
7 that with visits to both the National Consumer Law Center and
8 the Massachusetts Law Reform Institute, the state support
9 center in Massachusetts.

10 So the visit to Boston is timely, because it gives
11 an opportunity for the Board and others and friends to visit
12 those programs and get an on-the-ground fix on what's going
13 on there. If anybody has any questions, I would be happy to
14 entertain them. But that's a brief update on where we are.

15 MR. MCCALPIN: LaVeeda?

16 CHAIR BATTLE: Yes, Bill?

17 MR. MCCALPIN: We were in Atlanta in the spring.
18 The comment was made as we were out visiting that housing
19 project that publicity should have been arranged for that in
20 advance. Are we doing something in Boston to capitalize on
21 our looking at the Mass Law Reform and the Consumer Law
22 Center?

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1 MS. BERGMARK: I don't know the answer to that. I
2 can certainly communicate that back to Karen and express your
3 interest in having that done.

4 MR. BROOKS: I can give a brief report on that. I
5 talked to Karen Crosby about it, introduced it at the Boston
6 Globe, the Massachusetts Lawyers Weekly, which seemed to be
7 very much interested. I know Karen has sent up some
8 material, at least to the Lawyers Weekly, who were hoping to
9 run an article in the week prior to the meeting. It comes
10 out on Thursday.

11 So there would be an article, we hope, next week,
12 Thursday. And then, we would follow up with more. So I
13 think the door is wide open there. And there are two or
14 three people on the Globe who are alerted. Whether we have
15 gotten anything from them yet, I don't know. But we're
16 working on that.

17 CHAIR BATTLE: Maria?

18 MS. MERCADO: What about as far as the media, the
19 regular networks that come and do some kind of photo op?
20 Because realistically, I mean, a great percentage of the
21 people that we're trying to reach about our services may not
22 necessarily read the newspaper.

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1 I'm not saying that's true. But I don't know
2 whether some of them will be covering -- even if they just
3 gave us a minute spot or whatever. Do they come to events
4 like that?

5 MR. BROOKS: It's very hard to get them to events
6 like that. But we're working through the Boston Bar
7 Association PR people. And I have not been involved in this
8 directly, except with the Globe and the Lawyers Weekly. But
9 the suggestion was that we get a hold of the local TV people.
10 And I promised that to Karen.

11 So I think we're suffering still a little from the
12 fact that we have not got a communications director on the
13 staff. Karen has a lot of other things to do. And I sense
14 that she's doing the best she can, but we can do better.
15 I've tried to do the best I can.

16 MS. MERCADO: I'm sure that probably the Bar might
17 have some contacts or whatever from media. I was just in the
18 Boston area last weekend, and I saw a different human
19 interest story in the regular TV networks. One was a United
20 Way thing, something with an elementary school, doing a
21 program for some children for the Halloween stuff.

22 So, I mean, they cover human interest type stuff.

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1 It's not just either international affairs or your regular
2 murder or robbery. I mean, there's a big to-do about an
3 ambulance not getting over there within a certain time. So
4 if we could get it, whether it's in combination with the Bar,
5 or maybe the centers might have some contacts.

6 The National Consumer Center or somebody might have
7 some media contacts to get the local networks there. Because
8 whatever the agenda is that you think would be more
9 appropriate, to give us some PR would be good.

10 MR. BROOKS: Well, I've left it with Karen, that
11 she was going to create material which could be sent up with
12 the most tempting face on it that would get the media
13 interested in it. This was two or three days ago that I last
14 talked with her, and the material was in process then. But
15 we can check with the centers and see if they can give us a
16 little more boost on it.

17 I agree with you. It's something that ought to be
18 done. And it does require staff work. And I think Karen's
19 doing the best she can. But if we could give her a little
20 encouragement, we might do better.

21 MS. BERGMARK: I'll follow up. And a big thank
22 you's in order also to John for helping. And, as Pats knows,

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1 John has been key in helping us figure out Boston, how to
2 take advantage of the opportunities we're going to have to
3 be. So thank you. I know you'll get duly thanked next week,
4 but that's a preview of that.

5 MR. BROOKS: Thank you.

6 CHAIR BATTLE: Were there any other questions or
7 concerns about the president's report?

8 (No response.)

9 CHAIR BATTLE: I think the one thing that has been
10 raised is significant. I think that this Board has done some
11 really tremendous things in its first year of operation.
12 We're just about at a year of having been in place.

13 And if we could begin to get significant press
14 associated with it, I think it will have a ripple effect on
15 our ability to get appropriations and some level of
16 visibility, ultimately, to try to get the Act reauthorized
17 and other things and increased enthusiasm among the ranks,
18 the people that are served, as well as the attorneys that
19 work for Legal Services and the staff.

20 So we're moving in that direction, and we're making
21 strides. And we're real pleased that you've made the kinds
22 of strides in the right direction with regard to government

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1 relations and know that we'll be hearing soon back from you
2 on communications, as well. So I think we're all anxious to
3 have someone in place to be able to realize getting the word
4 out about the work that we're doing.

5 Okay. The next item that we have on our agenda is
6 to really consider and act on the proposed committee meeting
7 schedule for calendar year 1995. And I did not see in our
8 materials -- I see John is pulling something out. I pulled
9 up the last book that we had.

10 MR. BROOKS: This is Bill's letter.

11 CHAIR BATTLE: Let me just say this. When we met
12 in August, I first raised the issue about us really taking
13 some time to look at what our agenda is going to be for next
14 year, so that we can get a fix on the regulations that we
15 have got to consider and the other dynamics as those
16 regulations relate to other Board work as to how we might
17 want to organize it, so that we can be most efficient in our
18 utilization of time.

19 And at that time, we received a proposed memo that
20 kind of outlined which areas we have left to give
21 consideration to and also kind of listed them, not
22 necessarily in order of priority, but just so that we would

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1 know what's available and what's on the plate.

2 Out of that group, I think we have got one, two,
3 three, four regulations that are in specific subject areas.
4 1612 is in the area of legislative and administrative
5 advocacy; 1614 in the area of private attorney involvement;
6 1602, the remaining portions relating to the Freedom of
7 Information Act -- we have got some portion of 1602 that
8 we're going to consider today, but then there are other
9 things that we might want to consider that don't relate
10 necessarily to the OIG in 1602; and then, 1622, which
11 pertains to the regulation on the Sunshine Act.

12 There are about five regulations that really are in
13 a cluster that relate to fiscal responsibility. And that
14 would be inclusive of 1627, 1628, 1629, 1630, and 1631.

15 The other issue that was raised is the fact that we
16 may need to, even after we have gone through this process,
17 depending on how reauthorization goes, go back as we have
18 been publishing in our supplementary materials, and make any
19 adjustments to any of the regulations based on any changes
20 that may happen in the law if reauthorization happens next
21 year.

22 And then, there may need to be some changes because

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1 of LSC enforcement procedures or some other things that
2 happen based on how we reorganize ourselves around other
3 issues.

4 With those being the issue areas, I thought it
5 would be important for us to give some thought to how we plan
6 to approach this. Certainly -- and we have got Maria and Tom
7 here with us today -- it seems to me when we talk about the
8 fiscal regulations, that we would need to do that in tandem
9 with your committee, with ANA.

10 Because as we're considering those, we'll need to
11 bring in the people that have normally been related to your
12 function, and we would need to time it at such a point in
13 time that it's not a busy time for you because you're doing
14 budget but maybe a time when you have the time and space that
15 you'll be able to meet in tandem with our committee, and we
16 can get those fiscal regulations really hammered all the way
17 out.

18 So I would just now like to say, at least as it
19 relates to that, I really would welcome input from ANA as to
20 what they're looking at for next year, so we can kind of work
21 together to set the time that's going to be most appropriate
22 for both committees to really sit together and work through

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1 the fiscal regulations. We have got two of the members here,
2 if you've got any thoughts.

3 MR. SMEGAL: I will defer to Madam Chair, who keeps
4 her calendar handy, I hope.

5 MS. MERCADO: Actually, I don't have my ANA stuff
6 here with me. But just trying to garner from memory and a
7 little bit of our experience this past year, the springtime
8 is going to be very busy for us, because that's usually when
9 we're doing most of the budgetary hearings in Congress, that
10 in order to spend the kind of time that we need to spend on
11 these sections that deal with the fiscal end of Legal
12 Services, probably sometime after May would be the better
13 time.

14 Sometime in the summer, I think, would be a good
15 time for us to schedule those particular parts of it,
16 although I know Tom and John are usually the ones that are in
17 and out a lot in the summer. So I don't know what their
18 schedule is like. Maybe toward the front end of the summer
19 might be better. But Tom can speak to --

20 MR. SMEGAL: The problem that we both have is a
21 litigation schedule. And unfortunately, the only court that
22 takes the summer off is the Supreme Court. I think the rest

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1 of the district courts seem to continue in session.

2 But earlier in the summer, I think, would probably
3 be better. August is not a good month for a lot of other
4 reasons, including the ABA meetings. It's a holiday time,
5 vacation time, for me, at least. I don't know about John.
6 But I would think June or July, those time frames, May --

7 CHAIR BATTLE: Okay. June or July.

8 MR. SMEGAL: Maria Luisa, was there that much
9 activity up on the Hill in May?

10 MS. MERCADO: We had two different hearings, both
11 before the Senate and the House. But I don't know whether
12 part of that was just because of all the reorganization that
13 really brought a lot of the ire and requested that we go back
14 again. I hope that that isn't going to happen again this
15 year.

16 So my sense of it is that hopefully, in May, we
17 shouldn't have to be that involved in it. They would have
18 taken care of a lot of the problems way before then. So I
19 would think that May probably will end up being the best.

20 CHAIR BATTLE: Summer. Early --

21 MS. MERCADO: May, June would probably be the
22 better part.

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1 CHAIR BATTLE: Okay. Early summer is what you're
2 saying.

3 MS. MERCADO: Yes.

4 CHAIR BATTLE: There are a couple of things. And
5 that input is extremely helpful to us, because I think we
6 have learned a lot. 1607 is one of the first regs that we
7 put in the hopper. And we're just getting it out of the
8 final hopper today. So that gives you an idea of what the
9 cycle really is like on a part reg.

10 Once we undertake a regulation, it goes through our
11 committee, it goes out for public comment, the public
12 comments come back, and then we consider the public comments,
13 we make subsequent amendments to it, we in the interim make
14 sure that the Board is aware of it, so if there's any real
15 concern about a part reg, that it can come back, and we can
16 give consideration before it goes out.

17 But ultimately, because of the 60-day time frames
18 that we put on how long it stays out for public comment, that
19 has meant that the total time frame for consideration is
20 going to be really significant.

21 And when we begin to work on fiscal regs, in
22 particular, I think we're going to need to have a pretty

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1 clean plate, so that we can sit down and just do fiscal regs
2 alone and not be in a cycle where we're having to give
3 consideration to a lot of other things that would take up
4 members of your committees' time that may not bear or relate
5 necessarily to what it is that they're there for. So we'll
6 have to give consideration to that as part of how we put the
7 schedule together.

8 There are other issues, as well. The legislative
9 and administrative advocacy is something that -- why don't I
10 do this before we get into this discussion? Suzanne and
11 Linda, do you all want to come forward? Because as we
12 discuss the issue of the schedule, it's going to be helpful
13 for us to know where the staff is and where the working group
14 is in its process of being able to make recommendations into
15 this whole procedure.

16 As I understand it -- well, we're talking just
17 generally now about legislative and administrative advocacy,
18 and just so that we'll have an idea of where that particular
19 reg is.

20 MS. PERLE: The regs working group is working on a
21 draft, based on the current legislative framework in the
22 Appropriations Act and the LSC Act. And that has been shared

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1 with the LSC general counsel's office. And the comments have
2 been received.

3 And I think that currently, there's a new draft
4 that's being completed which hasn't been shared with the full
5 regular working group but has been shared with the subgroup
6 on legislative advocacy. That group has worked closely in
7 redrafting that proposal.

8 The plan now is, I believe, to have a full meeting
9 of the regs working group -- a short meeting in conjunction
10 with NLADA, but I don't know that we'll have an opportunity
11 to do much substantive work. We then have another meeting in
12 January. And hopefully, we'll work along with the staff, and
13 they'll be included in that meeting, so that we should be
14 able to, I would hope, get a draft to be ready to give to the
15 committee in early February. I think that's reasonable.

16 CHAIR BATTLE: Bill, you had expressed some real
17 concern about private attorney involvement. And also, I just
18 briefly had a chance -- I'll apologize for not having read
19 your letter earlier -- but to review the letter --

20 MR. McCALPIN: That's what I get for sending it a
21 week in advance.

22 (Laughter.)

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1 MS. MERCADO: These litigation attorneys.

2 CHAIR BATTLE: That's right. And I know that
3 you've looked not only just at this issue. I know that you
4 expressed some concern about it before. But also, in really
5 kind of stepping back and looking comprehensively at what
6 Operations and Regulations has on its plate, from the
7 standpoint not only of looking at regulations, but also at
8 our responsibility as it relates to reauthorization and as it
9 relates to operations, as well.

10 So you're free to add your comments, I guess, now
11 before we go on through the list.

12 MR. MCCALPIN: Let me begin by saying that I suffer
13 from the disability of not having a complete copy of my own
14 letter. My successor secretary was operated on last Friday,
15 so I had trouble finding it. I have a copy of the letter,
16 but I don't have a copy of the exhibits that were attached to
17 it. And basically --

18 CHAIR BATTLE: I think John does.

19 MR. MCCALPIN: Yes. And I think that Susan and
20 Linda and members of the committee and Alex, at least, got
21 copies of the letter. What I did was to look at the
22 regulations and say, "Which are the regulations which impinge

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1 directly upon our recipients?" And it turns out that 26, I
2 think, out of 31 impinge directly upon the recipients.

3 Two affect principally members of the public.
4 That's 1602, which we'll be dealing with, and the state
5 council thing. And two others deal only with internal
6 operations of the Corporation. And that's the bylaws, which
7 we have fiddled with from time to time, and 1622, Sunshine,
8 which does not affect recipients and only affects the
9 Corporation.

10 And so I thought that the arrangement that we set
11 up early this year about initial processing through the
12 working group, then to this committee, then out for
13 publication, then back to us and onto the Board was exactly
14 the right way to go about all those regulations which impinge
15 directly on recipients. And I think that's exactly what we
16 ought to be doing, just what we are doing.

17 With respect to those that affect the public and
18 those that deal essentially only with the internal operations
19 of the Corporation, I thought that the initial responsibility
20 could be internal to the Corporation, whether staff or this
21 committee or whatever, that whatever we came up within a
22 reverse process would go to the working group for its

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1 consideration and come back to us.

2 Like you, I thought that there were a number of
3 regulations that ought to be looked at together, not only the
4 fiscal ones, but I thought that 1606, 23, 25, and 31, which
5 had to do with termination, suspension of grants, denial of
6 funding -- and I put 31 there instead of with the fiscal
7 ones, but I think it's arguable where it ought to be
8 consolidated.

9 And finally, I thought that 1613 and 15, which
10 relate in a general way to criminal proceedings, might well
11 be considered together. So I thought we just ought to --
12 when we get around to them, that we ought to consider these
13 that I mentioned together.

14 And as far as scheduling is concerned, I thought
15 the first priority ought to be to finish what we have
16 started. And obviously, we're doing that. I thought that
17 internally, we ought to look at 1622 pretty quickly. 1603
18 could wait. I thought 1614, we ought to defer until -- as I
19 understand it --

20 MR. BROOKS: Excuse me, please. Just identify what
21 the subject matter of these numbers are, please.

22 MR. McCALPIN: Sure. 1622 is Sunshine, and that's

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1 the one that I think we need to get at pretty quickly, both
2 because the Wilkinson case has shed some light on our
3 responsibilities in that respect, and because it's a matter,
4 I think, that needs our attention.

5 1603 is the state councils. And I think that can
6 be the end of the line, because I'm not sure there are any
7 state councils in the U.S. at this point in our history.
8 1614 is PAI. It's my understanding that the working group
9 and/or the Provisions Committee are dealing with this subject
10 as a matter of principle and philosophy. And when the policy
11 jells, then I think it will come to us to put that policy
12 into the language of an amended 1614.

13 CHAIR BATTLE: Right.

14 MR. MCCALPIN: But I do think that we ought not get
15 ourselves involved in 1614 until a working group and
16 Provisions has had an opportunity to work through all of the
17 ramifications of that particular regulation. Then, I agreed
18 essentially with your suggestion about the four or five being
19 initially considered by Audit and Appropriations.

20 And then, with respect to the rest of them, we
21 finish what we started, and then we decide in what order to
22 take up whatever is remaining on the plate.

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1 CHAIR BATTLE: You mentioned some regs that were
2 not in this listing that we had. And probably --
3 particularly those that impinge upon recipients, which is
4 what we have taken up at the onset of our whole process of
5 redoing the regs, are the ones that we need to look at to
6 determine whether -- if they were not on this list, if for
7 some reason, the reg working group has it in the hopper or
8 doesn't have those particular ones in the hopper, so that
9 we'll know how they're going to fall out in the process.

10 MS. PERLE: I don't know which ones you're
11 specifically referring to.

12 CHAIR BATTLE: Well, when you mentioned 1626, 1623,
13 1635 --

14 MR. MCCALPIN: 25 and --

15 MS. PERLE: Those are all regulations that deal
16 with enforcement of the Act and the regulations.

17 CHAIR BATTLE: Okay.

18 MS. PERLE: And the regs working group or actually
19 a subset of the regs working group, which is the PICA group,
20 which is -- I don't remember what the acronym stands for --
21 program improvement compliance and accountability, I think --
22 has been working very closely with John Tull and the staff of

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1 OPEAR in working out new mechanisms to approach compliance
2 and enforcement and evaluation of programs.

3 And I think the regs working group's view of the
4 regulatory issues was that we should not dive in to changing
5 those regs until there was a pretty good sense within the
6 Corporation about how those activities needed to go forward.
7 So the regs working group and the PICA group have not, to my
8 knowledge, spent any time specifically dealing with the
9 regulations.

10 But similarly to what you discussed in terms of
11 PAI, they're kind of working out the sort of policy framework
12 upon which those rule changes will be based. So I think that
13 it's fair to say that we wouldn't recommend diving -- that
14 the regs working group dive into those regs until --

15 CHAIR BATTLE: Why don't we do this? Given the
16 procedure we have got, how many more regs do we have that
17 have some bearing directly on our recipients that we have not
18 yet undertaken?

19 And let's take a look at what they are, carving out
20 from that -- of course, we know that private attorney
21 involvement ultimately will, but that's already something we
22 plan to defer, given the internal process and we know based

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1 on what you just said about the enforcement regulations and
2 where they are in the process.

3 Are there any other regs that we need to consider
4 beyond legislative and administrative advocacy that will go
5 through the process as we have done with the others that
6 impinge directly on assistance?

7 MS. PERLE: I think there are a number of them.
8 Can I just make one note to something that Mr. McCalpin said
9 earlier with respect to the bylaws in 1622?

10 CHAIR BATTLE: Okay.

11 MS. PERLE: I think that those rules do in a
12 certain sense deal primarily with the internal workings of
13 the Corporation, but they have a large impact on the public,
14 including recipients, especially 1622, which deals with how
15 the Corporation is going to operate its business with respect
16 to the public nature of its proceedings and documents and
17 things like that.

18 So I think it's -- well, I have no problem with the
19 notion that the staff can take a first crack at dealing with
20 those, and the regs working group should be in a kind of
21 reactive position to what the staff does. I do take some
22 issue with the characterization that they're purely internal.

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1 I think that if you're dealing with the issue of
2 public meetings, that is a very important issue for the
3 public and recipients to be able to have some impact on. So
4 I don't dispute or suggest that it should be done in a
5 different way than Mr. McCalpin suggested, but I do think it
6 should be characterized slightly differently.

7 CHAIR BATTLE: And certainly, when we undertake the
8 Sunshine Act or 1622, we will continue the same process of
9 allowing public comment as we consider it and putting it out
10 for public comment. So there still will be an opportunity
11 for public input into the process, even if we flip where the
12 initial drive for proposals comes from.

13 MS. PERLE: The authority rules that were sort of
14 within the cluster of rules that the working group designated
15 as kind of program issue rules were 1605, which was appeals
16 on behalf of clients --

17 MR. MCCALPIN: 1605 and what?

18 MS. PERLE: Appeals on behalf of clients.

19 MR. MCCALPIN: Yes.

20 MS. PERLE: The two, 1613 and 1615, that deal with
21 criminal; 1616, which deals with attorney hiring; 1617, which
22 deals with class actions; 1620, which deals with --

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1 CHAIR BATTLE: Could you slow down?

2 MS. PERLE: Sorry.

3 CHAIR BATTLE: Because we are all writing as you
4 go. You were saying -- 1613 is?

5 MS. PERLE: 1613 is restrictions on legal
6 assistance with respect to criminal proceedings. 1615 is
7 kind of a companion to that, which deals with basically
8 habeas corpus petitions. It's called "restrictions on
9 actions collaterally attacking criminal convictions."

10 1616 is attorney hiring. 1617 is class actions.
11 1620 is priorities and allocations of resources. And I think
12 all the others are characterized the way Mr. McCalpin
13 suggested, that they go either in the fiscal or the
14 enforcement provision. The exception, I guess, is 1626 is --
15 sorry -- is the restrictions on legal assistance to aliens.
16 And 1624 is prohibitions against discrimination on the basis
17 of handicap.

18 CHAIR BATTLE: The last one, 16 --

19 MS. PERLE: And 1613 is redistricting. Correct.

20 CHAIR BATTLE: No. 1613 is restrictions on
21 criminal --

22 MS. GLASOW: 1632.

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1 MS. PERLE: 1632 is on redistricting. Pardon me.
2 1626 is aliens, and 1624 is handicap discrimination. With
3 respect to those that we have mentioned, I agree with Mr.
4 McCalpin -- I think the suggestion that he made in his
5 letter, which is that some of those rules are not difficult,
6 they're not rules where we have had major problems in
7 interpretation, and that they could be put off until kind of
8 later in the process.

9 But on the other hand, some of those are fairly
10 easy to fix, that the problems that we have had have been
11 fairly discreet. And we have done a little bit of work on
12 the criminal activity, the rule governing criminal activity.
13 There are a few clarifications that could be made. And I
14 think that those may be rules that we could deal with on a
15 fairly fast track that wouldn't be too problematic.

16 The one rule, with respect to class actions, I
17 think we ought to deal with that one sooner rather than
18 later, because even though it is not one that would be, I
19 think, difficult to -- I don't think there are major
20 substantive issues on it, there is a problem with the current
21 rule.

22 And the current rule includes the restrictions on

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1 class actions -- only those restrictions on class actions
2 that appear in the LSC Act. There are a series of additional
3 restrictions on class actions that appear in the
4 appropriations language and have been in the Appropriations
5 Act for 10 years, give or take -- I'm not exactly sure when
6 they were first instituted -- and have never been
7 incorporated into the rule.

8 And it's confusing. There are many recipients that
9 take the rules out, and they think that the rule that exists
10 now on class actions covers the waterfront, in terms of the
11 rules that govern their participation in class actions, and
12 that's not true.

13 So I think it would be helpful to take a crack at
14 revising that rule to incorporate the restrictions from the
15 appropriations measure, which I think in all likelihood, we
16 will have to live with for the foreseeable future, even if
17 there is a reauthorization. So I think that rule, we
18 definitely ought to start thinking about. And I don't think
19 it will be difficult drafting -- a set of drafting issues.

20 CHAIR BATTLE: Let me make sure that I understand
21 the grouping that you just identified.

22 MS. PERLE: Okay.

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1 CHAIR BATTLE: And it was inclusive of 1605 on
2 appeals --

3 MS. PERLE: Appeals.

4 CHAIR BATTLE: 1613, restrictions on the criminal
5 activity reg; 1616, is it on attorney hiring?

6 MS. PERLE: Yes. And 1615, also.

7 CHAIR BATTLE: And 1615, on the habeas corpus; 1617
8 on class actions, and you just spoke to that. Then, 1620 on
9 priorities and allocation of resources; 1626 on aliens; 1632
10 on redistricting; and 1624 on handicap discrimination.

11 MS. PERLE: Right. Now, with --

12 CHAIR BATTLE: Are there any others that would fit
13 into this cluster?

14 MS. PERLE: I think some of the ones that we have
15 already done, have started work on, fit into that cluster.
16 And they were in the cluster that the regs working group
17 began to work on.

18 Now, I would suggest a couple of things about some
19 of these, about the rule on handicap discrimination. I think
20 that before we start looking at revising that rule, that the
21 general counsel's office ought to sort of do a general look
22 on what the responsibilities of the Corporation are with

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1 respect generally to enforcement of civil rights laws. I
2 think that --

3 CHAIR BATTLE: The laws have changed substantially
4 in this area?

5 MS. PERLE: The laws have changed. You know, we're
6 now covered by the Americans With Disabilities Act. It was
7 never totally clear that we were covered under the -- I can't
8 remember the title that precipitated --

9 CHAIR BATTLE: 703? Is that --

10 MS. PERLE: Yes, the Disabilities Act. Right. It
11 was never clear what our relationship to that Act was, in
12 terms of its enforcement and its applicability to Legal
13 Services' programs. And I think if we're going to sort of
14 tackle civil rights enforcement, we need to tackle it in a
15 somewhat broader fashion than just simply looking at handicap
16 discrimination.

17 And we may discover that we really have a different
18 role in enforcement or a lesser role in enforcement than is
19 sort of indicated in the 1624 rule. So I think that we can't
20 just sort of dive into that rule. I think we need to sort of
21 have a lot of background work done first.

22 The restrictions on assistance to aliens, that rule

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1 was revised substantially in 1988 and 1989. The legislative
2 underpinnings for that rule are the same. There haven't been
3 any changes since then. There are many problems that were
4 worked out in a whole series of negotiations between the general
5 counsel's office and the regs working group representatives.

6 And I think that rule can stay until we have a
7 better sense of where we're going on reauthorization, if
8 there are going to be any changes on reauthorization. People
9 may disagree on that.

10 CHAIR BATTLE: By raising that, I think it is key
11 that we kind of consider in tandem with this, as you have in
12 your suggestion there, where we have regs that are
13 particularly key in the reauthorization process, so that we
14 don't end up having to rework the wheel twice.

15 If we know that there are going to be issues in
16 reauthorization and the reg at present is fairly clear, we
17 can put a low priority on them and consider those that we
18 think will be less apt to be considered in reauthorization
19 and also have a higher level of priority, in terms of need
20 for changed based on clarity or based on things, as you
21 suggested earlier, because they don't necessarily reflect
22 where the law is now.

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1 MS. PERLE: Right. I mean, I think that last part
2 of what you said is key. I put the restrictions on aliens,
3 1626, in a very different category from 1612, which is
4 legislative and administrative advocacy. Because that rule
5 has always been -- it's a nightmare, in terms of how one
6 interprets it. It's very confusing. It doesn't in all
7 situations accurately state the laws that presently exist.

8 And we really don't know what's going to happen, in
9 terms of reauthorization, under that rule. It may be that we
10 will go forward through reauthorization and wind up with
11 basically the same legislative framework that we have now.
12 But the rule that we have now doesn't state that legislative
13 -- I think we need to go forward with that rule. If we have
14 to change it later, we should. But I don't think we need to
15 go forward with the alien rule.

16 I'm not sure -- with respect to the redistricting
17 rule, there is no legislative framework for that rule
18 existing currently. I don't know -- I mean, I think that if
19 all of us had our druthers, we would just suggest that the
20 Board simply do away with that rule, but I don't think that
21 -- I think that realistically, that is not something that we
22 would suggest doing right now.

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1 We might simply wait until we see what happens in
2 reauthorization with respect to any restrictions that may
3 exist on redistricting under a new legislative framework.
4 But I think that's really something -- I think that's a
5 decision that the Board or this committee ought to make,
6 whether they wish to deal with that rule or not.

7 CHAIR BATTLE: Bill, did you have something
8 particular you wanted to raise on that issue?

9 MR. McCALPIN: Well, my only point was that having
10 been involved in the reauthorization process over the last
11 umpteen years, four or five years, anyway, and trying to
12 raise a political antenna, I thought that the six regulations
13 listed at the top of the last page were the ones most likely
14 to be affected in the reauthorization process and that by the
15 time of the December meeting, we could form a better
16 judgement as to whether the provisions currently involved in
17 reauthorization are likely to survive or whether there may be
18 greater changes in those areas, depending upon the
19 composition of the new Congress.

20 I just thought we ought to wait till December after
21 the elections, when we had some sense of what a new Congress
22 would look like, before we attempted to establish a priority

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1 for consideration of those six.

2 CHAIR BATTLE: What we may do today -- I really
3 think that this whole process is going to be an evolutionary
4 process, quite frankly. And what we may be able to do, at
5 least today, is to figure out clusters of issues and areas
6 that we plan to address based on what it is that we do know
7 about scheduling.

8 And I think that your point, Bill, is pretty
9 significant. Because in December, we certainly -- in fact,
10 after November 8th, we'll know.

11 MR. McCALPIN: But we aren't going to meet until
12 December.

13 CHAIR BATTLE: That's right. So we'll have a
14 better sense for what our expectations ought to be with
15 regard to some of the issues that are presently pretty high
16 level consideration in reauthorization. And that will also
17 affect how we will go through this process as within a
18 particular cluster of considering certain issues.

19 MS. PERLE: I think it's correct that we'll have
20 some better sense of where the winds are blowing by December.
21 I don't know that we will really have a good sense of whether
22 we're going forward with reauthorization and what the

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1 reauthorization is likely to look like until sometime in the
2 late winter or early spring.

3 CHAIR BATTLE: Maria?

4 MS. MERCADO: I was just saying, we'll know what
5 the bottom line maybe with Congress is going to be in
6 December, but you really won't know politically what are
7 going to be hot buttons, what are going to be priorities for
8 the particular new Congressional people that are coming on
9 the Hill. And hopefully, that's part of our Congressional
10 liaison type folks, who will see what is going to be key and
11 what will or won't --

12 MS. PERLE: Right. And first of all, seeing who's
13 chairing the various committees.

14 MS. MERCADO: Right.

15 MS. PERLE: And also getting a sense of what the
16 key committee members feel, in terms of what's the
17 appropriate approach to reauthorization for this program.
18 You know, I think it's quite up in the air.

19 CHAIR BATTLE: I see there being probably general
20 agreement about the regs. There are some, I think, Bill,
21 that you've got in your grouping that differ from the
22 grouping that Linda gave us. But overall, we're talking in

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1 general clusters which issues we ought to address.

2 And I think if we are able to at least establish
3 where we're going to start next year, I think that this
4 discussion will end up being worthwhile. Because from that
5 will fall out probably some realistic time frames. I think
6 we have been pretty ambitious.

7 I think this committee is to be commended for
8 having accomplished what we have been able to accomplish in
9 our first year of looking at regulations. As we get into
10 some of the other issue areas, we have to be mindful of time
11 and how much real time it may take, for example, to cover
12 fiscal regulations, because you've got a whole group of them,
13 and to cover some of the issues that we'll get into when we
14 start dealing with PAI. It may take much more time than
15 others.

16 So if we can at least figure out based on what we
17 have got on our plate where we're going to start next year --
18 and I think the other part of what I'm hoping we can do now
19 is figure out a way to finish our plat off with what we have
20 got now, so that when it comes time for us to deal with a
21 particular issue area, we can have cleared our plate based on
22 how we have prioritized what we have got to do, and we can

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1 begin when we have got to meet, for example, with delivery
2 people -- do that without having to do that with regulations
3 from other groups coming into the whole process as much as
4 possible, if we can.

5 And based on all that we talked about, what does
6 the committee -- or any suggestions about where we ought to
7 start? I mean, we have got the issue areas, and we have got
8 legislative and administrative advocacy as one that I think
9 Linda has pointed out.

10 Even though it's one where there is a high
11 probability that in the reauthorization process, this
12 regulation may end up needing to be changed, it also is a
13 very confusing regulation, very difficult now to read and
14 understand and implement and may not be congruous with where
15 the law is. So that's one that I think --

16 MS. PERLE: And I think it also serves- to chill
17 activity by recipients that this Board might be interested in
18 sort of encouraging. And so I think we need to work on it to
19 start sending a different message, as well.

20 CHAIR BATTLE: So long as it's consistent, of
21 course, with where the law is right now.

22 MS. PERLE: Of course.

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1 CHAIR BATTLE: Is that --

2 MS. BERGMARK: And I concur with that. I think if
3 we could get to that -- I heard you say that probably by
4 early February --

5 MS. PERLE: I think so. I think that's realistic.

6 MS. BERGMARK: We might have a draft from the regs
7 working group?

8 MS. PERLE: Right. And as I said, that draft will
9 be a draft that has been shared with the general counsel's
10 office and worked on. And I don't know whether other members
11 of the staff have seen it, as well.

12 MS. BERGMARK: That's certainly one that has the
13 potential for being something that will have interest both on
14 the Hill and within the Board but can be handled in a way
15 that does better accommodate the reg to what the existing
16 state of the law is, which I don't think anybody is going to
17 be able to make a case that that's not a confusing or a
18 difficult reg in its current form. So I would concur with
19 putting that on the list fairly high.

20 CHAIR BATTLE: Okay. With the first draft
21 potentially coming to us sometime in February.

22 MS. PERLE: And with respect to the fiscal

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1 regulations, the working group has begun work with Gary
2 Singesen on looking at some of these fiscal regulations. And
3 I think your proposal to begin working with your committee
4 either jointly or sequentially in late spring or early summer
5 would be consistent with the schedule for drafting.

6 CHAIR BATTLE: And this is just a process question
7 so that I can better understand with regard to the fiscal
8 regulations. Will there need to be any kind of policy
9 considerations that precede our work on those fiscal
10 regulations, or will we be able to do that work in tandem
11 with ANA and just look at them and clear them up?

12 MS. MERCADO: There's a lot of areas in
13 appropriations that overlap with provisions. And part of our
14 great problem, I think, this past year has been our inability
15 to get provisions ahead of us in setting priorities for where
16 those funds are going to go. I mean, we're actually dealing
17 with sort of the brick and mortar aspect of that, I guess.
18 And what goes inside that home, I think, is what's important.

19 And time and time again, it didn't matter what
20 committee you were dealing with before in Congress. We got
21 kicked pretty seriously, because we couldn't come up with
22 some very concrete proposals for the priorities for new

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1 programs or old programs, specifically what we were going to
2 do.

3 Even though people talk about generalities, they
4 don't trust this Board with generalities because they really
5 believe that we're in here to give a whole complete
6 revolution of the social agenda. And how that is translated
7 to Congress, in particular, with the programs that we have
8 planned really gets done in the provisions committee.

9 And part of the difficulty in having Audit and
10 Appropriations take over their responsibilities and having
11 input from the field in the working groups -- that wasn't
12 working on schedule. I mean, their working groups weren't
13 going to meet like almost a year later on issues that we
14 needed to have much earlier.

15 And I know we have discussed this everywhere we
16 have gone, that we have got to get the field and the
17 different stakeholders out there to move much faster and
18 provide the input much quicker, because we cannot go up a
19 second time -- it is my sincere feeling -- up to the Hill
20 requesting an increase in funding and not have some
21 particulars about how that's going to be spent.

22 We're looking at another hornet's nest, again. So

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1 to sum up the regulations that you're dealing with are really
2 going to have to deal with provisions. So Bucky's committee
3 is going to have to work --

4 CHAIR BATTLE: In terms of timing, I guess what I'm
5 hearing is, potentially, before we can address the fiscal
6 regulations as a committee to construct what language there
7 ought to be, there are some underpinning policy
8 considerations. Is that --

9 MS. PERLE: Well, I think that there are some, but
10 I'm not an expert in these fiscal regs. But they clearly
11 have an impact on accountability issues. But I don't think
12 that they have as much of an impact on the kinds of delivery
13 issues that Ms. Mercado is talking about.

14 I mean, I think they really are -- they're sort of
15 very bound up in terms of how programs account for the funds
16 that they receive from the Corporation for various purposes
17 and how they kind of document to the Corporation's
18 satisfaction and perhaps to Congress's satisfaction that they
19 are spending funds in the way that they were intended to be
20 spent.

21 I mean, there are policy issues, clearly, on the
22 fund balance rules and the subgrant rules. There are some

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1 policy issues which the Board will have to address when it
2 addresses the language of the rules. But I really don't
3 think -- unlike PAI, I don't think that these rules have the
4 sort of overarching policy implications with respect to
5 delivery.

6 MS. BERGMARK: And I think the staff interface for
7 that is going to be with John Tull and Danilo Cardona, the
8 PICA working group, on how these fiscal requirements,
9 subgrant approvals and question costs and approvals for
10 purchases and that kind of thing fit with what it is we're
11 trying to seek accountability from programs for.

12 MS. PERLE: And I think that the IG's office, too,
13 will be involved. Because they have a responsibility to
14 ensure that the --

15 MS. BERGMARK: I think that can happen from sort of
16 a staffing perspective over the course of the winter and the
17 spring.

18 MS. PERLE: And I think that the role of the
19 working group in this will be to surface those policy issues
20 that have been problematic that are implicit in these rules
21 and that have had problems for programs and also to surface
22 those sort of practical technical problems of these rules.

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1 CHAIR BATTLE: Yes. That is why I'm suggesting
2 that before we begin to chew on the fiscal regulations, that
3 we probably need to send some signals to the proper places,
4 so that those underlying issues of how we do the
5 implementation on accountability and whether or not there's
6 an interface that affects policy on delivery -- all those
7 things are worked out and we have got that framework from
8 which to work when we look at the fiscal regulations.

9 MS. PERLE: But I think what Martha is suggesting
10 is correct, that there are lots more staff-related issues
11 than overall Board-related policy issues.

12 MR. McCALPIN: I wanted to make a point, which is
13 essentially the one that Linda was making, and then raise a
14 question. With respect to the narrow issue of regulations in
15 the fiscal area, I don't think they have anything to do with
16 our budgeting or our request to Congress for appropriation.

17 They deal with the nitty gritty and the nuts and
18 bolts of how programs handle the money they get from us and
19 from other places. And to that extent, I'm not at all sure
20 that provisions is involved.

21 But the question I want to raise -- and it's a
22 question of process. And that is whether we're going to look

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1 to A&A and, I guess, Provisions, only for policy statements
2 or whether we're going to look to them for actually drafting
3 or redrafting the regulations.

4 CHAIR BATTLE: My understanding -- and this is why
5 we're trying to thrash this out -- is the reason for having
6 involvement and looking to ANA or to Provisions is so that we
7 can get their input on policy as to how the regulations ought
8 to go, the nuts and bolts and to invite their participation
9 when we begin the drafting.

10 But I don't think we can bump to them the
11 responsibility ultimately for drafting. I think that's our
12 responsibility.

13 MR. McCALPIN: But then, is the drafting then going
14 to be initially at this table, or is it going out to the
15 working group for consideration and drafting after they make
16 policy decisions?

17 CHAIR BATTLE: I think that's up for discussion.
18 My view is, again, you cannot begin drafting until you know
19 what it is that you're drafting around and that the policy
20 considerations have to come first and then the drafting and
21 proposals and then our consideration of it.

22 So that's why I think some of the work that we have

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1 got to do is going to be driven by -- for example, I don't
2 know if FASBE or if there are new accounting requirements
3 with regard to fund balances that we need to give
4 consideration to as to how accounting happens today that are
5 different from when the regulations went in. I'm not really
6 an expert in the fiscal area, but that might be a
7 consideration that we get from the staff.

8 From what I'm hearing from Martha, in large
9 measure, the proposals as to how this accountability ought to
10 work should come from our staff and then be reviewed by
11 potentially the corollary --

12 MS. PERLE: I think that what we're going to try to
13 do is have the staff work with the fiscal working subgroup of
14 the regs working group, so that those proposals that come to
15 you will be really joint proposals, not having originated in
16 one place or another, but be a joint effort from the get-go.

17 CHAIR BATTLE: But let's consider this, that number
18 one, we have to delineate our view of what the issues are so
19 that Audit and Appropriations can consider and say, "Well,
20 based on where we are and what we're doing, this is our
21 policy."

22 Then, our staff and the working group take that

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1 policy, come up with some sort of draft, and then we meet in
2 tandem with Audit and Appropriations in our review of what we
3 have got, so that we have got people involved in the process
4 at levels which I think would be appropriate for their level
5 of decision making before we ultimately come up with a draft.

6 MS. MERCADO: And just to give you a key example of
7 where staff and the working group, as well as the IG's office
8 and ultimately Provisions -- one issue is the whole issue of
9 whether or not grantees ought to get this kind of auditing,
10 the governmental auditing standards.

11 I mean, it is an Audit and Appropriations aspect.
12 But it's really something that Provisions has to look at, as
13 far as the availability and accountability. The IG wants
14 accountability. So there's a tug-and-pull there about policy
15 and what the law requires or doesn't require. It is not
16 solely the purview of the Audit and Appropriations Committee.

17 When you're looking at accountability in the fiscal
18 regulations, that's one aspect that we're going to have to
19 decide, whether or not it goes in there or doesn't go in
20 there or what exceptions there may or may not be. So there
21 are some policy stuff that has to be done beforehand.

22 MR. McCALPIN: I think it's arguable whether

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1 Provisions has any responsibility in that area that you
2 mentioned.

3 CHAIR BATTLE: Let me get control of our people
4 just a minute.

5 Martha?

6 MS. BERGMARK: I don't see a major distinction, in
7 terms of process, between this little cluster of fiscal regs
8 and the other regs, in terms of my comfort level with using
9 the process that we're already engaged in.

10 I think increasingly, what we have seen in the regs
11 so far and will increasingly see and certainly on these regs,
12 greater LSC staff involvement where it's appropriate, whether
13 it's from the OPEAR end or OPS or whatever in the development
14 of the regs and that at that point, then, some decisions can
15 be made more clearly about who needs to be involved here as
16 we go forward.

17 And we have done that, to some extent. The joint
18 committee meeting next week is an effort to move in the
19 direction of saying, "Okay. Let's make sure we have the
20 Board committees involved that need to be at the proper
21 stage."

22 So I would caution against trying to decide right

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1 here this minute, you know, precisely how we're going to do
2 that. I think if we can decide on a general schedule that
3 yes, we want to move a cluster of fiscal regs in the
4 spring/early summer, that the working group and the LSC staff
5 can move in that direction and that we can then at that point
6 look at it and look at what the specific issues are and say,
7 "Well, here's an opportunity where we should have a joint
8 meeting or not" and proceed that way.

9 CHAIR BATTLE: I have got a general question.
10 Because, again, this will help us to focus on how we ought to
11 prioritize for next year. Does anyone have a feel for what
12 kind of needs there might be for any amendments in the fiscal
13 area? And I think having some sense for whether they're
14 pretty much on target or whether there's a lot of work that
15 needs to be done would be helpful to us as we begin the
16 process of scheduling.

17 So if someone could at least take a look at that,
18 then we'll know if the fiscal regs really need an overhaul.
19 Then, it may be more than just the early summer that we'll
20 have to take to accomplish that.

21 If they are in pretty good shape and if our staff
22 is comfortable with it mirroring its responsibility for

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1 enforcing procedures that assure accountability, so that
2 there's very little we need to do, then that puts another
3 light, I think, on what we have got to do.

4 But as part of considering the clusters, what I
5 wanted us to do today is give general priority. We know
6 legislative and administrative advocacy for February. We
7 have got early spring for fiscal regs. But some sense for
8 whether or not there's a real issue in there or not would
9 help us, in terms of how we put our schedule together.

10 MS. PERLE: I think that probably the best person
11 to answer those questions, from the LSC perspective, is Gary
12 Singen, who is unfortunately not here.

13 But I have the sense -- again, I'm not an expert at
14 all on those rules, but I have the sense that some parts of
15 that whole fiscal -- the group of rules and guidelines
16 dealing with fiscal issues that include the audit guide and
17 several LSC documents, some of those are in pretty good
18 shape.

19 I think 1630 is in pretty good shape. I think
20 other pieces of that -- for example, the audit guide -- are
21 in very bad shape and need substantial review. I mean, we
22 have a peculiar system.

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1 We have two audit guides, and programs can choose
2 which one they want to use. One was done in 1981, and one
3 was done in 1986. And both of them -- the 1981 to a larger
4 extent, but the 1986 one, also, are substantially out of date
5 and don't take account of a number of issues that have
6 arisen. So I think those really need some substantial
7 attention.

8 In terms of some of the others, I think the
9 recipient fund balance rule needs substantial attention. And
10 the subgroup rule, fees and dues, needs substantial
11 attention. I don't know that the bonding requirement needs
12 to be touched at all. And I don't understand exactly the
13 purpose of 1631. So we may need to --

14 CHAIR BATTLE: Maria?

15 MS. MERCADO: Yes. I was just noticing -- you
16 might have some interest in this.

17 A PARTICIPANT: I think the inspector general
18 mentioned to the Board during the last meeting that the IG's
19 office is in the process of drafting a new audit guide that
20 we'll be giving to management. And it will work through the
21 process, then, outward to the field.

22 Hopefully, the draft -- it's going to be very

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1 short. And hopefully, it will be in shape to start getting
2 out for comment -- out of our office, at least, real soon.

3 CHAIR BATTLE: Okay. Well, I think as we get more
4 information about the issue areas in the fiscal regulations
5 cluster, that will help us to know how much time to allocate
6 to the whole area of addressing fiscal regulations.

7 My hope is that, at least with what we have said so
8 far, that if we get legislative and administrative advocacy
9 in February, that we will complete the process on the regs
10 that we have in the process now. Then, probably fiscal, it
11 seems to me, would be next.

12 MS. PERLE: We're not exactly sure how quickly the
13 Provisions Committee would go forward with consideration of
14 policy or goals for PAI, but we're hoping that will happen
15 sooner rather than later. And we might be able to begin some
16 initial consideration of a draft PAI reg at some point.

17 MS. BERGMARK: And did you have also on your list
18 "class actions"?

19 MS. PERLE: Yes. I think that we should go ahead
20 and do a redraft of class actions. We can work on that. The
21 general counsel's office staff and the regs working group
22 representatives can work on that together. We can do it

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1 pretty quickly. We can present it to the regs working group
2 when it meets in January. And I think we can have that one
3 ready in February, as well.

4 CHAIR BATTLE: Okay. So we're talking about now
5 potentially class actions and legislative and administrative
6 advocacy as the two?

7 MS. PERLE: And this sort of -- they sort of have
8 some natural affinity for one another.

9 CHAIR BATTLE: They're both confusing.

10 MS. PERLE: They're both confusing, and they both
11 deal with topics that are subject to substantial
12 misunderstanding and confusion on the behalf of recipients.

13 CHAIR BATTLE: Okay. Good. We're at a point where
14 -- I'll just find out where committee members are. I think
15 at least what we have done in this process is to figure out
16 where we're going to start next year and what we have got in
17 clusters on our plate.

18 And I think as we meet again and get a chance to
19 understand where fiscal regs are and take a look at some of
20 the other regs that were listed that we went through, we'll
21 get a better feel for what else and when we'll be receiving
22 input from the staff and from the regs working group on the

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1 other regs that we have got up.

2 What I would like to do at some point maybe in
3 December is to just -- from the process of the discussion
4 that we have had today and how we have listed and gone
5 through the regs, kind of set a tentative agenda for 1995 as
6 to what's realistic.

7 I want us to put our plate together with a
8 realistic group of regs in groups, so that we can consider a
9 cluster and have the right people that we need at the
10 meetings and do it in the most efficient way that we can and
11 also so that at the end of the year, we'll feel accomplished.

12 We will have, for example, either completed all the
13 fiscal regs and completed the initial consideration of those
14 regs that impinge on recipients in such a way that at the end
15 of the year, we can begin to look at some of the other issues
16 that we have got to address.

17 Are there any other questions about the scheduling
18 process?

19 (No response.)

20 CHAIR BATTLE: Next on our agenda, we have Consider
21 and Act on -- I'm sorry.

22 MR. McCALPIN: Let's talk a minute. We have only

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1 talked about one of what I think are three portions of the
2 agenda of this committee. With respect to reauthorization,
3 again, I think that we ought not to think about what we're
4 going to do about that until December.

5 But in the area of operations of the Corporation, I
6 think it's important that we come to an understanding between
7 this committee and staff of what is our responsibility in the
8 area and how we and staff will interact with respect to
9 structure, personnel policies, all that sort of thing.

10 The only time we have looked at this was before we
11 really had our own staff. Now, we have -- as Martha says, we
12 have filled out our staff significantly, and it may very well
13 be that our role under the rubric "Operation" may be
14 considerably different than we would have thought of it in
15 January of this year.

16 And I think we need to get some understanding
17 between us and staff of what is our role, in terms of the
18 internal operation of the Corporation.

19 CHAIR BATTLE: Martha, that question seems to be
20 really directed, for purposes of discussion, to you to see
21 exactly where we are.

22 As I understand it, we generally oversee and

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1 establish policy in the operations area. We really haven't
2 had any policy, other than just establishing what we did, as
3 you said, at the onset, where we thought we were going to go,
4 generally, so that the staff would have an idea of what our
5 overriding concerns were. But we haven't really delved into
6 setting any specific policies in any areas.

7 Martha, you mentioned earlier that a personnel
8 manual was being revisited. And I'm sure that there are
9 policy considerations in adopting a personnel manual that
10 this committee would have the responsibility for looking at.
11 And there are reorganizational changes being undertaken. And
12 the question is, are there any policy considerations that
13 flow into the whole process of reorganization that we ought
14 to be giving consideration to.

15 And I think, Bill, your concern in raising that at
16 this point is well taken. We really as a committee have not
17 spent time on the whole issue of operations, and we do need
18 to have some real understanding as to how and where those
19 kinds of considerations that this committee needs to have in
20 the operations area ought to be undertaken, in light of our
21 scheduling for next year.

22 MR. McCALPIN: I would like to suggest that maybe

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1 staff send us a paper or something on what they view as the
2 responsibility of this committee in the area, so that we get
3 some input from staff of what they think we ought to be doing
4 vis-a-vis what they're doing.

5 MS. BERGMARK: I think that it has been appropriate
6 that you've given Alex an opportunity to see what's on the
7 waterfront and to get his feet on the ground, in terms of
8 what are the needs there and what are the -- you know, we
9 have been engaged really in fact-finding over the course of
10 the months about what we're producing there internally.

11 So I think it probably is an appropriate stage
12 coming up shortly to begin to come to some agreement about
13 sort of what our findings are and, therefore, what that might
14 mean, in terms of an appropriate committee role.

15 But frankly, we have not gotten yet to the stage of
16 saying, "What of where we're headed seems to be truly kind of
17 an internal just management piece here, versus what are the
18 policy implications that the committee at the very least
19 needs to be briefed on and at most may have decision making
20 needs?"

21 So I think whether -- let me take back the notion
22 of a paper. Whether we produce a paper or some sort of

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1 report in some other format, I think the notion is one of
2 information sharing and communication to see what interaction
3 there ought to be in either a decision making way or an
4 information sharing way.

5 CHAIR BATTLE: Okay. Does that satisfy the concern
6 that you raised?

7 MR. McCALPIN: Yes.

8 CHAIR BATTLE: So we'll look forward to some more
9 dialogue around the issue of our responsibilities in the area
10 of operations.

11 Does that cover your memo, Bill, fully?

12 MR. McCALPIN: Yes.

13 CHAIR BATTLE: Well, good. I think that this
14 discussion -- I know it has taken some time this morning.
15 But I think it's extremely helpful to us, because we really
16 do need to step back from the work that we're doing at each
17 level on each reg to see exactly where we're going, so that
18 at the end of next year, we can look back and see if where we
19 got is where we intended to go. And this is a good
20 discussion to start us in that direction.

21 We next have 1607, Consider and Act on Proposed
22 Changes to Part 1607 of the Corporation's regulations, on our

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1 agenda. 1607 is in -- you should have as a committee member
2 received at least a week before this meeting a binder, which
3 is inclusive of draft proposed rules for 1602, 1604, 1607,
4 1609, 1610, and 1611. And under Tab 3 in that binder, you
5 will find 1607.

6 1607 was part of much spirited debate at our last
7 meeting, as we went back through it. And one thing that
8 we're doing now that I think has been extremely helpful to me
9 is that we're putting in bold the changes, so that the
10 committee as we go through, we're clear as to which sections
11 are changed as a result of our discussion and which ones have
12 remained the same.

13 And I think that helped me tremendously in going
14 back through and reading and preparing for today. So I
15 appreciate that change in the process by staff.

16 MS. GLASOW: I do want to let you know, we did miss
17 a few places.

18 CHAIR BATTLE: I did notice that, too.

19 MS. PERLE: And a number of changes were made in
20 the commentary that were not bolded. But I think that most
21 of any significant change in the rule itself was indicated.

22 CHAIR BATTLE: I did note that there were some --

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1 I'm not certain as to particularly whether they were in 1607
2 or in some of the other rules. There were some changes that
3 were not bolded. But I really do think that that practice is
4 going to be extremely helpful to us in helping us to get
5 through the process.

6 MS. PERLE: We try.

7 CHAIR BATTLE: As we went through 1607 with a fine
8 tooth comb for the last time last meeting time, there was a
9 provision that resulted in much discussion which had to do
10 with the waiver provision which would allow the president of
11 the Corporation to waive the requirement of client
12 participation on a board where the sole activity of the
13 recipient was not the provision of and delivery of legal
14 services to our client constituency.

15 And as a result of the discussion, we have before
16 us a proposal with some significant changes in the waiver
17 provision in the commentary on page 22, 1607.6, picking up on
18 the top of page 23, 1607.6(b) and carrying over to 24 and 25.

19 The general discussion in the commentary reflects
20 the concern that we had about how this particular provision
21 on a going forward basis will affect decision making in the
22 waiver area. And rather than go through and read that, I'll

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1 take any observations or comments that anyone has about the
2 comments to see if, in your view, they are consistent with
3 our general consensus at the last meeting.

4 MS. PERLE: I just want to note that on page 23,
5 the bottom of 23 and the top of 24, it's bolded. But I think
6 that was a computer glitch, because there weren't any
7 changes, as I saw it.

8 CHAIR BATTLE: To (b)(1). Okay.

9 MS. PERLE: Right. It starts with the language of
10 (b)(1).

11 CHAIR BATTLE: Right. Correct.

12 MS. PERLE: There were no changes there.

13 MS. MERCADO: I just need like a minute or two to
14 read it, because I'm not a member of the committee, so I
15 didn't get this.

16 CHAIR BATTLE: Okay. All right.

17 MR. MCCALPIN: Let me go to this issue. I want to
18 go back and suggest some minor language changes in the
19 commentary. But let's concentrate on this issue which you
20 have raised here now.

21 As I understand it, the issue was whether we would
22 require client membership on boards of organizations which

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1 are not solely or primarily dealing with the provision of
2 legal services. And the consensus that was reached is that
3 we ought to require client participation on the board of any
4 organization that receives our funds. Am I right about that?

5 CHAIR BATTLE: In the form of a policy board, if
6 not -- and I think that that's why the language, as you bump
7 through and look at the actual changes in the regulation,
8 there is a change in "policy board" definition, and there is
9 also a change in the waiver provision, so that the president
10 no longer has the discretion to fully waive the client
11 participation responsibility to an entity that receives our
12 funds, even if they are not engaged solely in the provision
13 of legal services.

14 MR. McCALPIN: That's D on page 33?

15 CHAIR BATTLE: Yes.

16 MR. McCALPIN: Right?

17 CHAIR BATTLE: That's right. Yes.

18 MS. PERLE: The waiver provision that permitted the
19 waiver of client board membership has been deleted.

20 MR. McCALPIN: I'm sorry. I didn't hear you.

21 MS. PERLE: The waiver provision that appeared last
22 time, which basically said for those entities that were

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1 described where it wasn't one of the primary purposes the
2 provision of legal assistance, that waiver provision that
3 would have permitted waiver of the client board participation
4 requirement has been deleted completely.

5 So that what it says now is that if it's not
6 appropriate because of certain circumstances to require the
7 governing body of an entity to have client participation, you
8 must have a policy board that meets the composition
9 requirements of the governing board rule.

10 MR. McCALPIN: I want to make a point. The minutes
11 record me as being opposed to this. I'm not sure whether
12 that's a totally accurate characterization or not. But the
13 one thing that I think is important to note is that what we
14 have here is, I believe, a conflict between two principles
15 that have permeated much of our activity.

16 One is full client participation, which I fully
17 support. I think that we have benefited greatly from the
18 participation of clients in all our activities.

19 The other principle, which is probably less
20 evident, is that we have characterized prior Boards for
21 imposing conditions or restrictions beyond those which are in
22 the statute. And, indeed, there is a provision in the

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1 reauthorization bill which we support which would prohibit
2 the Corporation from imposing any condition or restriction
3 beyond those imposed by the Congress.

4 And arguably, when we go beyond what the Congress
5 has said in terms of those entities which require client
6 participation, we are in some respects departing from that
7 principle and falling into the practice which we criticized
8 in prior Boards. I think I support it, and I think you can
9 -- I do support what we have here.

10 And you can argue that we haven't really modified
11 the statute, since it's in terms of policy boards, not
12 governing boards. But I think in the future, we need to be
13 careful about this Corporation imposing on recipients
14 conditions and restrictions beyond those which are required
15 by the Congress.

16 CHAIR BATTLE: I think that that is a point which
17 is well taken from the standpoint that each time that we give
18 consideration to in this process redrafting a regulation, we
19 need to be cognizant of the implications of putting
20 restrictions or in place something that the statute does not
21 require.

22 But we have done it in this area, because I think

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1 we do have an overriding policy consideration, as we did, for
2 example, on the regulation that we have on diversity, which
3 is a requirement that we put in for consideration that has
4 nothing to do with the statute, but it has to do with the
5 policy position that we have taken as a Board.

6 So I think, as I said, that your point is well
7 taken, that any time that we undertake to do this, we have to
8 be mindful of what the statute requires and where we depart
9 from that, that we are making a departure from that. But at
10 the same time, we have to weigh that in light of whatever our
11 position is with regard to the underlying policy which drives
12 our decision to depart.

13 And I think at this point, as you have said, I
14 strongly support the position that we have taken on
15 departing, because I think it will significantly be a way of
16 enhancing any recipient of our funds by ensuring that at some
17 level, they have some sort of client input into the process.

18 Maria?

19 MS. MERCADO: I'm sorry that I wasn't present
20 during this discussion, because I'm probably going to throw a
21 wrench into this. I have a different philosophy, I guess, of
22 policy bodies versus governing bodies. I mean, if you're

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1 going to have client input, the client input ought to be in
2 the governing body, rather than a policy body.

3 It's sort of like all these advisory groups that
4 can sort of advise, but you don't have to carry out the
5 recommendations that the advisory committee does to any
6 particular governing board. And so if you're going to have
7 client input, it ought to be in the governing body.

8 I understand the whole argument between support
9 centers being nondelivery of legal services. But ultimately,
10 they are in the work that they do in providing the support
11 systems for them. I'm not so sure -- and I don't know where
12 in the statutes it talks about policy bodies. There isn't
13 any, is there?

14 MS. PERLE: No. The notion of a policy body was
15 one which came up in the late '70s when the Corporation
16 funded the delivery system study projects, where they funded
17 a number of projects. The recipients were entities that had
18 been in existence for some time that did other things,
19 prepaid legal insurance programs, Bar associations, a number
20 of other entities.

21 And when we looked at the rules that we were
22 working under, it would have suggested that the board of

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1 directors of this huge insurance company that ran a prepaid
2 legal insurance plan, for example, had to be completely
3 reconstituted along the lines of our rule.

4 And I think there was general recognition that that
5 was not a reasonable thing to require and that what we really
6 wanted to ensure was that there be a body with responsibility
7 to formulate and enforce policy with respect to the LSC
8 grant, the program that was funded by the LSC grant funds.

9 And so we developed the concept of a policy body,
10 which was utilized in those 25 or 30 programs -- actually, it
11 was utilized in some proportion of those programs where the
12 recipient was one of the sort of peculiar entities, not our
13 typical recipient. And those were the situations where it
14 was used.

15 We anticipate that this rule will be used in the
16 situation, for example, with FRAC, which was the entity that
17 we talked about last time, which receives only 5 percent of
18 its funding from LSC funds.

19 It does -- a huge amount of its work is advocacy
20 run issues that doesn't relate to legal assistance for poor
21 people, that -- while it's clear that we want to require that
22 there be client input with respect to those activities funded

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1 by the LSC grant and those that relate closely to the work
2 that's funded by the LSC grant, we really don't think it's
3 necessarily appropriate to impose on an organization that
4 gets such a small percentage of its money from LSC and that
5 has so many other demands on its governing body to impose all
6 of the requirements and restrictions on that overall
7 governing body, so long as the use of LSC funds is clearly
8 governed by a body that meets the requirements of this rule.

9 MS. MERCADO: But isn't ultimately the main
10 governing body, for example, of FRAC free to totally
11 disregard whatever the advisory committee does or doesn't do?
12 Or is there some mandate that they are to --

13 MS. PERLE: Well, first of all, this is different
14 than an advisory body. And if you look at the definition on
15 page 27 of a "policy body," it says, "'Policy' refers to a
16 policy board or other body established by a recipient to
17 formulate" --

18 MS. MERCADO: Where are you at? I'm sorry.

19 MS. PERLE: On page 27. Are yours the same
20 numbers?

21 CHAIR BATTLE: Do you see the bolded print on page
22 27?

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1 MS. PERLE: The bolded print about a little less
2 than a third of the way down which gives a definition of
3 "policy body," which is, it "formulates and enforces policy
4 with respect to the services provided under grant or
5 contract."

6 And then, later on in the rule, it says that the
7 president, in granting a waiver, has the authority to
8 determine what responsibilities and obligations that policy
9 body will have. So we anticipate that that body is something
10 much more than an advisory committee.

11 MS. GLASOW: It basically oversees the LSC grant.
12 It's just a recognition that there is some other governing
13 body for the grantee which is a very large special
14 organization that may have some authority, for instance, to
15 hire or fire executive director. But certainly, this board
16 of directors over here is not going to make decisions
17 governing this grant. That would be done by the policy body.

18 CHAIR BATTLE: Does that meet the concern that you
19 raised about it being a policy or advisory body?

20 MS. PERLE: It's something different than a
21 advisory body. We have had these policy bodies -- we haven't
22 had any specific recognition for them in the regs, but I

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1 think that they have worked in those instances where they
2 have existed.

3 And I think that we would have to speak to the
4 people that have been involved in them to get their view of
5 how effectively they do work, in terms of making and
6 enforcing policy for those programs. But it's my
7 understanding that they have met the goal for which they were
8 established.

9 MS. MERCADO: I guess part of my --

10 CHAIR BATTLE: The policy board, too, has the same
11 responsibilities that are set out for governing boards
12 otherwise. So --

13 MS. PERLE: With respect to setting policy. There
14 may be some differences, in terms of how they interact with
15 the rest of the organization.

16 CHAIR BATTLE: That's right, how the membership is
17 comprised and how they implement their responsibilities.

18 John, I think you were moving the mike to be able
19 to speak. Were you?

20 MR. BROOKS: You just said it. Thank you.

21 CHAIR BATTLE: Okay.

22 Bill?

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1 MR. MCCALPIN: As long as we're on page 27 and
2 1607.2(e), may I suggest that we have fallen again into this
3 business of defining something by naming it? We define a
4 "policy body" as a "policy board." Why do we need the word
5 "policy" before "board"? Isn't it "a board or other body
6 established to formulate and enforce policy"?

7 MS. PERLE: You're right. Yes.

8 MR. MCCALPIN: I think we take out the word
9 "policy" as it appears in that line.

10 MS. PERLE: Yes. We agree.

11 MR. BROOKS: May I suggest, also, that "the policy
12 body refers to" -- what we really mean is "means."

13 MS. PERLE: "Means." Okay.

14 MR. BROOKS: And we have used the word "means" in
15 the earlier definition. Well, it's --

16 MS. PERLE: We need to change it in (d), as well.

17 MR. BROOKS: In 1607.2(a), we use the word "means."
18 In (b), we use "referred to." In (c), we say "means." I
19 suggest "means" would be appropriate for each one.

20 MS. MERCADO: Well, it would be the same for (d),
21 right?

22 MS. PERLE: Yes.

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1 MS. MERCADO: You want to change that?

2 MR. BROOKS: (d) and (e).

3 MS. GLASOW: So done.

4 MS. MERCADO: And (f).

5 MS. PERLE: Right. (f), also.

6 MR. BROOKS: And I have a few suggestions when we
7 get to it.

8 CHAIR BATTLE: Are we through with the "policy"
9 considerations? Can we go back to editing? And we have got
10 our editing specialist here on this committee to --

11 MS. FAIRBANKS-WILLIAMS: I have a question.

12 CHAIR BATTLE: Okay.

13 MS. FAIRBANKS-WILLIAMS: Does this policy body
14 still contain clients, or can they by the waiver not have any
15 clients at all?

16 CHAIR BATTLE: No.

17 MS. GLASOW: No. They're absolutely required to
18 have the composition requirements.

19 CHAIR BATTLE: They must have clients. That was
20 the whole purpose for striking an earlier provision which
21 allowed for the waiver of clients and in reworking the final
22 provision so that clients would be included on policy boards.

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1 MS. MERCADO: LaVeeda?

2 CHAIR BATTLE: Yes?

3 MS. MERCADO: I guess I didn't either hear it, or I
4 wasn't paying clear attention. Does that policy body that
5 deals with funds from Legal Services Corporation have the
6 ultimate say on how those funds get used?

7 MS. PERLE: Yes.

8 MS. MERCADO: And that policy body incorporates the
9 different requirements of client representation and so forth
10 on that board?

11 MS. PERLE: Yes.

12 MS. MERCADO: Okay. That's what I was concerned
13 about.

14 MS. PERLE: That's the purpose. And maybe what we
15 need to rewrite -- we need to do some rewriting on the
16 commentary. Maybe we need to make that point clear.

17 MS. MERCADO: Yes, because that's not real clear
18 from here. And when I see that and I think other people who
19 tend to be more advocates on the grass roots level, they're
20 going to say, "Wait a minute. I mean, all you're actually
21 going to have is an advisory committee like all advisory
22 committees that we're all acquainted with that can give a lot

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1 of good advice. But ultimately, the governing body can
2 either accept or reject the recommendations."

3 And 9 times out of 10, if it's a position that is
4 taken by the less versed or either the weaker of the
5 constituents that are being represented, that policy isn't
6 going to go through. And that was my ultimate concern, is to
7 make sure that it does happen. And if it does, I don't have
8 any problems with it.

9 MS. PERLE: I think we need to emphasize that in
10 the commentary, but that is clearly the intent.

11 CHAIR BATTLE: Okay. Are there any other concerns
12 about the issue that we have now had addressed in 1607 in the
13 waiver provision?

14 (No response.)

15 CHAIR BATTLE: If not, then let's go back through.
16 And if there are editing changes or questions, let's cover
17 those in 1607.

18 MS. GLASOW: I have on page 2 --

19 CHAIR BATTLE: Bill, do you have anything on page
20 1?

21 MR. McCALPIN: No.

22 CHAIR BATTLE: Okay. Page 2.

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1 MS. GLASOW: Page 2, it's above the section
2 analysis, and it's the paragraph that says, "The committee
3 recognizes the legislation." The line under that should be
4 "reauthorize" instead of "authorize."

5 MS. PERLE: I think also, and I mentioned this to
6 Suzanne earlier, that this was written at a time when there
7 was under consideration by Congress a specific bill. That is
8 no longer so. I think that what we need to do on all of
9 these rules is to change that to suggest that Congress may
10 consider in the next session of Congress reauthorization.
11 And so I think that we need to change that, with respect to
12 all of these rules.

13 MR. MCCALPIN: That was going to be my comment on
14 page 2, because I thought that paragraph needed to reflect
15 the current situation, where the Congress is not presently
16 considering legislation.

17 CHAIR BATTLE: Yes. I think that's well taken.
18 And we might be able to put that in the word processor and
19 just use it until circumstances change.

20 MR. MCCALPIN: Exactly.

21 MS. PERLE: I do. I borrow.

22 MR. MCCALPIN: That refers to all the rest of them

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1 what we're going to be dealing with.

2 CHAIR BATTLE: That's right.

3 MS. PERLE: I want to note, then, on page 3, in the
4 paragraph that starts, "One comment suggested that the
5 committee ask that we put in reference to the fact that those
6 law professors may serve as other members pursuant to
7 1607.3(d)." And that language is new, at the bottom of the
8 last full paragraph, the last sentence.

9 CHAIR BATTLE: Right. I recall that.

10 MS. MERCADO: Professors may what, now?

11 CHAIR BATTLE: They may serve as other members. In
12 other words, even though they are not licensed to practice in
13 the jurisdiction where the recipient is located and are
14 licensed somewhere else, they still may have the opportunity
15 to serve on the board under the "other" designation for board
16 membership.

17 MR. McCALPIN: Are you suggesting the change there,
18 Linda?

19 CHAIR BATTLE: No, just simply identifying --the
20 last sentence should have been bolded, is what she's saying,
21 because --

22 MR. McCALPIN: Should have been --

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1 CHAIR BATTLE: Bold, because it is added. It is an
2 addition that simply explains that law professors can serve
3 as other members.

4 MR. McCALPIN: Right.

5 CHAIR BATTLE: All right. Anything else on page 3?

6 (No response.)

7 CHAIR BATTLE: Page 4?

8 (No response.)

9 CHAIR BATTLE: Page 5?

10 (No response.)

11 CHAIR BATTLE: Page 6?

12 (No response.)

13 CHAIR BATTLE: Page 7?

14 MR. McCALPIN: Yes.

15 CHAIR BATTLE: Bill?

16 MR. McCALPIN: In the second line under 1607.3(a),

17 I wonder if we shouldn't insert the word "all," that "all

18 board members must be supported."

19 MS. GLASOW: That's fine.

20 MR. McCALPIN: That's what we have tried to do.

21 CHAIR BATTLE: Yes.

22 MS. PERLE: And I would suggest also that in the

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1 paragraph that starts 1607.2(e), that we put in some language
2 that clarifies that this policy body would set policy, the
3 point that was made by Ms. Fairbanks-Williams, that we want
4 to make it clear that that is the role of that policy body,
5 to set policy with respect to the LSC grant. I'm going to
6 add some language there.

7 Also, in the paragraph at the top that starts on
8 the previous page, the line that says "Requirements that
9 would allow a recipient to establish," that should now say
10 "would require a recipient to establish a policy body."
11 Because that was changed, based on the --

12 MR. McCALPIN: Where are you?

13 MS. PERLE: I'm at the top of page 7. I'm sorry.
14 From the top of the page, the one, two, three, fourth, fifth
15 line down. It talks about allowing a recipient to establish
16 a special policy board or body. And what we're saying now is
17 that it's required, rather than allowed.

18 MR. McCALPIN: Required?

19 MS. PERLE: Required. "The president has the
20 authority to grant waivers on board composition requirements
21 that would require a recipient" -- we may have to look at the
22 language. But the point is --

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1 CHAIR BATTLE: Requirements to require. Work that
2 language.

3 MS. PERLE: Right. But the point is that it's an
4 obligation. It's no longer something that's discretionary.

5 CHAIR BATTLE: That's discretionary?

6 MS. PERLE: Right.

7 CHAIR BATTLE: Okay. Anything else on 7?

8 MR. BROOKS: Well, I tell you, I'm going to make a
9 suggestion when we come to the rule itself on the definition
10 -- I'm sorry -- on the last page, 33, I think it is, that the
11 policy body not only conform as to composition but also be
12 deemed to be a governing body for purposes of 1607.4(a), (c),
13 and so on, which relates to compensation of governing body
14 members as it's now written should also apply to the policy
15 board members.

16 CHAIR BATTLE: Which section are you saying needs
17 to be added -- "but also deemed to be a governing body for
18 purposes of" what section?

19 MR. BROOKS: 1607.4(a) and (b) and 1607.5. In
20 other words, the policy board shall not only be composed in
21 the same manner as the governing body, but also be something
22 to these other governing provisions of members of the

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1 governing board. So it is, in fact, the governing board
2 complying with the requirements otherwise applicable to a
3 governing body. So --

4 MS. GLASOW: Earlier on, we had a reference to the
5 whole Section 4 for this policy body. And we deleted it
6 because, for instance, in paragraph (b), if they are subject
7 to, for instance, the D.C. corporate code, the nonprofit
8 corporate code, that could require that the policy body have
9 -- to use the example I gave earlier, have the power to hire
10 or fire an executive director. And so we deleted reference
11 from that. So (b) could be problematic with our policy body.

12 MS. PERLE: I think that the point is that the
13 policy body, by definition, has somewhat restricted
14 responsibilities with respect to the overall recipient and
15 that there might be some inconsistency between the way it
16 operationally has to be structured and the rule under (b).

17 CHAIR BATTLE: John, does the next sentence, "The
18 policy body shall have the powers and responsibilities the
19 president deems are necessary" cover in part your concerns in
20 that the president can in reviewing a particular applicant's
21 proposal to set up a policy body structure for that policy
22 body as many of the rules that govern the policy body as are

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1 practicable, given whatever the other dynamics are about
2 decision making for that particular entity?

3 MR. BROOKS: Well, almost. What I suggest is --
4 and I'm flagging this point for the commentary on 1607.

5 MS. PERLE: I think your point about the
6 compensation is certainly well taken, and we can certainly
7 add that.

8 MR. BROOKS: And then we can take up the details as
9 we get to page 33 with subparagraph (d).

10 MS. PERLE: Right. I think that Mr. Fortuno has
11 some concern about a similar issue, with respect to language
12 on the "governing body" definition, which says it has full
13 authority to govern the activities of a recipient. And then,
14 he's suggesting that if we give the policy body some
15 responsibility, that it doesn't have the full authority. And
16 maybe we need to take out "full" and put in "overall" or
17 something like that instead of "full."

18 CHAIR BATTLE: Tell me where that "full" is.

19 MS. PERLE: I'm sorry. We're looking on page 27 of
20 the rule, which deals with the definition of "governing
21 body." We had added some language that said "with full
22 authority to govern the activities of a recipient."

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1 And I think maybe what we ought to do is substitute
2 "overall" for "full," which gives you some recognition of the
3 fact that a program that has the governing body which has
4 received a waiver and requires them in lieu of that to set up
5 a policy board -- the governing authority no longer has full
6 authority to govern the activities of the recipient because
7 there is a policy board which now governs the activities that
8 are funded by the LSC grant.

9 CHAIR BATTLE: Would it be clear if you simply
10 deleted "full" with "authority to govern"?

11 MS. PERLE: I think so. But that was added at your
12 insistence, I think, originally.

13 CHAIR BATTLE: "Overall" --

14 MR. FORTUNO: Pardon me?

15 CHAIR BATTLE: "Overall" is further descriptive.
16 And it may help.

17 MR. FORTUNO: Well, I guess the concern was simply
18 this, that if you look at the definition of "governing body"
19 and then the following definition of "policy body," there
20 seems to, at least on its face, appear to be a conflict. And
21 the "governing body" is defined as having full authority to
22 govern.

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1 But if you have a policy body, and it's expressly
2 established to formulate and enforce policy, then it seems
3 that the Board does not have full authority, because some
4 portion has been carved out and given to the policy body. So
5 it was just finding some language that would recognize that.

6 Maybe taking out full authority does it, or maybe
7 including some language to the effect of "Subject to
8 subsection (e) below" -- you know. But that's --

9 MR. McCALPIN: I think just leave "full" out.

10 MR. FORTUNO: Delete "full"? Okay.

11 CHAIR BATTLE: And just say "authority." Yes. And
12 that covers it.

13 MS. PERLE: Okay.

14 CHAIR BATTLE: Okay. We were back on page 7 as
15 we're marching through this. Let me just mentioned, because
16 Pats slipped me a note, that our lunch is sitting out in the
17 hall. So if we think that we're going to take more than a
18 few minutes, we can --

19 MR. McCALPIN: I think we can get through this
20 fairly quickly.

21 CHAIR BATTLE: Okay. My suggestion was going to be
22 to try to get through 1607 and then break for lunch. Can

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1 everybody stand it? Okay. All right.

2 We are on page 7. Are there any other comments
3 about page 7, any other editing concerns?

4 (No response.)

5 CHAIR BATTLE: Page 8?

6 MS. GLASOW: Page 8 is just a technical revision.
7 Because the diversity provisions are found in different
8 sections, I need to put a new heading there that says
9 "Section 1607.3(b)(3), 3(c), and 3(d), because I'm talking
10 about it under another -- I'm talking about it under
11 paragraph (a), and it doesn't follow. It's really --

12 MS. PERLE: There just needs to be a title.

13 MS. GLASOW: It just needs the title.

14 CHAIR BATTLE: So you're saying the paragraph that
15 begins with "3, diversity" needs a section heading which
16 identifies the particular sections being discussed?

17 MS. GLASOW: That we're talking about, correct.

18 CHAIR BATTLE: Okay.

19 MS. GLASOW: And those sections are 3(b)(3), 3(c),
20 and 3(d).

21 MR. McCALPIN: 3(b)(3) what?

22 MS. GLASOW: 3 little (b) 3, 3(c), 3(d).

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1 CHAIR BATTLE: Okay.

2 MR. McCALPIN: What's the second one?

3 MS. GLASOW: 3(c) as in --

4 MR. McCALPIN: "D" as in "dog"?

5 MS. GLASOW: "C," as in "cow."

6 MS. PERLE: I think the only point is that we need
7 to have some reference to those rules to make it clear.
8 Whether it's a title or just in the language, we need to make
9 that change.

10 CHAIR BATTLE: Okay. Anything else on page 8?

11 (No response.)

12 CHAIR BATTLE: Page 9?

13 (No response.)

14 CHAIR BATTLE: Page 10?

15 MR. McCALPIN: Let --

16 CHAIR BATTLE: I'm sorry. 9.

17 MR. McCALPIN: Let me suggest under 1607.3(b) in
18 the second line, I think it reads better if we say "revises
19 the language of the current rule." I would move over to
20 precede "rule."

21 MS. GLASOW: Fine.

22 MR. McCALPIN: And is it accurate to talk about the

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1 Corporation's appropriation "act"? Actually, we are a piece
2 of a larger appropriation, state justice and all the rest.
3 And I'm just wondering if it's accurate to talk about the
4 Corporation's appropriation act.

5 MS. PERLE: How about if we say "in the act
6 appropriating funds to the Corporation"?

7 MS. GLASOW: "To the Corporation." Okay.

8 MR. BROOKS: Do we need a cite for that?

9 MR. McCALPIN: No, because it changes every year.

10 MS. PERLE: And also, we did put a cite in the rule
11 itself citing this current appropriation and similar
12 appropriations language that requires the same.

13 MS. GLASOW: Any subsequent or similar language.

14 CHAIR BATTLE: Okay. Anything else on 9?

15 (No response.)

16 CHAIR BATTLE: 10?

17 (No response.)

18 CHAIR BATTLE: 11?

19 (No response.)

20 CHAIR BATTLE: 12?

21 (No response.)

22 CHAIR BATTLE: 13?

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1 (No response.)

2 CHAIR BATTLE: 14?

3 MS. GLASOW: 14.

4 CHAIR BATTLE: Yes.

5 MS. GLASOW: Under 1607.3(f), second line, I would
6 like to talk out the word "substantively," because it may be
7 misunderstood to suggest that we have made such a substantive
8 revision from the proposed rule that it may need
9 republication.

10 And I believe Laurie has provided the committee
11 with a memo she did on that issue. And we have all looked at
12 it in the general counsel's office. And we concur that
13 republication is not necessary.

14 MR. McCALPIN: Take that out.

15 CHAIR BATTLE: Yes. Okay. Anything else on 14?

16 (No response.)

17 CHAIR BATTLE: 15?

18 MS. GLASOW: 15, the same change on the paragraph
19 with the heading 1607.3(h), take out the word
20 "substantively."

21 CHAIR BATTLE: Okay. For the very same reason?

22 MS. GLASOW: Yes.

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1 CHAIR BATTLE: Okay. All right. Anything else on
2 15?

3 (No response.)

4 CHAIR BATTLE: 16?

5 (No response.)

6 CHAIR BATTLE: 17?

7 (No response.)

8 CHAIR BATTLE: 18?

9 MR. MCCALPIN: Yes.

10 CHAIR BATTLE: Okay. Bill?

11 MR. MCCALPIN: Two things. The last line before
12 point (b), I wonder if it should -- as the kind of matters
13 that "might appropriately" instead of "should." And then,
14 six lines from the bottom at the end, we refer to "model
15 rules" the first time. Do we need to say what those are? Do
16 we need to define what we mean by "model rules"?

17 MS. GLASOW: We could certainly spell that out
18 better and give the full definition and --

19 MR. MCCALPIN: Even by way of a definition or ABA
20 model rules of professional responsibility or something of
21 that sort.

22 MS. GLASOW: Sure. We'll fix that.

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1 MR. McCALPIN: It seems to me it's a very elliptic
2 reference there.

3 CHAIR BATTLE: Anything else on 18?

4 (No response.)

5 CHAIR BATTLE: 19?

6 (No response.)

7 CHAIR BATTLE: 20?

8 (No response.)

9 CHAIR BATTLE: 21?

10 (No response.)

11 CHAIR BATTLE: 22?

12 (No response.)

13 CHAIR BATTLE: 23?

14 (No response.)

15 CHAIR BATTLE: Anything on 24?

16 (No response.)

17 CHAIR BATTLE: 25?

18 (No response.)

19 MR. McCALPIN: Wait a minute. Back up a minute.

20 If you look at the first two lines on 22 and the last
21 underlined sentence at the top of 24, it looks to me like
22 they duplicate each other, where you talk about "could

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1 partially waive compensation, partial waiver of
2 compensation."

3 Do we need to cover that two different times in
4 those places? The first two lines on 22 and the last
5 underlined sentence above 1607.6(c) -- is that an unnecessary
6 duplication?

7 MS. PERLE: I'm sorry. The last two lines on 22?
8 I've --

9 MR. McCALPIN: It says, "This provision could be
10 used as authority for partial waiver of the compensation
11 prohibition." At the top of 22, we say, "The Corporation
12 could partially waive the composition prohibition to allow
13 partners," and so on. In other words, we're saying the same
14 thing twice.

15 MS. PERLE: Right. Because there's two provisions
16 that deal with the same issue. One is saying that pursuant
17 to a waiver granted under a later section, you can do this.
18 You can set up this kind of a policy. And then later, we
19 talk about the waiver provision.

20 So I think it's mentioned twice to make it clear
21 that both of these provisions have an effect on what happens
22 with respect to this. But we can certainly look at it and

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1 see if we can shorten it.

2 MS. GLASOW: It's meant to be helpful to someone
3 who is researching a specific section. It would refer them
4 to another or clarify an issue more fully, whereas they may
5 not know that or may not go on to read about another section.

6 MR. McCALPIN: Okay.

7 CHAIR BATTLE: Okay?

8 MS. PERLE: But we'll look at it and see if we can
9 do it in a little tighter way.

10 CHAIR BATTLE: Anything else on 22?

11 (No response.)

12 MR. McCALPIN: 24.

13 CHAIR BATTLE: 23?

14 (No response.)

15 CHAIR BATTLE: 24?

16 (No response.)

17 CHAIR BATTLE: 25?

18 MS. GLASOW: On 25, I have a reference to the
19 "committee" should be the "Board."

20 MS. PERLE: Right.

21 MS. MERCADO: What page?

22 CHAIR BATTLE: 25.

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1 MS. PERLE: I have actually a suggestion on 24.

2 CHAIR BATTLE: Okay.

3 MS. PERLE: Under 1607.6(d), the paragraph at the
4 bottom, the sentence about halfway down says, "However, the
5 policy board would at a minimum need to comply with" -- I
6 think that we should say, "Such a policy board would need to
7 comply with appointment and membership requirements." I'm
8 not sure I understand exactly why the minimum language was
9 put in there. And I think we need to add --

10 MR. McCALPIN: Karen, you're talking down to the
11 page.

12 MS. PERLE: I'm sorry. I don't understand exactly
13 why that language "at a minimum" was put in there. And I
14 think that we should make it more affirmative, saying that
15 "such a policy body would need to comply with the appointment
16 and membership requirements," and then we should add some
17 language, as we discussed earlier, that makes it clear that
18 this is not an advisory body, that this is a body which has
19 ultimate authority for the use of LSC grant funds.

20 So I think I would make those changes. I would
21 take out the "however" and "at a minimum" and then add a
22 sentence that deals with the fact that this is the authority

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1 for policy with respect to LSC funds.

2 MR. BROOKS: And I think we should consider the
3 same topic that I was talking about before about the
4 compensation clause and so on, which should be referred to
5 here, as well.

6 MS. PERLE: Yes. I think that's right.

7 CHAIR BATTLE: Okay. Edna?

8 MS. FAIRBANKS-WILLIAMS: Does this include the
9 boards that govern the Indians that do not have full-fledged
10 accepted lawyers but have tribal lawyers?

11 MS. PERLE: There's a separate provision for that.
12 And this does not require a policy board. Those programs, as
13 I understand it, are required to have one-third clients, but
14 they're not required to have the full complement of
15 attorneys, because they have tribal advocates on them. And
16 that's an existing waiver that has been in our rules since
17 the very beginning and was carried over from the OEO rules.

18 MS. FAIRBANKS-WILLIAMS: But it says that granting
19 a waiver under paragraph -- if there was to be a new tribe
20 arriving, which there have been several small tribes
21 gathering together in different places, would they have to be
22 under the full rules now, or could they revert back to the

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1 others?

2 MS. PERLE: No. The waiver for a new program like
3 that would be granted under a different section. It wouldn't
4 be under paragraph (b)(2). It would be under paragraph
5 (b)(1), which talks about the nature of the community or the
6 legal community. It's a different kind of a waiver. And I
7 can't think of an instance where the client portion of those
8 requirements would be waived in those circumstances. But it
9 might well --

10 MS. FAIRBANKS-WILLIAMS: I'm not worried about the
11 clients' boards. I'm worried about the tribal lawyers that
12 are not full-fledged lawyers being able to sit on the board.
13 If you just have clients -- and lawyers who are not lawyers
14 are sitting on the boards now.

15 So if you get too stringent with this, the ones
16 that are practicing tribal law but are not full-fledged
17 lawyers would not be lawyers on the board, so they would not
18 be eligible to sit on the board, unless this waiver did allow
19 that.

20 MS. PERLE: All I'm saying is that there is a
21 provision permitting that kind of a wavier, but it is not
22 paragraph (b)(2). It's paragraph (b)(1.)

1 CHAIR BATTLE: This waiver only has to do with the
2 whole issue of clients, which is my understanding. And so,
3 therefore, part of the issue she's raising has to do with
4 board membership --

5 MS. PERLE: It could. But what I'm saying is that
6 the situation that Ms. Fairbanks-Williams is talking about
7 would generally be granted under the previous waiver
8 provision. And the policy board requirement doesn't apply to
9 that.

10 The requirement for that one is that the program
11 has made efforts to comply. And because of unusual
12 circumstances within the community, it can't comply. In this
13 instance, the unusual circumstances are that there aren't
14 enough lawyers. And, in fact, the people that practice in
15 tribal court are tribal advocates. They are not regular
16 lawyers who are admitted to the Bar.

17 So I don't think that this provision, (d), would
18 have any impact on those boards and that they would be
19 permitted under (a) -- or (b)(1). Pardon me.

20 CHAIR BATTLE: Does that satisfy your concern,
21 edna?

22 MS. FAIRBANKS-WILLIAMS: Yes.

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1 MS. PERLE: Okay.

2 CHAIR BATTLE: Anything else on 24?

3 (No response.)

4 CHAIR BATTLE: 25?

5 MS. PERLE: I have one suggestion on 25.

6 CHAIR BATTLE: Okay.

7 MS. PERLE: The last sentence of the paragraph
8 coming over from the previous page, where it says, "The Board
9 intends that such a waiver would be given only in the most
10 extenuating of circumstances." I think that's somewhat
11 strong language, and I would suggest that we say "unusual
12 circumstances."

13 In other words, clearly, this is not a situation
14 where the Corporation would use this waiver provision
15 frequently.

16 MR. MCCALPIN: How about "very unusual"?

17 MS. PERLE: Fine. "Very unusual." I just think
18 "most extenuating" suggests something sort of coming from
19 outer space.

20 CHAIR BATTLE: Anything else on 25?

21 (No response.)

22 CHAIR BATTLE: 26?

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1 MR. BROOKS: Yes.

2 CHAIR BATTLE: Okay.

3 MR. BROOKS: I wonder if we could break for lunch
4 at this point.

5 CHAIR BATTLE: Do you have quite a few on that?

6 MR. BROOKS: I've got --

7 CHAIR BATTLE: We do have lunch out here, and I
8 don't know if it's getting cold or hot on us. But John has
9 suggested that before we go into the rule portion, that we
10 now break for lunch and take up the rule portion right after
11 lunch. So we are now in recess. And I think it's 12:36.

12 Is 30 minutes enough for lunch, or do you all want
13 an hour? Okay. We got started a little bit late, so let's
14 take about a 30-minute lunch and get started right at 1:00,
15 if we can.

16 (Whereupon, at 12:36 p.m., a luncheon recess was
17 taken.)

18

19

20

21

22

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A F T E R N O O N S E S S I O N

(1:23 p.m.)

1
2
3 CHAIR BATTLE: Let's go back on the record and test
4 the mikes. I can test this mike by saying thank you to
5 Melodie Hayley.

6 MS. GLASOW: I would like to just once give
7 recognition to Melodie Hayley, who very conscientiously works
8 with us to put all these materials together and get it copied
9 and sometimes in a very short time frame. And I would just
10 like to recognize her for her efforts in this process.

11 CHAIR BATTLE: Thank you. And that recognition is
12 well taken. I think that -- I was really pleased that we
13 were able to get the materials this time in advance, though
14 it certainly was late by the time I got a chance to read
15 them. But I think it really does make a difference when
16 you've got a good staff to work with you to get something
17 that requires as much detailed work as do these regs done,
18 and do them as well as you've had them done.

19 MS. PERLE: We discovered, I think, a couple of --
20 maybe a month or so ago that the Corporation had access to
21 HANSNET. And that really facilitated the interchange between
22 our offices.

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1 Because instead of just simply faxing things back
2 and forth, we could actually electronically pass the actual
3 disks -- the material back and forth so that we could each
4 work on it separately and get it together, and we didn't have
5 to have messengers with disks going back and forth. So I
6 think that did help. But we did burn up the fax machine. We
7 tied them up.

8 CHAIR BATTLE: Because of the -- I was about to
9 say, too, Suzanne, you mentioned -- and I think it's going to
10 be very helpful to us -- that if we also begin to have the
11 little compact computers that you can bring with you to the
12 meetings, when we do the kind of editing changes that we're
13 doing right now on a 1607, we'll be able to really look at a
14 final before we leave and sign off on it.

15 Because when it gets to this level, the changes are
16 at that level where I think we can do them and be pleased
17 with them before we leave. And that's a step into the 29th
18 century, in terms of technology, I guess.

19 Bill, did you have something you wanted to add?

20 MR. McCALPIN: I just wanted to say that after
21 making the point about getting it out a week in advance so we
22 would get it on the Friday, I left town last Friday and

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1 didn't get it till Sunday.

2 (Laughter.)

3 CHAIR BATTLE: There's nothing like that last-
4 minute push, too.

5 I'm sorry. John?

6 MR. BROOKS: Well, I got mine on Friday, and I was
7 very grateful. Thank you.

8 MS. GLASOW: You're welcome.

9 CHAIR BATTLE: I think we have got a full house
10 back again. And we're ready to start on the rule portion of
11 1607, which begins on page 26 under the third tab in our
12 booklet for this meeting.

13 Are there any changes to the provisions on page 26?

14 MR. McCALPIN: Yes.

15 CHAIR BATTLE: Okay. I'll start with John and then
16 go on to Bill.

17 MR. BROOKS: On 1607.2(b), "board member" refers to
18 a member of a recipient's governing body. I think we should
19 enlarge that to include "or policy board as defined in
20 Section 1607(e).

21 MS. MERCADO: I'm sorry, John. I missed -- what
22 page?

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1 CHAIR BATTLE: Page 26, 1607.2 definitions, (b).

2 MR. BROOKS: Paragraph (b), "board member" should
3 include policy board members.

4 CHAIR BATTLE: Also, you have suggested that we use
5 "board member means" rather than "refers," if we're to be
6 consistent.

7 MR. BROOKS: Right.

8 CHAIR BATTLE: "Means a member."

9 MR. McCALPIN: LaVeeda?

10 CHAIR BATTLE: Yes?

11 MR. McCALPIN: Let me ask Susan and Linda -- you
12 know, when you do something like this, you've got to stop and
13 think, what does that do in the whole rest of the body of the
14 regulation? Is there anyplace where we use "board member"
15 which would not be consistent with this being a policy board
16 member?

17 MS. PERLE: I think we have to look at that.

18 MR. McCALPIN: It concerns me.

19 MS. GLASOW: I'm not sure that it's necessary,
20 anyway, because that policy board provision refers back to
21 the composition requirements of Section 3, which would
22 incorporate the definition of "board member." So I don't

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1 feel that we need to change the definition of "board member"
2 to refer to the policy board, because the policy body already
3 refers back to the composition requirements, which would
4 incorporate the definition of "board member."

5 MS. PERLE: But I think we could go back and look
6 at it. And if it makes sense to do it, then we'll do it.
7 And if it doesn't, then we won't. And we can report back in
8 November.

9 MR. BROOKS: If it picks up in subparagraph (c)
10 there, "'Eligible client member' as used in this part means a
11 board member," so that's where it comes back in. And I think
12 for purposes of the policy board, that should cover the
13 policy board member, as well as a governing board member.
14 Well, why don't you look at it?

15 MS. GLASOW: Okay.

16 MR. BROOKS: It would seem to me it would be
17 helpful.

18 CHAIR BATTLE: Okay. Are you suggesting any change
19 to (c), or only a change to (b), which by reference would be
20 inclusive in (c)? I think that's what you're --

21 MR. BROOKS: I think that's my suggestion.

22 MS. MERCADO: It would be, because then it would go

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1 back.

2 CHAIR BATTLE: Yes. It would go back.

3 MS. GLASOW: Okay.

4 CHAIR BATTLE: On to page 27.

5 MR. McCALPIN: No.

6 CHAIR BATTLE: I'm sorry. Still on 26. That's
7 right, Bill.

8 MR. McCALPIN: In subparagraphs (d) and (f) on the
9 next page, we refer to "the Act." It seems to me that in
10 other regulations, we have defined "the Act" as the Legal
11 Services Corporation Act, with a citation. We have not so
12 defined "the Act" under 1607.2.

13 MS. GLASOW: It's defined in part 1600. And I
14 think --

15 MR. McCALPIN: Well, I know, but we have decided
16 lots of times -- but, for instance, in (e), you say "the LSC
17 Act." And it leaves you to wonder whether (d) and (f) were
18 something different from the LSC Act in (e). And in many
19 instances, we are -- I think that we have defined "Act" in
20 other regulations, even though it's in 1600.

21 MS. GLASOW: I can look to see if we have done
22 that. I'm not sure that we have. But you're right. We

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1 should not say "LSC Act" in one place and "Act" in another
2 within the same rule. That is confusing.

3 MR. McCALPIN: And it seems to me if we define
4 "Act" to begin with, then we are out of the trouble.

5 MS. MERCADO: I don't have the part with me, but
6 does part 1600 outline -- and then the different issues, in
7 the definition, "the Act" means this particular statute?

8 CHAIR BATTLE: In 1600.1, the section on
9 definitions, "Act" in quotes means the Legal Services
10 Corporation Act public law, and then it gives the section and
11 the amendment. To the extent that there may be further
12 amendments to that act, once you put it here, then it's
13 adopted by reference for everywhere else.

14 MR. McCALPIN: Okay. If we're going to rely on
15 1600 for defining "Act" throughout the whole body of
16 regulations -- okay. But then we simply ought to say "Act."

17 MS. GLASOW: You're correct. That's correct.

18 MS. PERLE: So we shouldn't say "LSC Act"?

19 MS. GLASOW: That's correct.

20 MS. PERLE: Okay. I've been putting "LSC" in.

21 CHAIR BATTLE: And I think if we for any reason
22 have to refer to any other Act, we ought to completely state

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1 the commonly known name for any other Act, so that we
2 distinguish it. Because when we enter Freedom of Information
3 and some other areas, we do have regs that fall from other
4 Acts other than the Legal Services Act.

5 MS. GLASOW: That's correct.

6 CHAIR BATTLE: All right. Now, we already have
7 dealt with the concept of removing on page 27 "means" in
8 Section (d). And the word "full" is now out in the next
9 line, with "authority to govern." And we have deleted the
10 use in (e) of the word "policy."

11 "Policy body" means a board now, and we have
12 stricken "refers." And we're using consistently throughout
13 "means" when we're doing a definition. And now, we have
14 stricken the use of "LSC Act," and we're going to use "Act"
15 throughout to make it consistent.

16 In (f), we have also stricken the use of "refers"
17 and replaced it with "means." And is there anything else on
18 page 27?

19 MR. McCALPIN: Yes. I would like to suggest a
20 little bit more parallel construction in 1607.3(a). We say,
21 "A recipient shall have a governing body." And later on, we
22 say "consists." The "consists of members" I'm sure is

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1 intended to refer to "governing body," although it
2 conceivably could refer to "recipient."

3 I would suggest that we say "shall have a governing
4 body which reasonably reflects the interests and which
5 consists of members," so that it's clear that both of those
6 subordinate clauses refer to "governing body," rather than
7 "recipient."

8 MS. GLASOW: Fine.

9 MS. MERCADO: Could you read that again, Bill?

10 MR. McCALPIN: "Shall have a governing body which
11 reasonably reflects the interests of the eligible clients in
12 the area served and which consists of members, each of whom
13 is supported."

14 MS. PERLE: That's fine.

15 CHAIR BATTLE: Anything else on 27?

16 (No response.)

17 CHAIR BATTLE: 28?

18 (No response.)

19 CHAIR BATTLE: Anything on 29?

20 (No response.)

21 CHAIR BATTLE: 30?

22 (No response.)

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1 CHAIR BATTLE: 31?

2 (No response.)

3 CHAIR BATTLE: 32?

4 (No response.)

5 CHAIR BATTLE: 33?

6 MR. BROOKS: Yes.

7 CHAIR BATTLE: Okay.

8 MR. BROOKS: This gets back to what we were talking
9 about earlier, "that the president shall require that a
10 recipient have a policy body." This is 1607.6(d) on page 33.
11 "Shall have a policy body with a membership composed and
12 appointed in the manner prescribed by Section 1607.3.

13 Then, I suggest adding, "Such policy body shall be
14 deemed to be a governing body for purposes of Section
15 1607.4(a) and (b) and Section 1607.5." The 1607.4(a)
16 requires a governing body to have at least four meetings a
17 year and require timely and reasonable prior public notice of
18 all meetings, which is --

19 MS. PERLE: That's in (a).

20 MR. BROOKS: That's in 1607.4(a).

21 MS. PERLE: (a).

22 MR. BROOKS: Then, (b) requires "that a governing

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1 body shall establish and enforce broad policies concerning
2 the operation of a recipient."

3 MS. PERLE: But the point that we were making
4 before is the policy body wouldn't have authority with
5 respect to all the operations of the recipient, only those
6 things with respect to LSC funded activities of the
7 recipient.

8 MR. BROOKS: Well, I think that's a good point, but
9 I think the policy board ought to have that kind of authority
10 with respect to the LSC grant and the operations financed by
11 it.

12 MS. PERLE: I think it does by definition. And I
13 think that we did discuss that we would add language to the
14 commentary that would make it clear that it did have full
15 authority with respect to that. I'm worried that it will be
16 more confusing if we add that language here.

17 Renee just suggested that the last sentence, we put
18 "The policy board shall have such additional powers and
19 responsibilities as the president determines are necessary."
20 Because the definition outlines the authority, with respect
21 to the LSC grant activities.

22 MS. GLASOW: That's a good point.

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1 MR. BROOKS: Yes.

2 MS. MERCADO: Did you say 1607.5 also, John?

3 CHAIR BATTLE: Yes.

4 MR. BROOKS: I'm happy to have further
5 consideration on (b) there. I think there's a point that
6 needs to be covered.

7 MS. PERLE: Your point on (a) is certainly well
8 taken, and the point on 1607.5 is clearly well taken.

9 MR. BROOKS: And I agree on that last sentence.
10 That bothers me. I think we should have in mind that the
11 president may grant a waiver. It's not required in any case.
12 But if he does, they have --

13 MR. McCALPIN: Where is this?

14 MS. MERCADO: So you're talking about the third
15 line, where it says, "The president shall" --

16 MR. BROOKS: I'm going back just to the basic
17 waiver provision, that a waiver is not a right. It's a
18 matter of discretion for the president.

19 MS. PERLE: But it says that.

20 MR. McCALPIN: Isn't that (b)? Isn't that what it
21 says? "Upon application, the president may waive."

22 MR. BROOKS: Exactly.

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1 MS. GLASOW: He's just stating his agreement with
2 that.

3 MR. BROOKS: That's my point. There's no automatic
4 waiver.

5 MR. McCALPIN: No. You're not making any change.

6 MR. BROOKS: No. I'm just pointing that out as
7 a --

8 CHAIR BATTLE: He's affirming what's there.

9 MR. BROOKS: Yes. And that is clearly consistent
10 with what I think paragraph (d) is coming out as now.

11 MR. McCALPIN: We're not going to make any change
12 in 1607.4(b), are we?

13 MR. BROOKS: No.

14 MR. McCALPIN: No. Okay.

15 MR. BROOKS: But I just don't want us to get mixed
16 up between the "mays" and the "shalls" and the "musts."
17 Because the basic premise here is that the president "may."
18 He doesn't have to in any situation.

19 CHAIR BATTLE: Are there any other questions or
20 observations on page 33?

21 (No response.)

22 CHAIR BATTLE: No? Okay. Well, what we have

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1 before us, I think, are some editorial changes to 1607, after
2 which once those editorial changes are made, I think we're in
3 a position to recommend approval to the Board of this
4 particular regulation.

5 Bill?

6 M O T I O N

7 MR. McCALPIN: I'll move that this committee
8 recommend to the Board for adoption as a final regulation
9 Part 1607 as before us and as modified here today.

10 CHAIR BATTLE: Is there a second to that?

11 MR. BROOKS: Second.

12 CHAIR BATTLE: Okay. Discussion at all about it?

13 (No response.)

14 CHAIR BATTLE: All in favor?

15 (Chorus of ayes.)

16 CHAIR BATTLE: All opposed?

17 (No response.)

18 CHAIR BATTLE: We ought to really have a ceremony.

19 (Applause.)

20 MR. McCALPIN: How about champagne?

21 CHAIR BATTLE: That's right. I think this is the
22 first reg to make it all the way through the process.

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1 MR. MCCALPIN: Well, it hasn't got there yet.

2 CHAIR BATTLE: All the way through our process, at
3 least. So we certainly will have this as an agenda item for
4 the general Board meeting scheduled for next week in Boston.

5 We now then can move on to 1602. 1602 is under
6 your first tab in your booklet. And it is specifically a
7 proposed regulation which would address the Freedom of
8 Information request responsibility of a corporation as it
9 relates to materials which may either originate with the
10 office of inspector general or be under the control of the
11 office of inspector general.

12 And we, as you probably recall, decided before this
13 rule became final, because of circumstances involved in
14 litigation and other reasons, to pull it back and to give it
15 this committee's consideration, take it through the process
16 before putting it out for publication. And we are now at a
17 point where we can go through this rule.

18 Generally, what we have done in this process is to
19 take it line by line. But what I think I'm going to suggest
20 is that we take this page by page, as opposed to line by
21 line. This certainly is a rule that has already had
22 significantly more scrutiny than the normal rules that we're

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1 getting in our first cut and first look.

2 So if there's no objection to that process, we have
3 the inspector general's general counsel with us and a person
4 from the office of general counsel at the table now. And
5 we'll go, starting with the supplemental materials, page by
6 page.

7 MS. MERCADO: Madam Chair, if I might, for those of
8 us Board members who aren't on the committee, if you could
9 just give us a minute or two to read the page, because we
10 didn't have the materials ahead of time. You have to
11 specify --

12 MR. MCCALPIN: May I make an irreverent comment
13 which, in view of my history, will surprise nobody and make
14 what might be considered a Senator Proxmyer award? For the
15 first time in history, I find in the comment every possible
16 infinitive that could be split has, in fact, be split. It's
17 a 100 percent record of split infinitives.

18 (Laughter.)

19 CHAIR BATTLE: That only could have been discerned
20 by Bill McCalpin. Well, this walk-through will give us an
21 opportunity to do our very skillful editing of this rule,
22 because it has not as of yet been through that process with

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1 this committee. So Bill --

2 MS. BERGMARK: And we appreciate Bill's efforts to
3 carefully call our attention to everything we should be
4 watching for.

5 MR. MCCALPIN: I have a reputation to uphold.

6 MS. BERGMARK: I hate split infinitives, myself.
7 It's a character flaw thing.

8 CHAIR BATTLE: On page 1, are there any
9 corrections?

10 (No response.)

11 CHAIR BATTLE: Page 2? And we're really referring
12 to the comment material, the supplemental material.

13 (No response.)

14 CHAIR BATTLE: Maria, I'm going to look up to make
15 sure that you're with us, because I know that you need to
16 have just a moment to look at it before we move on.

17 MS. MERCADO: We're on 3?

18 CHAIR BATTLE: Yes. We'll move to 3. Page 3. The
19 only change on page 3, we observed in our initial reading of
20 the rule the fact that in many instances, we talked about the
21 OIG's authority to grant but not deny. And so wherever
22 there's of course the authority to grant, there's also the

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1 authority to deny.

2 And we didn't want that particular rule to be left
3 without both of those possibilities being accounted for. So
4 at the bottom, there's the addition of granting or denying
5 any request.

6 MR. BROOKS: And it also has been made gender
7 neutral.

8 CHAIR BATTLE: That's right. Throughout this rule,
9 there are changes to assure that the rule is also gender
10 neutral.

11 The next page is 4. Are there any observations or
12 corrections to 4?

13 (No response.)

14 CHAIR BATTLE: 5? Bill?

15 MR. McCALPIN: In the third line of the last
16 paragraph, I looked at the word "assumption." And I'm not
17 sure that that really lays the obligation on the requester.
18 And I wondered if it isn't a presumption or a condition of
19 the request that the requester agree to the \$25 charge. It
20 doesn't seem to me that it quite does what we want it to do.

21 The "we impose as a condition on the request that
22 the requester assume a \$25 charge," it just seemed to me that

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1 that could be made more explicit with respect to imposing the
2 obligation on the requester.

3 CHAIR BATTLE: So you would change "an assumption"
4 to "a condition"?

5 MR. McCALPIN: Well, to include a condition that --
6 yes. I think "condition" is probably better than
7 "assumption." Because "assumption" is entirely within us.
8 And "condition" lays it on the requester.

9 CHAIR BATTLE: Is there anything else about page 5?
10 (No response.)

11 CHAIR BATTLE: I just had a question. "The
12 requester agrees to pay up to \$25 in charges for services
13 associated with their request." But then, we lay out a very
14 detailed schematic as to what the hourly rates are for the
15 people who have to do the work to put a request together.
16 And you hit the ceiling, it seems to me, real quickly, when
17 some of the salary levels are \$35 an hour, \$25 an hour.

18 And to the extent that someone comes in with an
19 extremely voluminous request, I just had a question as to why
20 that \$25 ceiling has been set.

21 MS. TARANTOWICZ: I believe it's just customary.
22 I'm not sure that it's in -- as a matter of fact, let me just

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1 quickly check the FOIA itself which speaks about it.

2 MS. MERCADO: Are we charging a whole lot more than
3 what a FOIA request would charge under the guidelines of
4 FOIA?

5 MS. TARANTOWICZ: No. It's set up pretty well in
6 the guidelines as to -- if you'll just give me one second.
7 It's either the case that the \$25 is in the FOIA, or -- we
8 checked around to see what was customary for agencies to
9 charge or to assume that a requester would pay before having
10 to call and say, "Do you agree to pay this amount?"

11 MS. MERCADO: For some reason, in the back of my
12 mind -- and I haven't recently looked at that -- I thought
13 that -- and I know at least looking at some of the Texas
14 stuff, that there is some argument about whether there is a
15 cap for how much staff time -- I mean, if you're paying
16 someone \$35 an hour or \$100 an hour -- is charged on a FOIA
17 request or whether you have a cap up to a certain amount,
18 whatever it is, \$1 a page, 50 cents a page, whatever this
19 stuff happens to be.

20 Because it could be onerous to the effect that you
21 are obstructing FOIA by the amount of money that you're
22 requesting to be paid for that search for those documents

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1 that are to be given.

2 MS. FAIRBANKS-WILLIAMS: Yes. They could really
3 harass --

4 MS. MERCADO: Sure. If I ask for a FOIA request
5 from a bank, they're going to charge me \$100 for their vice
6 president to look for information for me and another \$200 for
7 their attorney to review the document and \$1 a page for
8 whatever else.

9 MS. TARANTOWICZ: I don't think you're allowed to
10 charge for determining the legal --

11 MR. McCALPIN: If you look at the schedule of
12 charges, I don't think that's a problem here. As a matter of
13 fact, it seems to me, if anything were overly generous -- we
14 give them 2 free hours and 100 free pages.

15 MS. TARANTOWICZ: That's in the FOIA itself, 2 free
16 hours, 100 free pages. And you're allowed to charge for
17 direct costs. I think that most of the review, practically
18 speaking, is not done by high-level --

19 MR. McCALPIN: Laurie, pull the mike closer to you.

20 MS. TARANTOWICZ: I'm sorry. Most of the review,
21 the initial -- locating the document, it's generally not done
22 by higher-level employees.

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1 So the fees charged are normally not the outrageous
2 fees that you would get. And the review charges for
3 assessing legally whether or not something may be withheld or
4 has to be released, those we're not allowed to charge for
5 and, of course, we don't. And that's set out in the
6 regulation, as well.

7 CHAIR BATTLE: Okay. Does that satisfy the concern
8 that you raised about excessive potential charges under this
9 reg?

10 MS. MERCADO: Yes.

11 CHAIR BATTLE: All right. Let's take a look at the
12 next page of -- I'm sorry.

13 MR. BROOKS: Before we leave this, I'm bothered a
14 little bit in view of this discussion. On page 22, the rule
15 itself, subparagraph (h), "Requesters must agree to pay all
16 fees charged for services associated with their request."
17 Now, that's for services.

18 "The Corporation will assume that requesters agree
19 to pay all charges associated with their request up to \$25,
20 unless otherwise indicated by the requester and then
21 negotiate for anything over \$25."

22 CHAIR BATTLE: You mean the language --

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1 MR. BROOKS: The first line says, "Requester must
2 agree to pay." And then, in the second and third line, "The
3 Corporation will assume that requesters agree to pay up to
4 \$25." I don't quite get the logic of that.

5 MS. FAIRBANKS-WILLIAMS: Then, it says down here in
6 the last sentence, "The Corporation will not deem to have
7 received it until a requester agrees in writing to pay all
8 fees charged for services."

9 MR. McCALPIN: That's if it exceeds \$25.

10 CHAIR BATTLE: So are you saying the way that
11 that's written, it's unclear as to at what point the
12 determination is made that a requester has made that
13 agreement? Is it statutory? Is it going to be regulatory
14 that the agreement exists up to \$25, and can it be more
15 clearly stated?

16 MR. BROOKS: Yes. The "must agree" and "assume"
17 aren't quite consistent.

18 MS. TARANTOWICZ: I agree. We can clarify that. I
19 think what we're trying to get at here is that you have to
20 pay for the services for processing the request. However,
21 before, we have to call you back and make sure that you're
22 willing to pay and tell you how much it's going to cost.

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1 To avoid all of that, we're going to assume that
2 you're agreeing, if it's less than \$25. But we can certainly
3 clarify the language to make that clearer.

4 CHAIR BATTLE: Right. The second sentence needs to
5 be clarified, I think, along the lines of what Bill suggested
6 about preconditions on requests up to \$25 with regard to the
7 agreement.

8 Did you have a problem, John, with the rest of that
9 Section (h), or is that clear?

10 MR. BROOKS: No. I think we have the precondition
11 for anything over \$25.

12 CHAIR BATTLE: But not the precondition below.

13 MR. BROOKS: But up to 25, it's a little confusing
14 to me whether there's an implied agreement which would comply
15 with the "must agree" and we're just assuming it, or is it an
16 implied agreement which would sort of take care of itself,
17 with or without any assumption.

18 MS. TARANTOWICZ: Right.

19 CHAIR BATTLE: Okay. Can we move on to page 6?

20 Okay. Page 6.

21 MR. McCALPIN: If you'll look at about the middle
22 of the page under the words "Freedom of Information," there

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1 is a statement: "For the reason set out above, Part 1602 of
2 Title 45 of the code be amended as follows." And I would
3 suggest that we need to adopt a consistent phraseology of
4 what we're doing.

5 If you take a look at 1604 as an example, we don't
6 have any similar language at all. And if you look at 1607,
7 it says, "For the reasons set forth, LSC proposes to amend 45
8 C.F.R. 1607." And we say "be amended" or nothing or
9 "proposes to amend." I think we ought to adopt a consistent
10 phraseology of what we're proposing.

11 MS. MERCADO: From what you stated, I sort of like
12 the phraseology that's here in page 6. That's pretty much
13 most consistent with what most of the statutory stuff was.

14 MR. McCALPIN: Well, the "be amended" -- I don't
15 see what -- "For the reasons set forth above, Part 1602 be
16 amended." I think that "is amended" or "we propose to amend"
17 -- or what. But the "be amended" I thought was not
18 descriptive of what we were doing.

19 But in any event, it seems to me we ought to be
20 consistent from regulation to regulation about what we're
21 doing.

22 CHAIR BATTLE: I think -- and maybe this is

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1 something that we as a committee have not discussed. We
2 pulled this back. Are we at a point where we're reviewing
3 this? It has already been out for public comment, and we are
4 just going through and making some editing changes, or are we
5 making a proposal at this point that will be the final reg
6 that goes to the Board?

7 If it is the final at this point, then I think the
8 language that we use in the supplemental information needs to
9 reflect the finality of it. If it is a proposal that we're
10 talking about sending back out for comment, then that's a
11 different thing.

12 MS. SZYBALA: I thought we had determined last time
13 that you were going to publish again for comment and try to
14 have that publication time span our regs working group
15 meeting, so that their comments would be back. And in the
16 next round, hopefully, it could go to final.

17 CHAIR BATTLE: Which clarifies it, then. We're
18 talking "proposes to amend."

19 MR. McCALPIN: Okay.

20 CHAIR BATTLE: Because that's where we are.

21 MS. MERCADO: So it would read, "For reasons set
22 out above, Part" -- how would it read?

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1 MR. McCALPIN: "LSC proposes to amend -- as
2 follows."

3 MS. MERCADO: Part 1602 -- okay.

4 CHAIR BATTLE: Is it the committee proposing to
5 amend?

6 MR. McCALPIN: Not if we're not going to put it out
7 for publication.

8 CHAIR BATTLE: Yes, we are. We are.

9 MR. McCALPIN: We are?

10 CHAIR BATTLE: Yes. I think the regs working group
11 wants to have an opportunity to comment. So it's really the
12 committee.

13 MR. McCALPIN: What about 1607? When we publish
14 1608 --

15 MS. MERCADO: Well, it wouldn't be --

16 CHAIR BATTLE: The format -- and I appreciate the
17 concern that Bill is raising. The format at the onset of
18 this is distinguishable from the format that we have adopted
19 for other rules, because with our proposals and other rules,
20 for example, 1604, the action is called "proposed rule,"
21 "This proposed regulation would amend," and you got a
22 summary. We kind of have this set out in final form.

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1 MR. McCALPIN: This is the way we published 1607 as
2 an example. And we didn't say anything along those lines at
3 all over here in the third column.

4 CHAIR BATTLE: So we didn't use any of this stuff.

5 MR. McCALPIN: We didn't use it at all.

6 CHAIR BATTLE: We have a sentence in 1607 that
7 reads, "This proposed rule is intended to amend 45 C.F.R.
8 Part 1607 and to supersede Part 1607's interpretive
9 guidelines published" and then a date. So if we can come up
10 with a basically consistent approach to setting out what this
11 proposal is, I think that that will bode us well in this
12 whole process.

13 Suzanne?

14 MS. GLASOW: I think what happened here is this
15 rule was taken from the disk where the final rule was
16 published. And the final rule language wasn't amended at the
17 same time that we put in the gender neutral language. And so
18 basically what needs to be done is go through this and change
19 it back to proposed rule language instead of final rule
20 language throughout.

21 CHAIR BATTLE: Right. And I think that's what
22 we're picking up on. Okay. Anything else on page 6?

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1 MR. BROOKS: "Computer printout" is such a common
2 way to do it, it seems to me that would be worth adding.

3 MS. SZYBALA: Just for informational purposes,
4 there is a bill -- I'm not sure exactly where it's at right
5 now.

6 MR. McCALPIN: Pull the mike closer.

7 MS. SZYBALA: I'm sorry. There's a bill called the
8 Freedom of -- now, I can't think of the word. But it's a
9 computer Freedom of Information Act amendments that are going
10 in, the Electronic Computer Freedom of Information Act
11 amendments of 1994, which are going to end up being the
12 Electronic Freedom of Information Act amendments of 1995.

13 And how that is going to relate to this, at this
14 point, I don't know. I tend to think it's not going to
15 relate to LSC very much. It is for people who are asking for
16 government records that would be best if given in disk form
17 in machine-readable copies. It's a Computer Information Act
18 for machine-readable copies. But we'll keep track of it.

19 CHAIR BATTLE: Point well taken.

20 Bill, is there anything else you were going to
21 raise?

22 MR. McCALPIN: If you're finished with it, I have a

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1 couple of problems about the "educational institution" as
2 follows: First of all, I'm not quite sure why preschool
3 comes before public or private, because preschools can be
4 either public or private.

5 It seems to me it means a public or private
6 preschool, elementary, or secondary school. It's suggesting
7 that preschool is something different from public or private.

8 But I'm more concerned about the last clause. It
9 says, "And an institution of professional or vocational
10 education which operates a program or programs of scholarly
11 research," which would suggest that if all it does is operate
12 a classroom program, it doesn't qualify.

13 And frankly, I think if you think about the
14 vocational educational entities, junior colleges or
15 proprietary vocational and that sort of thing, they don't
16 operate programs of scholarly research. They're all
17 instructional. So it seems to me that there are a lot of
18 problems with so defining "educational institution" and "the
19 professional or vocational education field."

20 CHAIR BATTLE: Was there any particular reason why
21 this definition was exclusive with regard to vocational or
22 professional education? Or was this a definition taken from

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1 somewhere else with regard to FOIA?

2 MS. GLASOW: These are some --

3 CHAIR BATTLE: Suzanne, when you speak, would you
4 come to the mike?

5 MS. GLASOW: These are some earlier amendments to
6 the FOIA. And the whole FOIA is here, right? Is that
7 correct? Some of these definitions came right out of the
8 Justice Department guidance. It came out when they amended
9 the FOIA in 1986. And I think that's why that language just
10 pretty much mirrored the Justice Department amendments.

11 MR. McCALPIN: But what it would suggest to me is
12 that a professional or vocational education institution which
13 does not offer scholarly research would not be included
14 within this regulation. And I think that's a mistake.

15 MS. MERCADO: Why can't we just have it just
16 "professional and vocational education," period, without
17 having just "scholarly research"? Because you're right. A
18 lot of vocational institutes aren't necessarily scholarly.

19 MR. McCALPIN: That's right.

20 MS. MERCADO: It all deals with practicum. And a
21 lot of them leave more to be desired. They're not educating
22 anything.

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1 CHAIR BATTLE: And the only question I have is, to
2 the extent that we're trying to -- or if we have any guidance
3 that we have got to track, if we're going to depart from it,
4 we need to be aware of where that guidance comes from and
5 why. And with that caveat, I agree that unless there's some
6 reason for being exclusive about vocational education or
7 professional education, it seems that that qualifier is
8 unnecessary for FOIA purposes.

9 MS. SZYBALA: Whatever model rules are out there
10 are not binding on us or any agencies. So all agencies put
11 their own imprint on it as they adopt it.

12 MR. MCCALPIN: But professional vocational
13 institutions are quite different from higher education. Very
14 different.

15 MS. MERCADO: This is like your business college or
16 mechanics college or bus drivers college.

17 MR. MCCALPIN: Lankin Technical School in St. Louis
18 is an example.

19 CHAIR BATTLE: Yes. There are a lot of schools
20 that would be excluded if "scholarly research" --

21 MR. MCCALPIN: Barber college.

22 CHAIR BATTLE: Yes, barber college. Cosmetology

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1 school.

2 MR. McCALPIN: Cosmetology. That's exactly right.

3 CHAIR BATTLE: Okay. We are putting our imprint on
4 the "educational institution" definition by striking "which
5 operates a program or programs of scholarly research."

6 "FOIA" means "Freedom of Information Act." Any
7 questions on that?

8 (No response.)

9 CHAIR BATTLE: Anything else on page 7?

10 MR. McCALPIN: Let me ask -- in the noncommercial
11 scientific institution, what's the significance of putting
12 "commercial" in quotes? Does that mean that it's borrowed
13 from someplace and has a special meaning in this provision?
14 Or are we really talking about a not-for-profit entity?

15 I wonder if we shouldn't say "a not-for-profit
16 institution which is operated solely." But I'm not sure what
17 that means, "not operated on a 'commercial' basis."

18 MS. TARANTOWICZ: I think that might be because we
19 define "commercial use request" earlier on in the
20 definitions. And within that definition, it elaborates.
21 "Information for use or purpose that furthers the commercial
22 trade or profit interests." And I think that that's what we

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1 mean by "commercial" in quotes. It's not necessary to put it
2 in quotes.

3 MR. MCCALPIN: You're referring back to a
4 definition of a "commercial use request."

5 MS. TARANTOWICZ: I know. But we're talking
6 commercial, trade, or profit, that type of business. I mean,
7 we can clarify it in the definition here.

8 CHAIR BATTLE: Well, I've got a question. Because,
9 Bill, when you raised the potential issue of clarifying
10 "commercial" and using the term "not-for-profit" as an
11 alternative, then are we being exclusive, depending upon
12 whether -- you know, you've got a scientific institution
13 which has not organized under state law as a not-for-profit
14 but certainly does operate on a noncommercial basis.
15 "Noncommercial" may be a better, broader descriptive way to
16 handle it.

17 MS. MERCADO: Maybe it would be easier to figure
18 out which noncommercial scientific institution --

19 CHAIR BATTLE: You know --

20 MS. MERCADO: Because, really, this is dealing with
21 a competitive, with the whole issue of patents and trademarks
22 and all kinds of stuff. If somebody's requesting FOIA

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1 information, it's solely to promote their commercial
2 interests.

3 CHAIR BATTLE: What about somebody doing a science
4 project with a science club at school that's not organized,
5 not-for-profit, but it certainly is not a commercial
6 institution and for some reason, they need to make some sort
7 of request?

8 You could argue that that science club is a
9 scientific institution, but it's not organized not-for-
10 profit, but it certainly is noncommercial. That's why I'm
11 saying, not putting the stricture by using the terminology
12 "not-for-profit," which has legal significance attached to
13 it, but just "noncommercial" may get at it better.

14 MR. McCALPIN: I have a hard time thinking of an
15 example of an institution operated solely for the purpose of
16 conducting scientific research which is not commercial. Are
17 we talking about the National Institutes of Health, for
18 instance, which is a government entity?

19 MS. PERLE: What about all the biotech companies?
20 What about all the commercial biotech companies that have
21 sprung up around? And they're for-profit organizations.

22 MR. McCALPIN: Well, but --

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1 MS. PERLE: I mean, I don't know that they would
2 ask for our information.

3 MR. McCALPIN: But they're not solely for research.

4 MS. MERCADO: They're selling. They're commercial.

5 MR. McCALPIN: They market their research.

6 CHAIR BATTLE: Why do we need this definition here,
7 anyway?

8 MR. McCALPIN: I don't know.

9 CHAIR BATTLE: I mean, let's just ask the basic
10 question. You know, when you think about the kinds of
11 institutions out there that might be asking for information
12 from us, noncommercial scientific institutions? Of what
13 relevance is that in the scheme of things for Legal Services?
14 Or is this a definition that comes out of the model that we
15 have just had?

16 MS. MERCADO: Or are they perceiving that there's
17 bound to be some kind of litigation of something that would
18 have resulted in some of the work that they did? And did
19 they have access to that information? I mean, is that part
20 of what we're looking at?

21 MS. PERLE: My understanding of this is it's not
22 whether they're going to get the information but whether

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1 they're going to have to pay for it.

2 MS. MERCADO: Right.

3 CHAIR BATTLE: Okay.

4 MR. BROOKS: I wonder if it really adds anything to
5 the definition of "commercial use requests." It's almost the
6 other side of the coin. If we eliminate it, it seems to me
7 the "commercial use request" definition pretty much takes
8 care of the problem.

9 CHAIR BATTLE: And I guess, John, following up what
10 you're saying, how are you distinguishing a not-for-profit
11 scientific institution from any other not-for-profit, and
12 why?

13 MR. MCCALPIN: Yes.

14 MS. MERCADO: Because they have to be able to get
15 the information, and they're a not-for-profit. And you're
16 saying that they won't get an exemption. Only the
17 scientific --

18 CHAIR BATTLE: That's my point in raising it.

19 MS. TARANTOWICZ: It's used on page 19 at the
20 bottom under "fees." And it basically limits fees to
21 document duplication and not basically fees for search.

22 CHAIR BATTLE: What we're asking now is, we're

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1 trying to determine why that exemption exists for scientific
2 institutions that are not-for-profit and not overall for
3 other not-for-profits. If we're going to exempt educational
4 institutions --

5 MS. MERCADO: And scientific institutions, but not
6 other not-for-profits -- what about AARP?

7 MS. FAIRBANKS-WILLIAMS: We have one in Vermont
8 that's --

9 MS. TARANTOWICZ: This basically tracks the
10 language of the FOIA. Our regulation is basically taken from
11 the FOIA. So we're free to change it, I suppose, and expand
12 upon it. But the reason that it's in there as it is is
13 because that's what in the Freedom of Information Act.

14 CHAIR BATTLE: Essentially, what we're doing here
15 is saying that if you've got this not-for-profit scientific
16 institution, you pay the basic \$25 and then \$1 per page or
17 whatever the standard rate is per page beyond that, and you
18 don't have to pay the labor costs.

19 MS. TARANTOWICZ: Right.

20 MS. MERCADO: And the argument, I guess, would be
21 that nonprofits in particular, of which a lot of them
22 represent poor people, if they requested information, that

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1 the same standard of a not-for-profit, whether it's an
2 educational institution or a scientific institution, ought to
3 have the same kind of exemption.

4 Because by its nature of being nonprofit, it
5 doesn't have -- I think the whole purpose and intent of it is
6 that they didn't have that other excess money to go in and
7 request that other information.

8 CHAIR BATTLE: And it may be that this came from
9 patent and copyright, where scientific institutions have some
10 significance. But in our realm, the significance goes more
11 to not-for-profits than actually scientific institutions.

12 MR. MCCALPIN: I would agree with you. If you
13 think about it, would an institution engaged in economic
14 research qualify as a scientific -- you know, there are those
15 who think economics is not much of a science. But the
16 implication is that this is physical science, chemistry,
17 physics, medicine, biology, that sort of thing.

18 Going to your point, it seems to limit the reach to
19 a group which doesn't have any particular relevance to what
20 we're doing.

21 CHAIR BATTLE: To us. Yes.

22 MS. MERCADO: From my perspective and having spent

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1 over 20 years working with nonprofits, I think that one of
2 the most onerous things for nonprofits in doing FOIA
3 requests, as I mentioned to you earlier, was having these
4 \$100 fees for clerks, you know, in addition to whatever other
5 time, dollar per page, and asking a nonprofit to pay that
6 cost.

7 And I think the policy behind it is to be able to
8 provide for those entities who aren't commercial, who aren't
9 for profit. The availability of FOIA is that there not be a
10 deterrent to having FOIA requests granted to them.

11 MR. McCALPIN: On the other hand, if you exempt
12 not-for-profits -- I suspect that the MacArthur Foundation is
13 a not-for-profit organization with \$3 billion in assets.

14 MR. BROOKS: As a practical matter, does anybody
15 know how many requests have been made on either a commercial
16 or a noncommercial basis under the Act?

17 MS. TARANTOWICZ: I can certainly find that out for
18 you.

19 MR. BROOKS: Is it a problem, or isn't it,
20 economically?

21 MS. TARANTOWICZ: We'll have to look into that.

22 MS. BERGMARK: We get a regular flow of them.

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1 They're not usually terribly voluminous, I think, or terribly
2 burdensome. But aren't we on about number 40 or something
3 for this year?

4 MS. TARANTOWICZ: Yes. We keep pretty busy.

5 CHAIR BATTLE: My suggestion might be to just
6 strike this definition. I think that if we struck the
7 definition of "scientific institution" for our purposes, we
8 wouldn't lose anything. Now, that may get at it.

9 If we have not in the past had a particular
10 exemption, but if there is the ability for us to waive the
11 fee if someone petitions and shows us that they are a not-
12 for-profit, and they don't have the money, and they're making
13 a request and it's a reasonable request, I think that we
14 ought to potentially have that leverage available.

15 But I agree with what Bill is saying. Not every
16 not-for-profit is of meager funds. So we wouldn't want to
17 open the door to allow every not-for-profit to come and
18 freely access information without having to pay for it. So
19 if we strike this section and revisit the issue, allowing a
20 waiver in appropriate circumstances where someone can
21 demonstrate a need for waiver, I think that that might
22 clarify this exemption.

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1 MS. PERLE: But the problem is on page 19, with the
2 rule itself, we use the term "noncommercial scientific
3 institution." Do we just strike the definition --

4 MS. TARANTOWICZ: And that's because under the Act,
5 under the FOIA, we have to have that provision -- you have to
6 have a reduced rate for those types of entities. It may not
7 come up in our particular circumstances, or something else
8 may be more relevant. I understand what you're saying, but
9 the FOIA requires that we have a reduced rate for those types
10 of entities.

11 CHAIR BATTLE: And that was the first question I
12 asked about whether we needed to have this at all. If we
13 have got to have it, we have got to have it.

14 MS. MERCADO: We can add a section to it, then,
15 maybe another -- I don't know, another number or another
16 little section that deals with giving the discretion to the
17 Corporation to waive nonprofits who indicate --

18 CHAIR BATTLE: Who petition for such a waiver.

19 MS. MERCADO: Yes.

20 CHAIR BATTLE: And the waiver would really put them
21 in the same category as would be a noncommercial scientific
22 institution which obviously had a lobby when the FOIA reg was

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1 originally passed.

2 Linda?

3 MS. PERLE: Just to give you a little history on
4 this, whenever the center has asked for information under
5 FOIA, we have always been denied waiver of fees.

6 So we might -- to the extent that you're concerned
7 about nonprofits getting access to information at a
8 reasonable cost, you might want to consider looking closely
9 at those waiver provisions to ensure that the people you
10 think really need to have access to information at a
11 reasonable cost do have access under this waiver provision
12 standards, taking account of those organizations. I don't
13 know that they do.

14 MR. BROOKS: That's on page 20.

15 MS. MERCADO: I see. Under (f)?

16 CHAIR BATTLE: "Public interest," yes. Okay. So,
17 Laurie, are you telling us that notwithstanding its relevance
18 to Legal Services, that the Act requires that we have a
19 provision which allows for a reduced rate for the
20 noncommercial scientific institutions and that the language
21 in the Act that is required uses the term "noncommercial
22 scientific institution"?

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1 MS. TARANTOWICZ: Yes. That's correct.

2 CHAIR BATTLE: And so if that term is used, then we
3 have to define its use in our context.

4 MS. TARANTOWICZ: Right.

5 CHAIR BATTLE: The term that we now have on page 19
6 is "noncommercial scientific institution whose purpose is
7 scholarly or scientific research."

8 MS. TARANTOWICZ: That's an exact quote from the
9 FOIA.

10 CHAIR BATTLE: Okay.

11 MR. MccALPIN: And can't we leave out the
12 definition, as long as that's in?

13 MS. TARANTOWICZ: Sure.

14 MR. MccALPIN: It seems to me that is the
15 sufficiently descriptive of what we're talking about, but we
16 don't need the definition, as well.

17 CHAIR BATTLE: The only thing we had in our
18 definition is -- the results of which are not intended to
19 promote any particular product or industry -- which
20 potentially --

21 MS. TARANTOWICZ: Because of the noncommercial
22 aspect.

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1 CHAIR BATTLE: I agree, Bill. It's pretty self-
2 descriptive and probably not relevant.

3 MS. SZYBALA: I think the gloss on what it means
4 would come out of FOIA cases, actually the case law, because
5 that's a quote from the Act. So I agree. You don't need the
6 definition.

7 CHAIR BATTLE: We'll strike it, then. That's my
8 suggestion. We won't spend time trying to explain it in our
9 context, because it's basically not relevant in our context.

10 Okay. And we move on to page 8. Bill?

11 MR. McCALPIN: In the fourth line under
12 "representative of the news media," I would suggest you could
13 strike the word "that is." The term "news" means information
14 about current events. I think "that is" is unnecessary.

15 CHAIR BATTLE: Yes. Anything else on page 8?

16 (No response.)

17 CHAIR BATTLE: Page 9?

18 MR. McCALPIN: Look at the last sentence at the
19 bottom of 8 and the top of 9. "In the case of freelance
20 journalists, they will be regarded as working for a news
21 organization if they can demonstrate a solid basis for
22 expecting publication through that organization." It seems

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1 to me that freelance journalists may have multiple potentials
2 for publication.

3 When you say "that organization," you limit it to a
4 single one. And if they have a solid basis for expecting
5 publication, it seems to me it would be enough. When you
6 limit it to "that organization," you limit the market of the
7 freelance journalist.

8 MS. TARANTOWICZ: I think that's intended to mean
9 "a news organization."

10 MR. McCALPIN: That's right. But freelance
11 journalists by hypothesis don't work for any specific
12 organization.

13 MS. TARANTOWICZ: Right.

14 MR. McCALPIN: But now, we're saying that to give
15 them that credential, they have to prove or show that a
16 specific organization is going to publish it. And usually,
17 they don't know that when they're doing their research.

18 MS. TARANTOWICZ: Right. I understand the concern.
19 I think that what we meant was not a specific organization,
20 but a specific type of organization, meaning a news --

21 MR. McCALPIN: What we say in that part is "a solid
22 basis for expecting publication through that organization."

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1 MS. TARANTOWICZ: Right, which does sound like a
2 specific organization. But I --

3 MR. BROOKS: Why not just say "a news organization"
4 at that point?

5 MR. McCALPIN: Yes. I think that would be better.
6 LaVeeda, let me make one other point.

7 CHAIR BATTLE: Okay.

8 MR. McCALPIN: About the middle of the page, note
9 the Arabic 3. Section 1602.4 is revised as -- it's kind of
10 subtle. But the plain fact of the matter is, there is a
11 1602.3 in the current regulation, which is not being revised.
12 And it is the policy paragraph of the regulation.

13 And I think we need to be cognizant of the fact
14 that there is a provision in the current regulation which is
15 not being revised by what's in front of us. And I think we
16 need to go look at those to see whether we think they ought
17 to be revised.

18 CHAIR BATTLE: Okay. That's 1602.3?

19 MR. McCALPIN: Yes.

20 CHAIR BATTLE: Okay. 1602.3 is the policy
21 statement.

22 MR. McCALPIN: Yes.

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1 CHAIR BATTLE: When we get to -- we're now in the
2 commentary. When we get through to the regulatory part, why
3 don't we take a look at it and see in the context of the
4 other sections that we have before us whether there needs to
5 be some change to 1602.3.

6 MS. TARANTOWICZ: I think we are in the regulatory.

7 MR. McCALPIN: Pardon?

8 MS. TARANTOWICZ: I think we are in the regulatory
9 part.

10 MR. BROOKS: We are.

11 CHAIR BATTLE: Are we?

12 MR. BROOKS: Yes.

13 CHAIR BATTLE: Oh, I'm sorry.

14 MR. BROOKS: It started on page 6.

15 CHAIR BATTLE: Okay. Well, then, let's now take up
16 whether 1602.3 -- let me just read it, because I'm not
17 certain that everyone has a copy of it.

18 1602.3, policy: "The Corporation will make records
19 concerning its operations, activities, and business available
20 to the public to the maximum extent reasonably possible.
21 Records will be withheld from the public only in accordance
22 with the FOIA and this regulation.

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1 "Records that may be exempt from disclosure may be
2 made available as a matter of discretion when disclosure is
3 not prohibited by law and it does not appear adverse to
4 legitimate interests of the public, the Corporation, or any
5 individual. The Corporation will attempt to provide
6 assistance to requesting parties, including information about
7 how a request may be submitted. The Corporation will act on
8 requests for records in a timely manner."

9 1602.3, as I read it, seems to just set out what
10 the general policy is going to be.

11 MR. McCALPIN: You're right. I didn't raise that
12 with the idea that I thought we needed to make a change. But
13 I thought that we needed to be cognizant as we went through
14 this that there were other provisions in the regulation which
15 are not being -- which our predecessor Board did not propose
16 to amend, and we ought to exercise our own judgement.

17 CHAIR BATTLE: Sure. I think that's a legitimate
18 concern. Now, we're on 1602.4, which is being revised
19 because the location of the Corporation headquarters has
20 changed since the original proposal, so that it now reflects
21 the present address of 750 First Street, Northeast,
22 Washington, D.C. and the Corporation headquarters telephone

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1 number.

2 I know that I asked when I first saw this because
3 of the prospect of a change of location precipitating a need
4 to change a regulation whether this was required. And I
5 understand that FOIA does require that the actual address be
6 published in the regulation. So we have got to make this
7 change.

8 The next section on page 9, 1602.5, has to do with
9 an index of records.

10 MR. MCCALPIN: I have a question about the word
11 "current" in the first line. I don't know whether that's
12 statutorily required, but it does seem to me that "current"
13 means literally "up to the minute." And I'm not sure that we
14 can meet that in all instances.

15 And I wonder if it would be adequate if we had an
16 index that was updated from time to time or something of that
17 sort which kept us from being called to account if it takes
18 us a week or two or three to update an index. "Current"
19 means up to the minute, it seems to me.

20 MS. TARANTOWICZ: "Current" is in the statute.

21 MR. MCCALPIN: Is it?

22 MS. TARANTOWICZ: Yes.

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1 MR. McCALPIN: Then I guess we have no alternative.

2 CHAIR BATTLE: Okay. Page 10?

3 MR. McCALPIN: At the top of 10 -- I don't know why
4 we keep repeating "located at the address in 1602.4." We say
5 "at the Corporation's headquarters." And 1602.4 says where
6 that headquarters is. And we have it again in 5(a) in
7 1602.6(a) down below. And frequently, we keep saying "at the
8 address in 1602.4." Why don't we simply say "at the
9 Corporation's headquarters"? We have told them where that
10 is.

11 CHAIR BATTLE: Bill?

12 MR. McCALPIN: Under 1602.6(b)(1), "All final
13 opinions, including concurring and dissenting opinions and
14 orders made in the adjudication of cases" -- what does that
15 mean? Does that mean cases in the court to which the
16 Corporation is a party? Does it mean matters which are
17 adjudicated within the Corporation?

18 I would have thought that it meant the former, you
19 know, referring to those cases that we get in the general
20 counsel's report from time to time, cases to which the
21 Corporation is a party. I'm not sure that we have "cases" as
22 that term is usually used being decided within the

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1 Corporation.

2 MS. TARANTOWICZ: That does refer to administrative
3 type cases, actions. And the closest thing that we would
4 have to that are those procedures under our enforcement
5 regulations, 1625, 1606.

6 MR. McCALPIN: Well, it seems to me we need to
7 explain what we're talking about when we're talking about
8 "cases."

9 MS. TARANTOWICZ: Right. This language comes right
10 from the FOIA. We're certainly at liberty to explain what we
11 mean.

12 CHAIR BATTLE: And I think what we have to do is to
13 assure that in replicating the language from FOIA, that we
14 give it the specificity that goes along with our current
15 circumstances. And I think the point that Bill is raising is
16 adjudication of cases -- first of all, to some degree,
17 implicit in that statement is a case heard by a judge and an
18 opinion rendered by someone, because we're talking about
19 final orders or opinions, concurring or dissenting.

20 If what we're talking about are hearings that are
21 held on enforcement proceedings internally and
22 administratively, then we can further clarify that with the

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1 word "cases." Certainly, those documents that relate to
2 cases that are pending in a federal district court or
3 somewhere else are available directly from that court and
4 would not necessarily need to be made available from the
5 Corporation for a person to have access to that public
6 document.

7 But those cases that are adjudicated herein through
8 our own administrative process, we would be the appropriate
9 party to have access to and provide copies of those records.
10 So we may need to change the language here to make it clear
11 that we're talking about adjudications that come from within
12 the Corporation.

13 MR. McCALPIN: Within the Corporation. And
14 somewhat the same consideration in the next line.
15 "Statements of policy and interpretations." Interpretations
16 of what? The statute? The regulations? The interpretation
17 of policies? What are we talking about when we're talking
18 about "interpretations"?

19 MS. TARANTOWICZ: Again, that's a term used in the
20 statute, so we would have to go to the case law interpreting
21 the statute and apply it to LSC to see what that would mean
22 in our case. And we could certainly look into that.

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1 MR. MCCALPIN: I'm not objecting -- I don't say we
2 ought to drop the word "interpretation," but we ought to know
3 what we're talking about when we talk about
4 "interpretations."

5 MS. TARANTOWICZ: Right.

6 MR. MCCALPIN: I would suppose that the general
7 counsel issues opinions interpreting the statute and the
8 regulations. And somebody may interpret policies with
9 -- somebody other than the general counsel's office may
10 interpret policies. I guess we do that in connection with
11 monitoring and evaluation and that sort of thing. But I
12 think we need to explain what we're talking about.

13 CHAIR BATTLE: Okay. Anything else on page 10?

14 (No response.)

15 CHAIR BATTLE: Page 11?

16 MR. MCCALPIN: Subparagraph (d), "Certain records
17 may be edited by deletion." And then, the last sentence
18 says, "In such cases, the record shall have attached to it a
19 full explanation of the deletion." Well, if you give a full
20 explanation, you might as well not delete.

21 Again, maybe this is statutory language, but it
22 seems to me you have to have an explanation, but it's not a

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1 full explanation. Because then, you've defeated the purpose
2 of the deletion.

3 CHAIR BATTLE: Is it the reason for the deletion,
4 or full explanation of what is deleted?

5 MR. McCALPIN: Well, you can't have a full
6 explanation of what is deleted, because that would --

7 MS. SZYBALA: I don't know. I mean, I can just
8 tell you that I've done it. And in practice, every time the
9 OIG has redacted something, right at the redaction, we state
10 the section under which we have redacted something. That's
11 our explanation.

12 MR. McCALPIN: But that's not a full explanation, I
13 wouldn't think.

14 MS. SZYBALA: No, I guess it's not.

15 MS. MERCADO: Because a full one would have the
16 particulars..

17 MR. FORTUNO: But I think you also have to provide
18 an explanation -- a description as to what it is you've
19 deleted, because the individual who's being denied that
20 document or that portion of a document has a right to seek
21 review of that, first by the agency head and ultimately by
22 the federal court. And they need to know what it is that

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1 you're withholding and why, without an explanation of what's
2 deleted, they don't know.

3 MS. SZYBALA: In fairness, the cover letter does
4 say that what's deleted is identifying information, because
5 that's basically what we're doing.

6 MR. McCALPIN: Let me tell you, I've seen lots of
7 deleted records from the FBI. And they sure as hell don't
8 tell you what has been deleted.

9 MS. SZYBALA: But I've litigated against them and
10 have gotten them to do the affidavits that have driven them
11 crazy to tell us exactly what's deleted on every single line.
12 So they're supposed to. They just don't until you get a
13 Vorne affidavit.

14 MR. FORTUNO: And then they provide a Vorne index.

15 CHAIR BATTLE: So it gets back, really, to my
16 question. Is the requirement that you give an explanation of
17 what is deleted or why it's deleted, or is it both?

18 MR. FORTUNO: I think we have to do both.

19 CHAIR BATTLE: Okay. So would we in taking the
20 word "full" out be at variance with the statute, so that
21 attached to it is an explanation of the deletion? Is that
22 sufficient?

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1 MR. McCALPIN: Let me push this. Suppose that the
2 document describes a litigation strategy. And somebody asks
3 for that document, and we delete that because it refers to a
4 litigation strategy. Do we have to then tell the requester
5 what that litigation strategy is which has been deleted?

6 MR. FORTUNO: No, but we tell them that it was
7 litigation strategy that was deleted, without telling them
8 what the strategy was, and then explaining the exemption
9 under which that material was withheld.

10 MR. McCALPIN: Okay. But that's not a full
11 explanation.

12 MR. FORTUNO: Oh, no. No. And this may be more
13 semantics or nomenclature than anything else. I think we're
14 in agreement. We're not going to say, "We're going to delete
15 this, but let us tell you word for word what we deleted."
16 That, of course, is not what's intended.

17 What it is intended to do is say when we delete
18 something, we have to let them know without telling them
19 exactly, for example, litigation strategy, telling them what
20 our strategy was, telling them that what was deleted was
21 litigation strategy and what authorizes us to withhold that.
22 And that one does protect the material, while at the same

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1 time providing the requester with sufficient information to
2 make an intelligent decision as to how to proceed from that
3 point.

4 MR. McCALPIN: I don't have any objection to what
5 you're proposing to do, but I'm not at all sure that the
6 language we have in front of us on page 11 is in accord with
7 what you're talking about.

8 MS. SZYBALA: I think "description" is a better
9 word than "explanation." We describe what has been deleted,
10 don't explain it.

11 MR. McCALPIN: In general. Describe in a general
12 way what has been deleted and why.

13 MR. SMEGAL: A full explanation as to why.

14 MS. MERCADO: A description is more detailed.

15 CHAIR BATTLE: Linda?

16 MS. PERLE: Could I make a suggestion? What if it
17 says, "In such cases, the record shall have attached to it an
18 explanation of the reasons for the deletion and a general
19 description of the deleted material"?

20 MR. McCALPIN: Yes. That's all right.

21 CHAIR BATTLE: I like that.

22 MS. MERCADO: Thank you, Linda.

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1 MS. PERLE: You're welcome. Any time.

2 CHAIR BATTLE: Okay. Anything else on page 11?

3 MR. McCALPIN: Yes.

4 CHAIR BATTLE: Okay.

5 MR. McCALPIN: Again, we have that "at the address
6 and telephone number stated in Section 1602.4," about six
7 lines from the bottom. Why don't we just simply say "at the
8 office of the general counsel at the headquarters of the
9 Corporation"?

10 CHAIR BATTLE: Is it Corporation headquarters?

11 MR. McCALPIN: "At the Corporation headquarters."

12 MS. MERCADO: Is there a new lease out there?

13 CHAIR BATTLE: No time soon, I think. I have a
14 question. It says, "The person submitting written requests
15 should identify the records sought in the manner provided in
16 another section and should indicate the specific date which
17 they request or they wish to inspect the records."

18 At various points throughout this reg, we kind of
19 give direction to what it is that needs to be contained in a
20 particular request. Later on, we talk about a requester
21 agreeing to be responsible for up to \$25 worth of the expense
22 associated therewith.

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1 Is there any way to organize this so for a part
2 person, if they're coming to this reg, and they want to make
3 a request, they can come to a section that tells them exactly
4 what they're supposed to do to make their request something
5 that the Corporation can respond to?

6 MS. TARANTOWICZ: We can certainly do that. One of
7 the reasons that it's in more than one section is that we
8 actually have a dual responsibility. And that is, we have to
9 allow people to come in and inspect records. And in
10 addition, we respond to written requests, as in, "Please send
11 me this."

12 CHAIR BATTLE: Does this set out everything for
13 someone who wants to come in and inspect -- when they read
14 this section, does this tell them everything they need to do
15 before they come in and do the inspection?

16 And if it doesn't, then my suggestion is somewhere
17 in the comments or in the rule, it just makes sense to make
18 it clear and straightforward to the person who's making the
19 request everything they need to do in one place, either when
20 they're doing their inspection or if they're making a written
21 request, rather than sprinkling it in several different
22 places.

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1 Anything else on 11?

2 (No response.)

3 CHAIR BATTLE: Page 12?

4 MR. McCALPIN: I'm would point out again that there
5 are a number of parts of 1602.8 which are not included here
6 and are not being amended. Now, they are so lengthy that I'm
7 not sure whether you want to read all through them or not.
8 But is general counsel at least satisfied and OIG that we
9 don't need to look at these sections which are not in the
10 current amendment?

11 MS. MERCADO: Are we satisfied?

12 CHAIR BATTLE: Why don't I just read them? That
13 will put everybody at ease. I know it's a page worth, but
14 just hold on. Let's go through them, so that everybody will
15 have a chance with 1602.8, "availability of records on
16 request."

17 MR. McCALPIN: (a) is in front of us.

18 CHAIR BATTLE: (a), you have in front of you. And
19 (a) is substantially the same as is already published in the
20 regulation. I will read (b), because we have got out (b) and
21 then 2 --

22 MR. McCALPIN: (e)(1) and --

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1 CHAIR BATTLE: (b)(1) and (2). And then, we have
2 before us (b)(3). Okay? (b) reads, "Requests. (1), A
3 request will be acceptable if it identifies a record with
4 sufficient particularity to enable officials of the
5 Corporation to locate the record with a reasonable amount of
6 effort.

7 "Requests seeking records within a reasonably
8 specific category will be deemed to conform to the statutory
9 requirement of a request which reasonably describes such
10 records if professional employees of the Corporation who are
11 familiar with the subject area of the request would be able
12 within a reasonable amount of effort to determine which
13 particular records are encompassed within the scope of the
14 request and to search for, locate, and collect the records
15 without unduly burdening or materially interfering with the
16 operations because of the staff time consumed or the
17 resulting disruption of files.

18 "If it is determined that a request does not
19 reasonably describe the records sought as specified in this
20 paragraph, the response denying the request on that ground
21 shall specify the reasons why the requests fail to meet the
22 requirements of this paragraph and shall extend to the

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1 requesting party an opportunity to confer with the
2 Corporation personnel in order to attempt to reformulate the
3 request in a manner that will meet the needs of the
4 requesting party and the requirements of this paragraph."

5 Any questions about that?

6 MR. McCALPIN: Just stop and think a minute.

7 Toward the end, you talked about opportunity to confer with
8 Corporation personnel. We have made some efforts to
9 distinguish between general counsel and OIG. And does the
10 phrase "Corporation personnel" sufficiently broad to give
11 them the opportunity to confer either on the general counsel
12 side or the OIG side? I suppose it is.

13 MS. SZYBALA: Absolutely.

14 MS. TARANTOWICZ: And we're required to tell them
15 that they have an opportunity to consult with personnel. And
16 in that response, we can identify the particular person at
17 the Corporation they should contact.

18 MR. McCALPIN: Okay.

19 CHAIR BATTLE: All right. (2), which is also not
20 contained in the changes: "To facilitate the location of
21 records by the Corporation, a requesting party should try to
22 provide the following kinds of information if known: (i) the

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1 specific event or action to which the record refers; (ii) the
2 unit or program of the Corporation which may be responsible
3 for or may have produced the record; (iii) the date of the
4 record or the date of the period to which it refers or
5 relates; (iv) the type of record such as an application, a
6 grant, a contract, or a report; (v) personnel of the
7 Corporation who may have prepared or have knowledge of the
8 record; or (vi) citations to newspapers or publications which
9 have referred to the record."

10 So this really just identifies six different ways
11 to give some kind of specific identifying factor, so that you
12 know what it is, so that at least the Corporation personnel
13 can have some idea where to find what's being requested.

14 MR. BROOKS: I think the question there was, does
15 it work, as far as the staff is concerned, or does this give
16 enough information to the personnel at the Corporation to
17 respond with reasonable ease?

18 MS. TARANTOWICZ: Yes. I believe it does. When we
19 went through this regulation when we started with changing it
20 for OIG purposes, the person responsible in OGC for
21 responding to most of our FOIA requests went through it, and
22 she would have brought it to our attention, I'm sure, if

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1 there was a difficulty with this.

2 MR. BROOKS: Just one other suggestion. I noticed
3 the phrase "requesting party" was used in what you read,
4 LaVeeda. We have used "requester" in other sections. I just
5 suggest that that be made uniform.

6 CHAIR BATTLE: That makes sense. We used
7 "requester" earlier, didn't we?

8 MR. BROOKS: Yes.

9 CHAIR BATTLE: Okay. So what we would need to do,
10 Laurie, is take out "a requesting party" in Section 2, which
11 is not contained in the proposed language that we have before
12 us but in the actual reg as it exists and to use "requester"
13 throughout.

14 MR. McCALPIN: That's also in the fifth to the last
15 line in 1.

16 MS. TARANTOWICZ: I'll do a search through the
17 whole reg, and I'll make sure we have it consistent.

18 MR. McCALPIN: Actually, I think a "requesting
19 party" may even be preferable to "requester."

20 CHAIR BATTLE: "Requesting party." Let's just be
21 consistent, whichever way we go.

22 MR. McCALPIN: Yes. Whichever way, let's be

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1 consistent.

2 CHAIR BATTLE: Okay. We do have Section 3.
3 However, I'm noting that what we have done in subsection 3 is
4 to strike the rest of the language that is now contained in
5 the regulation from the word "when" to the end.

6 MS. TARANTOWICZ: Right. The purpose for that was
7 to be more in line with the Corporation's actual practice.
8 When this regulation was originally drafted, it was
9 anticipated that requests would go to various locations in
10 the Corporation. And now, we have streamlined it so
11 everything goes through the office of general counsel. So
12 that's to reflect that actual practice.

13 CHAIR BATTLE: This particular section says, "The
14 Corporation is not required to create a record to satisfy a
15 request for information." But let me read on what it used to
16 say. "When the information requested exists in the form of
17 several records at several locations, the requesting party
18 should be referred to those sources, if gathering the
19 information would unduly burden or materially interfere with
20 the operations of the Corporation."

21 Suzanne?

22 MS. GLASOW: I believe that was deleted because at

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1 one time, we had records in all different places. Now, it's
2 all in one place. We don't even have an archives off
3 building site anymore. So it was revised to reflect that.
4 And at the regional offices, it exists in one place, too.

5 CHAIR BATTLE: All right. Now, we're on to 4,
6 which is contained in what we have got before us. And we
7 have 5 before us. Are there any changes to 4 or 5? We get
8 into gender --

9 MR. MCCALPIN: Where are we?

10 CHAIR BATTLE: We're on page 13 at 5(c). We have
11 gender neutral additions to (c).

12 MR. BROOKS: Let's pause here a minute on 5. "The
13 Corporation may require that fees be paid in advance. And
14 the Corporation will advise a requester as promptly as
15 possible if the fees are estimated to exceed \$25 or may be
16 indicated by the requester."

17 I just would like to think about that. You have,
18 no doubt, thought how that ties in with the assumption or
19 presumption of agreement by the requesting party.

20 CHAIR BATTLE: At the top of page 13, instead of
21 "requester," we need to add "requesting party" in line 1.

22 MR. MCCALPIN: Yes. And there are a couple of

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1 places in paragraph 5, too. But I think they're going to do
2 this throughout.

3 CHAIR BATTLE: If we see it, I think we might need
4 to flag it just to make sure. Is that to Renee or to Laurie,
5 that you're thinking about whether this payment in advance is
6 expressly what we want? Is that your question, John?

7 MR. BROOKS: Well, I just want to make it
8 consistent with the other provisions there. And I think this
9 is a desirable provision to have that may require that fees
10 be paid in advance. But I don't want it to conflict with the
11 other provisions.

12 MS. TARANTOWICZ: Right. It references a later
13 section, which I believe talks about the reason that we would
14 require a payment in advance. And I think that's because --
15 it would be if a person about to pay fees on a prior request,
16 so we were worried about getting the money or if the fee
17 exceeds -- I believe it's \$250.

18 MR. BROOKS: It's perfectly reasonable.

19 MS. TARANTOWICZ: Right. I'll make sure it's
20 consistent.

21 MS. MERCADO: Madam Chair?

22 CHAIR BATTLE: Yes?

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1 MS. MERCADO: I'm not sure whether I would be out
2 of order or not, since I didn't quite finish the last
3 discussion a little while ago on the whole issue of waiver.
4 I think we had talked about going back into a section dealing
5 with nonprofits; is that right?

6 So that when we're talking about this waiver or of
7 fees, that would be incorporated into -- because in addition
8 to the nonprofits -- and I wasn't sure where they fell into
9 this category, because I don't know this whole rule
10 completely.

11 But where do our grantees fall, as far as any
12 request that they might have? Are they automatically in
13 nonprofit? Are they under some other category, "commercial,"
14 "noncommercial"? Some of them might be under nonprofit
15 programs. But where do they fall?

16 CHAIR BATTLE: From what I have seen about
17 exemptions so far or any kind of definitional distinction,
18 they would fall in the category of entities --

19 MS. MERCADO: They're all nonprofit.

20 CHAIR BATTLE: Yes, but we don't have a provision
21 allowing for waiver of nonprofits. What we have is a general
22 waiver provision, which applies to anybody that wants to

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1 request the waiver. And I don't know that that's not a bad
2 idea.

3 We could have an indigent client that wants to
4 request records in connection with something that is not a
5 part of a not-for-profit. So I wouldn't want the waiver
6 provision to be exclusive. But I think what we need to do is
7 to establish some guidelines for how that waiver ought to be
8 implemented, so that the criteria is geared toward indigence
9 or ability to pay.

10 MS. MERCADO: Well, then, I guess my view in this
11 would be that there's actually two different categories that
12 we are talking about. We're talking about the automatically
13 exempted folks. You've got the educational institutions, the
14 noncommercial scientific institutions, and whether or not in
15 that other section you would have profits in that category.

16 And then, on the waiver, it would incorporate those
17 as well. And it would include the individuals that you're
18 talking about. But it wouldn't necessarily automatically
19 make this an exemption. Maybe it's something that we need to
20 spend a little bit more time in discussion on, because I just
21 know from the historical perspective, especially on the part
22 of grantees, there's some difficulty with some of that

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1 section.

2 CHAIR BATTLE: With getting information?

3 MR. McCALPIN: I think the discussion ought to wait
4 until we get to 1602.13 on page 19. And that describes who
5 pays for what.

6 MS. MERCADO: 1602 what?

7 MR. McCALPIN: .13 on page 19.

8 MS. MERCADO: Okay.

9 CHAIR BATTLE: We are at 3 o'clock. And I'm
10 wondering if people need a 5- or 10-minute break. We're
11 going to continue on with this. Do we? Okay. Let's take
12 about 10 minutes, and then let's come back.

13 (A brief recess was taken.)

14 CHAIR BATTLE: I think we are now essentially
15 gathered around. We during this break lost Tom Smegal, who
16 was fortunate enough to join us for a brief period of time.
17 I think he has got a deposition in Cincinnati. It was
18 continued long enough for him to make some portion of this
19 meeting. And he has got to get back. And Martha should be
20 back in just a moment, and Edna, also. Edna's here? She'll
21 be back.

22 But what I would like to do is go back on the

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1 record and just state an observation and a reason why I think
2 this observation probably applies to where we are with regard
3 to 1602.

4 Initially, if we just go through the history just
5 briefly, 1602 was amended to clarify the role of the Office
6 of the Inspector General as it related to documents under the
7 control of the Office of the Inspector General previously and
8 to delegate some of the responsibility that the Office of
9 General Counsel had for providing responses to requests where
10 those documents were under the control of the Office of
11 Inspector General.

12 That was the sole purpose for the amendments that
13 previously had been made to 1602. As I understand it, it was
14 not a full-blown review of 1602, FOIA, and where that
15 regulation is in light of where the Corporation is in its own
16 organization, with the exception of the one particular
17 provision which recognized that all records are not kept in
18 various different places in regional offices but in one
19 central location. And that was one change.

20 We are now in our review going much more in-depth
21 than intended initially with this regulation, because we're
22 not only reviewing the portions of the regulation that

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1 pertain to the delegation of responsibility to the Office of
2 Inspector General, but doing a comprehensive review as we
3 have of all regulations of 1602, in light of FOIA.

4 And I'm not certain that the staff is prepared
5 today to go into that depth of review and to respond to
6 questions with regard to that.

7 So rather than spend additional time today with
8 editing changes and philosophical questions about this
9 particular regulation, I think it probably would be better
10 utilization of this committee's time if we defer further
11 consideration of this regulation until the staff has an
12 opportunity to go back and to the kind of in-depth review
13 that we have done of all the other regulations and to take
14 into consideration the concerns that have been raised by
15 members of this committee today, the questions about the
16 historical context of some of the provisions that we have,
17 and the application of those provisions to our specific
18 circumstance here at LSC, and be prepared at a later date,
19 prioritizing this one, along with others.

20 I'm not certain that the working group has had an
21 opportunity to look at this as in-depth as we are now
22 considering it. So to put this one fully in the loop, I

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1 will it be provided at no charge? I'm not quite sure what
2 that means. If the information provided routinely might be
3 voluminous, does it still mean no charge? I don't
4 understand it.

5 Then, we have the not-for-profit thing that we
6 talked about before. We have the commercial use request.
7 And then, I think that we need to have some idea about why,
8 for instance, in (c) is there no charge at all for time, but
9 charge for duplication after the first 100 pages.

10 In (d), we charge after the first 2 hours and after
11 the first 100 pages. I'm not sure that we have explored or
12 should explore that. And then, in (e), is this the schedule
13 of standard charges that is referred to elsewhere, or is
14 something else -- than the standard charges? I just think
15 that 13 is one that needs -- we need to understand the
16 philosophy behind it.

17 CHAIR BATTLE: Okay. That point is well taken.
18 And additionally, I think in 13 is the whole issue that we
19 have raised about how you're going to instruct to the
20 requesting party their obligation to state their willingness
21 to pay the \$25 fee at the onset, so that that's clear.

22 And all of the things that you want the requesting

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1 party to do, potentially, can be placed in one place, so that
2 they can look to somewhere that tells them exactly how to
3 make a request, what needs to be contained in a request.

4 Are there any other concerns other than the ones
5 that we have covered so far?

6 (No response.)

7 CHAIR BATTLE: We have a new member of the general
8 counsel's staff who has joined us, if you'll state your name
9 for the record.

10 MS. GRETCHEN: Yes. My name is Joanne Gretchen. I
11 am titled the "FOIA administrator," which means I am a
12 nonlegal worker. I simply respond to the requests according
13 to policy and all other requirements. When in doubt, I
14 always confer with general counsel or a member of the general
15 counsel's staff who ultimately have the authority to release
16 or to refuse to release documents or parts of documents,
17 because sometimes, we do partial releases.

18 MR. MCCALPIN: Can you give us some idea of the
19 volume that you handle, particularly of the different
20 categories of requests that we're talking about here?

21 MS. GRETCHEN: Yes. It's hard without going back,
22 Mr. McCalpin, to look over the last few years. But in

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1 general, we handle between I would say 75 and 90 requests
2 annually. At the moment, we're up to about number 79. But I
3 wish to point out that approximately 20 percent of those are
4 from a single requester who files regularly with us, so that
5 we --

6 MR. McCALPIN: Is that Wilkinson?

7 MS. GRETCHEN: No, it is not. It's another private
8 person. The point is, if we deduct his approximately 14 so
9 far this year, that leaves us at about low sixties, something
10 like that, which is just about right for October.

11 MR. McCALPIN: Can you tell us something about the
12 extent to which the requests come from our recipients or from
13 some of these other categories that we have in here,
14 educational institutions or noncommercial scientific
15 institutions?

16 MS. GRETCHEN: Once again, sir, without having the
17 records so that I can go and do a proportion for you or a
18 percentage for you --

19 MR. McCALPIN: Just in general.

20 MS. GRETCHEN: I would estimate that about 25 to 30
21 percent of our requests annually come either from programs
22 looking for other program information or employees of

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1 programs or former employees of a program looking for
2 information about that program.

3 CHAIR BATTLE: Why don't I suggest this? Rather
4 than necessarily putting Joanne on the spot to give ballpark
5 figures, why don't we make that part of what we're requesting
6 them to provide us, so that as we go through this, we have
7 some feel for the actual utility of sections that we have to
8 undertake looking at to change in all those respects in the
9 areas that Bill has suggested.

10 Are there any other suggestions that we need to
11 make?

12 (No response.)

13 CHAIR BATTLE: And if not, I thank you, Laurie and
14 Joanne and Renee, for coming before us with regard to changes
15 to FOIA. And we will look forward to hearing back from you
16 at a time when you've had a chance to go back through and
17 comprehensively review this regulation in light of the
18 concerns that we have raised today. Thank you very much.

19 MS. MERCADO: Thank you.

20 CHAIR BATTLE: My suggestion is that we move on to
21 1604. We had determined that we would consider 1610 and 1609
22 in tandem. And unless my committee thinks that they can do

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1 that in an hour and-a-half, 1604 is not a terribly long reg
2 for us to consider. So let's undertake it next.

3 1604 pertains to the outside practice of law. And
4 one of the issues, as I understand it, that we initially
5 addressed in our first review of this regulation had to do
6 with the intersection of the professional responsibilities
7 which an attorney may have under their own code of
8 professional responsibility and as it relates to the local
9 courts to provide either pro bono work in some areas or some
10 legal assistance that's court ordered and our provisions with
11 respect to how attorney's fees ought to be handled in those
12 instances, as well as in instances in which we do authorize a
13 lawyer to be involved in the outside practice of law for
14 family or friends and some other specific instances.

15 So we decided initially on, I believe, page 1 of
16 the supplemental information that, since in all of our other
17 sections, we had set out a purpose for the section, that we
18 would do so with regard to this, as well. So the language
19 that we have got on page 1 is a statement of the purpose of
20 the section pertaining to outside practice of law.

21 MS. PERLE: Excuse me. I think we always had a
22 statement of purpose on this one. We just changed it.

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1 CHAIR BATTLE: We changed it? Okay.

2 MR. McCALPIN: Let me say in that connection, I
3 like the thrust of the September 9 draft better than the
4 draft that we have before us here, because the September 9
5 draft put it in terms of "reasonable demands on all members
6 of the Bar" and then goes into "pro bono" and all the rest.

7 When I look at this, what we have before us, "to
8 permit Legal Services' attorneys to engage in the outside
9 practice of law," I'm thinking about writing wills and trying
10 tort cases and all that sort of thing. It doesn't put it in
11 terms of the professional responsibility and obligation of
12 lawyers. LaVeeda, I'm over at the rule itself, rather than
13 the explanation.

14 CHAIR BATTLE: Okay.

15 MR. McCALPIN: And I have before me the September 9
16 draft, which was in the book that's dated September 9 that
17 was sent to the committee and the Board. I think that that
18 captures the essence of what we're talking about better than
19 what we have before us today.

20 MS. MERCADO: But it's twofold, isn't it?

21 MS. PERLE: The second sentence does, I think, deal
22 with those issues, but maybe not in quite as strong language

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1 as the September one.

2 MS. GLASOW: The committee had asked us to merge
3 the section from the last provision.

4 MR. McCALPIN: The outside practice of law -- what
5 I think of is the kind of practice I did for 40 years,
6 representing clients for a fee. And that's not what we're
7 talking about at all.

8 MS. MERCADO: Well, under the original Act, I think
9 it is. I think that as the '80s developed more awareness or
10 commitment by the Bars to do pro bono work, that that sort of
11 changed the focus of it. But initially, the outside practice
12 of law meant an attorney doing outside work, their own --

13 MR. McCALPIN: But attorneys in programs can't
14 practice outside for a fee under the statute.

15 MS. MERCADO: But you need to deal with the outside
16 practice of law that you would generally understand it to be
17 for money or profit or whatever, versus the outside practice
18 of law that deals with the pro bono requirement. I mean,
19 they're actually two different categories of outside practice
20 of law.

21 MR. McCALPIN: But I don't think that the first one
22 you're talking about is permitted to full-time lawyers, in

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1 any event.

2 MS. MERCADO: No, it isn't. But you still have to
3 deal with it.

4 MR. McCALPIN: Except that "to permit Legal
5 Services' attorneys to engage in the outside of law" is what
6 we say on page 7. And I don't think that's what we're
7 talking about.

8 MS. GLASOW: I see what you mean, Bill. I concur
9 on that.

10 MR. McCALPIN: And the approach -- not necessarily
11 the language, but the approach of September 9 is better.

12 MS. GLASOW: Yes.

13 MS. PERLE: Yes. I think we agree. This purpose
14 section was subject to a substantial amount of back and forth
15 between our offices with, I would say, probably about 12
16 different versions. And I think that this was sort of
17 settled on kind of at the last minute as we were trying to
18 get it out.

19 But I think that we all agree that what we're not
20 really trying to do is to allow the outside practice of law
21 that's prohibited under the Act.

22 MR. McCALPIN: That's right.

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1 MS. PERLE: But what we were trying to do is to
2 make it clear that there are circumstances under which
3 outside practice is permitted.

4 And they may go beyond the sort of mandatory pro
5 bono responsibilities or court appointments, to a certain
6 extent, to the extent that we would like to permit and
7 encourage Legal Services' program attorneys to do pro bono,
8 whether or not it's mandated by court rules or professional
9 responsibility rules, subject to the sort of overriding
10 responsibilities --

11 MR. McCALPIN: Your comment --

12 MS. PERLE: But what we're talking about is pro
13 bono outside practice. And what we're not talking about is
14 compensated outside practice.

15 MR. McCALPIN: Your comment raises another thing
16 that I was going to say later. So far as I am aware, there
17 is no state that requires mandatory pro bono.

18 MS. PERLE: There are a number of states that do
19 not -- you're right -- that have aspirational standards
20 for --

21 MR. McCALPIN: Florida is as close to it as any,
22 but it's not mandatory pro bono.

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1 MS. MERCADO: That is correct.

2 MS. PERLE: No. I think that's correct. I mean, I
3 think that in the next few years, we may see a change in
4 that. It's possible.

5 MR. McCALPIN: I'm not sure.

6 CHAIR BATTLE: The terminology that we have got in
7 the draft from September is "reasonable demands made upon all
8 members of the Bar." And certainly, if we massage that
9 language, it seems to me that we can cover what the purpose
10 of this section is really constructed to address.

11 MS. PERLE: Right. We want Legal Services' members
12 to be members of the community. We want them to be able to
13 fulfill familial responsibilities. We want them to be able
14 to participate in community activities as lawyers, not to the
15 detriment of their work for the programs, but we don't want
16 them to do wills on the side.

17 CHAIR BATTLE: Yes.

18 MR. McCALPIN: I think it may be confusing to use
19 the phrase "outside practice of law," when all you're talking
20 about is the very limited areas that were permitted under
21 this regulation. Because "outside practice of law" sounds
22 like the private practice of law for a fee.

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1 CHAIR BATTLE: The term before was "uncompensated
2 outside practice." Are you suggesting that we go back?

3 MR. McCALPIN: Well, that's better.

4 MS. PERLE: But the compensated and uncompensated
5 distinction has proved to be somewhat problematic, in terms
6 of interpretation, in the past, which is why we have tried to
7 get away from that. But I think that we understand Mr.
8 McCalpin's concern, and I think we share it.

9 And I think that we can redraft this in a quiet --
10 you know, when we have a little bit -- when we're not trying
11 to juggle six or seven different rules at one time. And I
12 think we can redraft it with his concerns in mind. And I
13 think we can do it in a way that you'll all feel quite
14 comfortable with. And we'll try to do that quickly.

15 MR. McCALPIN: If you're looking at page 7 in
16 connection with that, I would think that the title of 1604.7,
17 where you talk about "mandatory pro bono," is erroneous,
18 because there is no such thing.

19 CHAIR BATTLE: On which page are you referencing
20 now, 7?

21 MR. McCALPIN: There are a few voluntary Bar
22 associations which require pro bono as a condition of

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1 membership in a voluntary Bar association, but I don't think
2 that's mandatory pro bono in the sense that everybody thinks
3 about it. In no place that I know of must you do pro bono in
4 order to practice law.

5 MS. PERLE: Well, I think you need to look at
6 Section (d) and see if that meets the concerns that were
7 expressed last time, with respect to use of recipients'
8 resources, and then try to think of a title -- if it does,
9 then try to think of a title for the section that reflects
10 what you mean.

11 I mean, I don't think we have any difficulty
12 changing the title of the section or the language of (d), for
13 that matter.

14 But I think that what we were trying to address was
15 the concern that, to the extent that lawyers are fulfilling a
16 professional obligation to do pro bono, they should be
17 permitted to use limited resources and should be permitted to
18 identify their work with the program, as long as they weren't
19 using LSC funds for activities that weren't permissible.

20 MS. FAIRBANKS-WILLIAMS: There is one other point
21 that I would like to bring up that happens oftentimes in
22 Vermont. Since we are such a small state and lawyers tend to

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1 meet lawyers and marry lawyers --

2 MS. PERLE: That happens here, too.

3 MS. FAIRBANKS-WILLIAMS: Some of the lawyers work
4 for Legal Aid, and the private attorney involvement sometimes
5 places wife and husband or vice versa in situations -- I
6 think there needs to be a little bit of a clarification that
7 a lawyer is a lawyer.

8 And even though they might be married to the judge
9 or married to somebody else, they're a lawyer. I don't know
10 exactly how you do that.

11 MS. MERCADO: You mean is there a conflict of
12 interest? Is that what you're saying?

13 MS. FAIRBANKS-WILLIAMS: Yes, that they say it's a
14 conflict of interest, even though it is not a conflict of
15 interest.

16 CHAIR BATTLE: I think that the state professional
17 responsibility rules would guide one in determining whether
18 there, indeed, is a conflict of interest.

19 MS. FAIRBANKS-WILLIAMS: Well, they said that there
20 wasn't any, but the Legal Services decided that maybe there
21 was, so they moved lawyers around and so on and so forth just
22 to make sure that their skirts were completely clean. So I

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1 And I think that the problem with the Corporation
2 trying to deal with rules affecting those situations is that
3 they're so fact-specific, and they deal so specifically with
4 what's going on in the particular situation. And it's very
5 difficult for the Corporation sort of sitting here in
6 Washington to establish any rules that --

7 MS. FAIRBANKS-WILLIAMS: Well, I wanted you to be
8 aware of these problems when you were writing the rules and
9 think about it.

10 MS. PERLE: Okay.

11 CHAIR BATTLE: Rosie, did you need to come to the
12 mike? Introduce yourself.

13 MS. NEWSOME: My name is Rosie Newsome. It has
14 been taken into consideration by the LSC Board that husband
15 and wife working out of the same office was a conflict of
16 interest. We have had it happen in Northern Indiana. And in
17 our monitoring, it stated that our director's wife could not
18 be a secretary in our office.

19 At the time, my director sent a letter back to LSC
20 stating that he did not evaluate his wife. They, in turn,
21 sent another letter back to the Board telling them whether he
22 evaluated her or not, he was her boss, and it was a conflict

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1 of interest and a violation of the rules and regulations to
2 receive LSC fundings. That is part of one of the things that
3 put us on month-to-month funding when we first got on month-
4 to-month refunding.

5 MS. FAIRBANKS-WILLIAMS: I wasn't referring to two
6 people working for the same place. I was referring to one
7 working for Legal Aid and the other doing the private
8 attorney involvement through PAI or Judicare or something
9 like this but perhaps on the opposite side or whatever. But
10 they weren't both paid by Legal Services.

11 CHAIR BATTLE: It seems to me these issues are
12 conflict of interest issues. And, Rosie, I think both you
13 and Edna have raised concerns about implementation of
14 provisions that are really not statutory. I don't know where
15 that opinion came from in monitoring that it was a conflict
16 of interest for a husband to be the supervisor over his wife
17 in a secretary position in a program. But it's not
18 statutory.

19 So there are someplace else in the Corporation
20 where if there is a problem with regard to how conflict of
21 interest is being constructed, then we need to address that
22 at that place. But when we look at what we have got before

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1 us on outside practice of law in these regs, it's not here.
2 So somebody else took it from some other place and made it a
3 policy, but not from the regs.

4 MS. NEWSOME: Then what you're saying, when the
5 Board reviewed that refunding Act and sent it back with the
6 attention and footnoted what they wanted to see corrected,
7 that they were not within the -- yes, the Board did. They
8 were not in -- I think I still have the footnotes and all of
9 that, because we could not understand how it was still being
10 done. And she still works there.

11 Plus, it came for us to change our bylaws, right,
12 saying that no family members, husbands, wives, sisters, or
13 brothers, could sit on our board because it was a conflict of
14 interest. No family members could sit on that board. And
15 that's how it came about that some of the board members and
16 the attorneys wanted to know how could the director's wife be
17 a secretary for him.

18 So they wrote to LSC. And LSC found in our
19 monitored report how -- in our refunding app how long she had
20 been there. Well, she had been there for years. He didn't
21 lie when he said he didn't hire her. When he was attorney
22 manager in Michigan City before they closed that office down

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1 when Larry Clifford was the director, he hired her, which
2 made -- but after Kevin came on as director, he didn't fire
3 her.

4 So when they made this ruling, we had two family
5 members, one brother and one sister, on our board of
6 directors. And one of them had to resign. So that's when
7 LSC came in.

8 CHAIR BATTLE: Can you give us any guidance, Susan?

9 MS. GLASOW: I'm not familiar with this particular
10 case, but it sounds like it might be a situation from some
11 old opinions or application of the rules by LSC staff. I
12 would have to go back and look. It sounds like it might be a
13 situation that would come under 1607. -- well, it was 6. I'm
14 not sure if it's still 6 -- the compensation.

15 And it may have been an application that said, "If
16 the wife gets the money of her husband who is on the board,
17 and she is a staff person, because she's the wife, she's also
18 getting compensated. And, therefore, that situation can't
19 exist because it would be compensation to a board member in
20 violation of 1607.8." I suspect that may be what she's
21 talking about, but I'm not sure. I would have to go back and
22 look.

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1 CHAIR BATTLE: I think before we can address it, we
2 need some research into exactly what happened, where the
3 policy is, so we can correct a policy if it's at a variance
4 at all with our regulatory scheme.

5 MS. GLASOW: Okay.

6 CHAIR BATTLE: And thank you for bringing that to
7 our attention.

8 MS. NEWSOME: Thank you.

9 CHAIR BATTLE: We have gone through the purpose,
10 and Bill has suggested a change back to where we were in
11 September. And I think to the extent that it at least
12 addresses more specifically the professional responsibility
13 to be involved in pro bono work, rather than using a general
14 term of "outside practice of law," as though you're talking
15 about compensated outside practice of law while you're
16 working in the capacity as a full-time attorney for the Legal
17 Services recipient.

18 And if the staff understands that, then let's move
19 on to the definitional section and see if there are any
20 changes to the provisions on page 7 or 8.

21 MR. McCALPIN: Are you going to start with the
22 comment or with this --

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1 CHAIR BATTLE: I'm starting with the comment.
2 Well, let's see. Where am I? I'm -- no. Let's start with
3 the comment.

4 MR. McCALPIN: On page 1, there is again that
5 paragraph that "the Congress is now considering
6 reauthorization" and so on, which we have decided earlier
7 needed to be changed.

8 MS. PERLE: Yes.

9 CHAIR BATTLE: Okay.

10 MR. McCALPIN: And I expect you're going to change
11 the comment about 1604.1, since we're talking about changing
12 the language of the regulation itself, necessarily this will
13 change some.

14 CHAIR BATTLE: Why don't we do this? With this
15 one, since we have been through it one time before, let's
16 consider the supplemental information in tandem with the
17 language, so that we can cover them together. We have got
18 this definitional section of 1604.2 and "full-time attorney"
19 definition first. And then secondly, "outside practice of
20 law" definition. Are there any changes?

21 MR. McCALPIN: Purely typographical. I think the
22 last word on the page needs a "D" on the end.

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1 MS. MERCADO: Correct.

2 MR. McCALPIN: On page 7.

3 CHAIR BATTLE: Okay.

4 MS. PERLE: I had suggested to Suzanne on page 2
5 that the last sentence -- this is the sentence that says it
6 makes more sense to have a definition of "full-time
7 attorney" --

8 MR. McCALPIN: You're mumbling.

9 MS. PERLE: I'm sorry.

10 CHAIR BATTLE: It's late.

11 MS. PERLE: Sorry. The last sentence under the
12 Section 1604.2(a) commentary, the sentence says it makes more
13 sense to have a definition of "full-time attorney." I'm not
14 sure that is very explanatory. And I suggested we say, "This
15 proposal assumes the definition of 'attorney' found in 1600
16 but adds a definition of 'full-time attorney.'"

17 MR. McCALPIN: I think you're right.

18 CHAIR BATTLE: Yes. Anything else on 3?

19 MR. McCALPIN: Wait a minute.

20 CHAIR BATTLE: I'm sorry. Court appointment,
21 1604.2(c).

22 MR. McCALPIN: Turning to page 8, which is the rule

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1 on court appointment, I would suggest in the second line,
2 "'Court appointment' means an appointment in a criminal or
3 civil case made by a court under a statute, court rule, or
4 practice."

5 MS. MERCADO: What page are we on?

6 MR. McCALPIN: 8, second line.

7 MS. PERLE: I would also like to suggest back on
8 page 2 on the Section 1604.2(b) that defines "outside
9 practice of law" -- I haven't edited this, but when I read
10 this, it contains about 27 negatives.

11 And it needs to be sort of stated in a different
12 way, so that -- more affirmatively, so that it wasn't -- it's
13 very confusing, what those first couple of sentences mean.

14 CHAIR BATTLE: Bill, I was about to say under
15 "court appointment," whether -- I don't know whether, for
16 example, Social Security does appointments or whether there
17 are any other noncourt but administrative tribunals where
18 appointments are made or might be made, given the fact that
19 we're going through some changes in our judicial system that
20 might be by statute or court rule or practice in a particular
21 jurisdiction.

22 MS. PERLE: We can say, "but made by a court or

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1 administrative agency."

2 MR. McCALPIN: That's all right. But the plain
3 fact of the matter is, there's no clout behind an
4 administrative agency, because they can't control whether or
5 not you practice law the way a court can. The court can make
6 the appointments, because it has got the power to control
7 whether you practice law or not.

8 CHAIR BATTLE: But we want to include in our
9 definition, it seems to me, of "court appointment" people who
10 end up getting those kinds of appointments, it seems to me.
11 That's the issue.

12 MR. McCALPIN: I don't have any problem about
13 "court or administrative agency."

14 MS. MERCADO: Sometimes, you have school districts
15 that will appoint you to represent some of the juveniles.

16 CHAIR BATTLE: De Miller, would you come to the
17 mike and introduce yourself on the record?

18 MR. MILLER: De Miller from Legal Services of New
19 Jersey. Just one comment on the definition. You've got a
20 substantive rule in there, which is probably awkward. The
21 equal applicability point is best made not in the definition
22 but later, I think.

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1 Because a court appointment is a court appointment
2 is a court appointment, whether or not it's one of equal
3 applicability to all attorneys practicing or whether they
4 singled out a particular attorney. Later on in the court
5 appointment section, you pull out and say it's permissible if
6 it's generally applied. And if that needs to be reinforced
7 to get the notion of equal applicability in, that's fine.

8 But it's a little dissonant reading here to have
9 that kind of qualifier. It makes it sound like you're
10 looking at only a subset of court appointments. It goes
11 against common sense.

12 CHAIR BATTLE: "Practice which applies to all
13 attorneys in the jurisdiction"?

14 MR. MILLER: It just should have a period after
15 "practice."

16 MS. PERLE: Right, and then we should add the
17 qualifier to 1607.4.

18 CHAIR BATTLE: 1607.4?

19 MS. PERLE: 1604.7. Excuse me. It's late.

20 CHAIR BATTLE: Okay.

21 MS. MERCADO: I see.

22 CHAIR BATTLE: Now, we're moving on from court

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1 appointment to the general policy.

2 MS. GLASOW: There is an extra hyphen on the second
3 line that should not be there.

4 CHAIR BATTLE: "Full-time attorney," the second
5 hyphen?

6 MS. GLASOW: Yes.

7 MS. MERCADO: Are you on the comments or on the
8 rule?

9 CHAIR BATTLE: Both. We're kind of --

10 MS. GLASOW: That was the rule.

11 CHAIR BATTLE: The rule under (a), second line,
12 "Outside practice of law by full-time" -- take out the dash
13 -- "attorneys."

14 MR. McCALPIN: Wait a minute. Where are you?

15 CHAIR BATTLE: Page 8.

16 MS. GLASOW: Page 8, 1604.3(a), second line.

17 MR. McCALPIN: "Outside practice of law by" --

18 CHAIR BATTLE: "Full-time attorneys." Take out the
19 second dash.

20 MS. PERLE: There is a hyphen before "attorneys"
21 which doesn't belong there.

22 MR. McCALPIN: Okay. We're in 3. If you'll look

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1 on page 3 under 1604.3, "general policy," about the middle of
2 the second full paragraph, there is a sentence which reads,
3 "This concern is especially important due to the fact that
4 LSC recipients lack adequate resources to serve even a
5 fraction of the eligible clients." In fact, they do serve a
6 fraction. It may be a small fraction, but they do serve a
7 fraction.

8 CHAIR BATTLE: Take the word "even" out.

9 MR. BROOKS: "More than."

10 MR. McCALPIN: More than a small fraction,
11 probably.

12 MS. GLASOW: Thank you.

13 CHAIR BATTLE: Anything else on 3 under "general
14 policy" or general policy as it relates to the rule?

15 (No response.)

16 CHAIR BATTLE: We now move to "permissible outside
17 practice."

18 MR. McCALPIN: I don't understand the sense of the
19 last sentence in the first paragraph under 1604.4(a).
20 "Finally, the provision is not intended to suggest that any
21 outside practice that used time that an attorney could
22 otherwise use to be doing work on behalf of program clients

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1 is inconsistent with full-time responsibilities, even if the
2 attorney works for and excess of a 40-hour week." What's
3 that intended to say?

4 MS. PERLE: It's intended to deal with the
5 situation, again, that's actually, I think, arose where Legal
6 Services' attorneys who normally would work a 60-hour week
7 were doing outside practice and brought down the hours that
8 they were working on behalf of their program clients for
9 whatever period they were working on the outside practice to
10 50 hours a week.

11 And the Corporation basically said, "You're taking
12 away time that you would otherwise spend on your clients.
13 And so you can't do this." And so it was really intended to
14 deal with what we viewed as sort of an overreaching by the
15 Corporation staff in interpreting this rule.

16 MR. McCALPIN: "Provision is not intended" --

17 MS. PERLE: The sentence may be awkward, but --

18 CHAIR BATTLE: Can we just take another stab at
19 rewriting it so that it's clear? Anything else --

20 MS. MERCADO: And I think that maybe what it is is
21 that as a policy, you wouldn't want them, I assume, to dip
22 below the 40 hour a week time.

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1 MS. PERLE: Well, I don't think we should state as
2 a policy that they couldn't. I mean, if they had a court
3 appointment, for example, or if there was a program --

4 CHAIR BATTLE: A death penalty case, and it's
5 before the Supreme Court next week, and somebody starts to
6 ride you to say, "You can't spend any time to prepare for
7 this before the U.S. Supreme Court," I think you have to
8 leave some discretion.

9 MS. PERLE: Right.

10 MS. FAIRBANKS-WILLIAMS: Or if you're operating in
11 the red like we have been, and they have been working four
12 days a week instead of five, due to --

13 MS. PERLE: I think we really need to leave that to
14 the program director and the attorney to work out what's an
15 appropriate way to deal with a particular situation, whether
16 the attorney needs to take leave or whether the attorney can
17 work by the book for 40 hours a week or 35 and-a-half,
18 whatever the number of hours that their program's normal
19 working hours are while they're working on another case.

20 But I think that's really something for a case-by-
21 case determination between the attorney and the director
22 subject to the written policies of the program.

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1 MR. McCALPIN: LaVeeda, I would like to raise a
2 question about 1604.4(a) on page 8, particularly the bold
3 faced matter. The question is, does a director's designee
4 determine that the case -- the subject matter of the case or
5 the activity, the representation, is consistent with the
6 attorney's responsibilities.

7 I think the word "representation" should be
8 substituted for "case" or "matter," because that would
9 include both the subject matter of the litigation, as well as
10 the activity of the attorney in being involved in that case.
11 The way it reads now, it looks like you're looking to the
12 subject matter of the case to see whether it's consistent
13 priority-setting or something, attorney's responsibility to
14 the clients.

15 I would think that the word "representation" should
16 be substituted for "case" or "matter." So it would read,
17 "The director determines that such representation is
18 consistent with the responsibilities to the recipient's
19 clients."

20 MR. BROOKS: Well, "representation in such case or
21 matter." I think the "such" could be grammatical about it.

22 MS. PERLE: We could put in, I think, "the."

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1 MR. MCCALPIN: Are we really concerned about what
2 is the subject matter of the representation, or are we
3 concerned about the amount of time and resources taking away
4 from the program?

5 MR. BROOKS: No, I'm agreeing with you, just
6 nitpicking on the language here.

7 MS. FAIRBANKS-WILLIAMS: Oh, I think they nitpick
8 on both.

9 MS. PERLE: So are we looking at Section (a),
10 saying as, "The director of the recipient or the recipient's
11 designee determines that such representation in the case or
12 matter" -- or "determines that representation in such case or
13 matter is consistent"?

14 MR. MCCALPIN: I would be satisfied with that. But
15 it seems to me representation goes to the utilization of
16 resources, rather than the identification of the subject
17 matter.

18 MS. MERCADO: Right. Because the way it reads
19 right now seems to indicate that unless it's a case that was
20 sort of in line with the priorities or the particular type of
21 cases that programs are going to do for their Legal Services'
22 community, that that attorney couldn't do the pro bono work,

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1 relating to "permissible outside practice" that we need to
2 address?

3 (No response.)

4 CHAIR BATTLE: We move on to page 9. And
5 initially, when I read 1604.5 on "compensation," the question
6 I had was whether or not this applied to a situation where
7 you had representation of friends or family. And I see that
8 it does. So if you take a divorce for a cousin, and the
9 cousin says, "I want to pay you \$400 to do this divorce,"
10 then those funds would go to the recipient.

11 MS. PERLE: Correct. And I think that the
12 committee did discuss that at an earlier time.

13 CHAIR BATTLE: Yes.

14 MS. PERLE: And I think everybody felt that it's
15 fine for you to do the divorce for your cousin or whatever,
16 but you probably shouldn't profit from it. So you either
17 don't accept a fee, or you remit the fee to the recipient.

18 MR. BROOKS: Doesn't that raise the question of
19 fee-splitting, again? Would the recipient have any control
20 over the conduct of the employee staff attorney in the case
21 entirely independent of the recipient's business, in fact,
22 ineligible for the recipient?

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1 MS. GLASOW: Yes. This really does raise the issue
2 of fee-splitting. And we have looked into that. And it is
3 problematic with this rule. It's not a problem with 1609,
4 but it is a problem with 1604, which is part of the reason we
5 added this language subject to the applicable rules of
6 professional responsibility.

7 Basically, there are two -- as many of you, I'm
8 sure, know -- fee-splitting rules in most professional codes.
9 One is 5.4, where you cannot split a fee with a nonattorney.
10 And that was the rule that was litigated in the case that Mr.
11 McCalpin talked about in Missouri.

12 And that wouldn't be a problem for us, because the
13 problem there was the ACLU was considered to be not a legal
14 firm, a law firm, and was a kind of a private entity, in
15 essence. And so it was splitting a fee with a nonattorney.
16 That's not our problem.

17 The other rule on fee-splitting is 5.1, which
18 basically says an attorney cannot split a fee outside of his
19 own law firm, except under certain conditions. And that's
20 where both attorneys take proportionate responsibility for
21 the case to the client. There's a certain proportional
22 splitting of the fee, full knowledge and consent of the

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1 client, et cetera.

2 But none of that would take into consideration what
3 we have in 1604, which would be a situation where a recipient
4 attorney would take a case outside of his program's practice
5 on his own. It's his case. As a matter of fact, we say he
6 cannot identify the case with the program. So he does run
7 smack into this fee-splitting issue.

8 It's a little unclear out there how the different
9 Bars are interpreting this and enforcing it. I think we will
10 probably certainly get comments on it from the various Bars,
11 and that would be helpful. I am comfortable with sending it
12 out for comment, if the committee is. But it certainly is
13 problematic. It's not clear whether we could be basically
14 telling the grantees out there they could do something that
15 in turn their Bars would say they can't do.

16 MS. PERLE: I just --

17 CHAIR BATTLE: Wait just a minute. Ernestine, did
18 you have something?

19 MS. WATLINGTON: Yes. I just wanted to restate the
20 finding. When I got the clarification on that number 3 on
21 page 9, it was that these were not deducted from the
22 individual clients.

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1 MS. PERLE: I think the thing that we need to sort
2 of keep in mind is that there has been a rule that requires
3 you to remit fees to the recipient for a long time. This is
4 not a new rule. So that we have been acting under this
5 similar situation for a long time. And I don't recall that
6 it has ever been problematic.

7 But we certainly will ask specifically to get
8 comments on this, whether recipients or attorneys have ever
9 run up against a problem. We'll ask Bar associations that
10 would care to comment how they view these fees.

11 CHAIR BATTLE: De?

12 MR. MILLER: De Miller again from Legal Services of
13 New Jersey. As a person who chairs my state advisory
14 committee on professional ethics and as a person who has done
15 a lot of research on fee-splitting -- novel fee-splitting
16 arrangements that did run afoul of the model rules, this is
17 not a situation that is at all intended to be covered by any
18 of the fee-splitting rules.

19 And I would actually recommend that you not sort of
20 put it out as an open question but affirmatively state that
21 under -- if you're able to do so, I certainly would be and
22 believe it -- affirmatively state that under your

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1 understanding of the intention and construction of the fee-
2 splitting rules as to what they're supposed to achieve, this
3 is not a situation that's all covered with it.

4 That's to cut down on fairly reprehensible conduct
5 of steering and that sort of thing. So I wouldn't put it out
6 as an open question, "Is this a problem?" I would
7 affirmatively state -- and I would leave it alone in the
8 rule, and I would affirmatively state in the conduct your
9 conclusion that it is not a problem.

10 MS. GLASOW: I agree that prohibiting it for our
11 recipients does not serve the purposes of the fee-splitting
12 rules. And as I said, it's unclear how the Bars are
13 enforcing it. And I really appreciate De's comment, because
14 I see this as a situation where I would like to see this go
15 forward. There was some concern there.

16 MR. BROOKS: I think I'm comfortable with the
17 subject of the rules of professional responsibility in the
18 rule itself and with the reference to fee-splitting in the
19 commentary, which doesn't raise it as an issue, but it
20 bounces it back to the local rules.

21 So we may get comments on it. I think we have
22 covered it adequately here. I just raised the question to be

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1 sure we thought about it again.

2 CHAIR BATTLE: So since it's subject to the
3 applicable local professional responsibility rules, then
4 whatever those local rules would prevail with respect to the
5 application of this particular rule. And I don't think we're
6 running afoul of local rules by having that to qualify.

7 MS. PERLE: And just to reiterate what Suzanne
8 said, this is a rule that we're planning to send out for
9 notice and comment. We have lots of opportunity to react if
10 we get comments back that suggest this is a problem. And I
11 think the answer is that we won't.

12 CHAIR BATTLE: Okay. Anything else in the section
13 on compensation?

14 MR. McCALPIN: I would like to make a comment on
15 page 5 on the comment on compensation. At the bottom of the
16 second full paragraph, the last sentence, it seems to me,
17 needs to be reworked. "Recipients would need to consult
18 their applicable law to determine the status of the law in
19 their state." I think we can simply say, "Recipients need to
20 consult the status of the law in their state."

21 CHAIR BATTLE: Okay.

22 MS. PERLE: On the top of page 5 -- I caught this

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1 as I was looking at it actually this morning -- there's a
2 reference in the second line. The sentence says, "The LSC
3 Act provision on outside practice, Section 1006(b)(3),
4 prohibits" -- that reference is wrong. It should be Section
5 1007(a)(4).

6 1006(b)(3) is the provision that says that the
7 Corporation can't abrogate the authority of states with
8 respect to application of the rules of professional
9 responsibility, so that --

10 MR. McCALPIN: This is on the third line of page
11 5 --

12 MS. PERLE: On page 5, the third line.

13 MR. McCALPIN: And it should be what?

14 MS. PERLE: 1007(a)(4).

15 CHAIR BATTLE: The line just above that, instead of
16 "the LSC Act," are we going to just use "the Act"?

17 MS. PERLE: For the purposes of commentary, is it
18 necessary that we be so purist? I don't think so. And I
19 think --

20 CHAIR BATTLE: We're real pure on the rules, so
21 it's up to --

22 MS. GLASOW: On the bolded language in that very

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1 same paragraph that starts with the word "similarly,"
2 actually, we would like to make a separate paragraph that is
3 a separate thought. We'll probably get rid of the word
4 "similarly," and we need an introduction sentence there that
5 says what we're talking about and then --

6 CHAIR BATTLE: Okay. Those are some other editing
7 changes that we need to do to further --

8 MS. PERLE: There are a number of editing changes
9 that we have gone over and we can share with you, if you
10 would like. If not, we'll just make them and then --

11 CHAIR BATTLE: As you make the editing changes,
12 you'll bold them, as well, so when we look back at it, we'll
13 see what you've done?

14 MS. GLASOW: Yes.

15 CHAIR BATTLE: Now, that's the section on
16 compensation. Is there anything else about compensation on 5
17 or on 9 that we need to address?

18 (No response.)

19 CHAIR BATTLE: If not, let's move on to use of
20 recipient resources, Section 1604.6.

21 MR. McCALPIN: I would point out that there is a
22 miscitation in the second line on page 5. If you'll look at

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1 the first line of this on page 9, it's 1604.4(c), not (b).

2 MS. GLASOW: Thank you.

3 CHAIR BATTLE: I didn't catch that, Bill. Where
4 are you referencing? On page --

5 MR. McCALPIN: On page 5 in the commentary, the
6 reference to 1604.4 is inaccurate. That should be (c) rather
7 than (b).

8 CHAIR BATTLE: Yes, you're right, under "use of
9 recipient resources," we're referring to (c).

10 MR. McCALPIN: Then, I wondered, do we as a matter
11 of policy want to permit the use of recipient resources in
12 4(c)(i), which is winding up the prior private practice?

13 MS. PERLE: I think that the notion was that that
14 should be defined by the recipient's policies. But there is
15 a realization that if you get a phone call from the court on
16 a case that you're winding up, that you don't have to take
17 five minutes of leave to respond to that phone call or to
18 receive a fax or to send a fax but that clearly, if there's a
19 substantial amount of work that you're doing, that should be
20 done on your own time.

21 And I think that that's noted in 1604.4(c)(i),
22 where it says, "The attorney is newly employed" --

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1 MR. McCALPIN: Where are you?

2 MS. PERLE: On page 8. "The attorney" --

3 MR. McCALPIN: 8?

4 MS. PERLE: 8 at the bottom, (c)(i), "The attorney
5 is newly employed and has a professional responsibility to
6 close cases from a previous law firm and does so on the
7 attorney's own time as expeditiously as possible."

8 But I think that there's just some recognition that
9 there may be things that you simply have to do from your desk
10 -- you know, someone calls you -- that you cannot tell an
11 attorney that they absolutely can't take a phone call. They
12 might say if it's going to be a call that's more than of
13 short duration, "Please, I have to call you back at another
14 time." It's sort of a question of what is practical to
15 expect an attorney to do.

16 CHAIR BATTLE: De?

17 MR. MILLER: In our region, this question came up,
18 and a distinction was drawn precisely along the lines that
19 Mr. McCalpin just made because the outside practice is
20 compensated of closing out the cases, that it really stood in
21 a different place.

22 And while it was true as a practical matter that

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1 you need to be able to take phone calls from the court, the
2 drafting of this really needs to be broken out without
3 getting to language, so that the (c)(1) situation is not
4 under the sort of more liberalized limited test. The rest
5 are. And yet there's some room to take a phone call, if you
6 have to do that.

7 MR. McCALPIN: Do you want to permit the use of the
8 copying machine and what that requires or some secretarial
9 service or, as this says, a brief court appearance? Do you
10 want to permit all that under (b)(1)?

11 MS. PERLE: As you recall, the original proposal
12 talked about diminimous use of resources. And I think that
13 at one point, there was a distinction between the (c)(i)
14 cases and the other cases where there was a discussion of
15 making a distinction.

16 And so perhaps the way to deal with this is to go
17 back to the diminimous standard, with respect to (c)(1)
18 cases, and use the limited standard with respect to all the
19 other cases. And then, if somebody asks for a definition of
20 "diminimous," we're in trouble.

21 CHAIR BATTLE: I can envision a situation where --
22 when I closed my practice in Montgomery and started

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1 practicing in Birmingham, there were cases that a year and
2 two later resulted in a fee that I received that I ended up
3 having to do some appellate work on those cases. And the fee
4 was substantial.

5 And I split it with my new firm. And this
6 provision when you break out (c)(1) does not envision any
7 kind of split that might come under those circumstances,
8 depending on the nature of your practice.

9 MS. PERLE: I think the way that we deal with it is
10 to go back to the diminimous standard, with respect to
11 resources. It already says that you have to do the work on
12 your own time. And then if you do the work on your own time,
13 any fees that you receive, you should be able to keep.

14 So I think that we can draft, kind of combining
15 part of the old approach and this approach. I mean, we had
16 this same discussion at the regs working group at great
17 length. And I think it's fair to say we didn't reach any
18 total consensus. We sort of went with the majority rule in
19 our proposal.

20 And it's an area where there's a lot of differences
21 of opinion. And I think we'll get a lot of comments from
22 various people. And then, the committee will just have to

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1 weigh when it gets those comments what's the best approach
2 with respect to that. But I do think that we should apply a
3 diminimous test to it.

4 MR. McCALPIN: I think "diminimous" is more aptly
5 applied to Subsection 1 than 2, 3, and 4.

6 MS. PERLE: Exactly. That's exactly what we said.

7 MR. McCALPIN: In the old one, you had "diminimous"
8 under all four.

9 MS. PERLE: Yes. I understand that.

10 MS. MERCADO: So now we're bifurcating it, right?

11 MR. McCALPIN: Yes.

12 MS. MERCADO: Okay.

13 CHAIR BATTLE: Anything else on compensation, use
14 of recipient resources?

15 (No response.)

16 CHAIR BATTLE: Now, we're on to court appointments
17 and mandatory pro bono.

18 MR. McCALPIN: I think use of the word "mandatory"
19 is inappropriate.

20 MS. PERLE: As you recall, the last version did not
21 have any reference to mandatory pro bono. It only applied to
22 court appointments. And what the committee said was that,

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1 "What about the situation where there's mandatory pro bono,
2 and the attorney really must do this? Shouldn't we treat
3 that the same as court appointments?" So that's why this
4 language is in there. Certainly, we can leave it out.

5 MR. MCCALPIN: If you take out the word
6 "mandatory," I don't have any objection. But I don't think
7 there is any such thing as mandatory pro bono.

8 MS. PERLE: I understand that. The question is, if
9 you take out "mandatory pro bono" in both the title and in
10 (d), then what you are saying is, "Forget what we said with
11 respect to the rest of this rule about identifying your pro
12 bono work with the recipient, and forget what we said about
13 using program resources. You can use as much program
14 resources to do pro bono as you want, and you can identify
15 the recipient with your pro bono work, if you just say 'pro
16 bono.'"

17 So I think the way to deal with it is either to
18 remove it entirely -- remove (d) entirely and remove it from
19 the title and then deal with mandatory pro bono if it becomes
20 a reality at some future time.

21 MS. MERCADO: I guess part of the discussion that
22 we had -- because I was present for that discussion that we

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1 had on the mandatory pro bono versus the other pro bono -- is
2 that there was a feeling that at least in some of the states,
3 they are moving toward mandatory pro bono.

4 You know, there is a great outcry against
5 attorneys. And I believe that part of the quietening of the
6 masses by a lot of the state Bars is to require mandatory pro
7 bono, whether it's to say, "You're going to do one case or
8 five cases." I mean, we don't know what that means.
9 However, there's a move toward that.

10 And we wanted to differentiate between just saying
11 "pro bono" -- because theoretically, you could have an
12 attorney doing solely pro bono work on anything that came up
13 and not doing the recipient's work or the priorities of the
14 Legal Services community in the community that they're in,
15 serving the clients that have priority under the Legal
16 Services Act, because they're doing pro bono work for a
17 variety of other issues, so that if it's mandatory, then it
18 is at the same class as a court appointment, which you have
19 no options.

20 It is your state Bar that is saying, "Part of your
21 having a license in this state is to do mandatory pro bono."
22 Granted, while right now there may not be there, I don't

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1 doubt that in five years, there will probably be some, maybe
2 even earlier than that, that they'll have mandatory pro bono.

3 And so we were dealing with it sort of in a
4 prospective, because so many states are already at the
5 halfway point where they strongly urge that you do 100 hours
6 of pro bono work a year.

7 CHAIR BATTLE: May I make a suggestion? It seems
8 to me since we broadened "court appointment" to include
9 administrative agency, that if the Bar association develops a
10 mandatory pro bono, that it's an agency making an appointment
11 that fits within that court appointment definition and that
12 we can interpret it that way and deal with it on a
13 prospective basis until we can really revise the rule, given
14 some real instances where there is mandatory pro bono.

15 MR. MILLER: I actually would agree with Maria
16 Luisa totally, with her observations, and suggest that you
17 leave it as is. And the reason is that you're talking and
18 thinking statewide.

19 And it's true that there's nothing -- an additional
20 reason to the prospectivity of it is that you're talking
21 statewide, but there are counties and courts that are
22 substate in the country where there is a mandatory program in

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1 place. And it's called "pro bono." It's not called a "court
2 appointment system," no matter -- even though there is a
3 heavy court coercion element.

4 And it's not quite reached, I think -- or it's a
5 real stretch to reach it through the administrative agency,
6 you know, kind of lens. So I would suggest you leave it in
7 place as it is, because you have to be aware of these
8 substate situations that do exist now.

9 MR. BROOKS: I think we recognize the state of the
10 law by saying, "If this should come to pass."

11 MS. PERLE: And it does say that. The first word
12 is "if."

13 MR. BROOKS: That's right.

14 CHAIR BATTLE: It is.

15 MR. McCALPIN: I happen to disagree, as you
16 understand, with the content that's here. But one thing you
17 should understand is that the model rules of professional
18 responsibility were modified about a year and-a-half or
19 perhaps two years ago to insert some criteria for the
20 rendition of pro bono service in terms of hours per year and
21 the nature of the entity to receive it, not mandatory.

22 And I really disagree with -- I was responsible for

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1 the ABA Center for Pro Bono for three years. That's why I
2 have some background in this and have been in touch with them
3 as recently as within the last week or so. Well, the plain
4 fact of the matter is, if you take (d) now, it would, in my
5 judgement, not authorize any program director to provide
6 anything to any staff attorney, because you cannot come
7 within the phraseology of "mandatory pro bono."

8 There are no court rules that do it. So it says,
9 "If they are mandated, such legal assistance shall be
10 treated" -- but there is no mandate. But if you would phrase
11 this in terms of "if the attorney is subject to rules of
12 professional conduct which call for the provision of
13 mandatory service, then it will be so treated." It's not
14 mandated. It's aspirational. But the aspirational effects
15 of the model rules have been adopted in some of the states.

16 MS. PERLE: I would agree with you that that would
17 be an appropriate approach, if I understand what you're
18 saying. I think -- and maybe we just want to put it out and
19 see what the reaction is -- I think that to the extent that
20 what we're saying is that if the rules are aspirational,
21 aspirational rules say to you, "Legal Services attorney, you
22 should provide 40 hours or 50 hours of pro bono service

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1 outside of what you do. Then, you can use your program
2 resources, and you can identify your program with that
3 representation."

4 And I think that most project directors in the
5 country would object to that, because they would -- first of
6 all, there have been situations where there has been this
7 identification made by others, and it has gotten --

8 MR. McCALPIN: Basically, what we're trying to do
9 is to bring program attorneys up to the same level as the
10 rest of the Bar.

11 MS. PERLE: I agree with you. And in my view, I
12 share your view, and I think that's the appropriate way to
13 go. I will tell you that during the regs working group
14 discussions, this idea was thrashed back and forth ad
15 nauseam. And the majority of program directors came out at a
16 very different place from where you are and where I was. And
17 I think De may have been with those --

18 MS. BERGMARK: The problem with that was that --
19 you know, "We just want to control our secretaries so they
20 can't do except what we tell them to do." It was about,
21 "Well, we go through an elaborate process of setting
22 priorities for how Legal Services' resources are going to be

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1 used."

2 And if what you're going to do is sort of in effect
3 dilute them by having individual people say, "Well, my real
4 hot issue is -- and what I want to do is" --

5 MS. PERLE: Right. "I want to do environmental
6 work."

7 MS. BERGMARK: Yes, or whatever, you know, that
8 that represents a problem from a policy perspective and from
9 focusing very limited resources. So that was the --

10 MS. PERLE: Right. I have no difficulty if the
11 community wishes to adopt Mr. McCalpin's view and put it out
12 for comment. I think you'll get a lot of comments. And
13 then, you'll just have to deal with it.

14 CHAIR BATTLE: Now, let me see if I understand what
15 the real distinction comes down to from what De and Maria are
16 proposing and what Bill is proposing. What Maria and De are
17 proposing is that if you have a mandatory program, in order
18 to maintain your license, you must do this pro bono work,
19 then once it reaches that threshold, then it's to be treated
20 as you would court appointed cases.

21 MS. PERLE: To maintain your license or to maintain
22 your membership in a particular Bar.

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1 CHAIR BATTLE: Or membership in a particular
2 county, local, state, jurisdictional Bar. And Bill is
3 suggesting and what both of you are saying is that we
4 recognize that at this point, there are no states that have
5 yet adopted mandatory pro bono work, so it's a view toward
6 where things may be going in the future.

7 MS. MERCADO: Although there are some substate
8 entities that already require pro bono.

9 CHAIR BATTLE: Yes. Bill is suggesting the
10 aspirational -- we would love for all of the attorneys in the
11 State of Alabama or the State of Missouri to donate 50 hours
12 a year to pro bono work.

13 MR. MCCALPIN: Whatever your professional rules
14 call for.

15 MS. PERLE: But I just want to note that there is
16 nothing in this rule that says an attorney cannot do that on
17 his or her own time. It just says that the only situations
18 where we will permit more than the limited use of resources
19 or the identification of a particular case with the recipient
20 are those situations where it's a court appointment or it's
21 mandatory.

22 CHAIR BATTLE: And Bill is bringing that threshold

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1 down.

2 MS. PERLE: A step further. Right.

3 CHAIR BATTLE: Well, what he's saying is that you
4 ought to be able to use a program's funds and resources when
5 it's aspirational.

6 MS. PERLE: More than a limited amount. I mean,
7 you've already said it's okay to use a limited amount of
8 program resources. But what Bill would be saying was, "You
9 treat that case the same way you treat a program case." And
10 that really does bump directly up against the issues that
11 Martha was talking about, in terms of resources.

12 MR. MILLER: In addition to the policy kind of
13 question that Martha talked about, which is a resource
14 question, there is actually a national stewardship issue
15 here.

16 If you lower the threshold so that within the
17 aspirational framework of XDX hours, any pro bono activity
18 qualifies, then -- and you allow this lower standard for
19 program identification, putting aside the resource question,
20 you have the substantial possibility, I think, in a variety
21 of parts of the country that there's identification of the
22 program with stuff the program can't do or is highly

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1 controversial.

2 So in addition to the resource allocation and what
3 Linda is talking about, which is hearing from project
4 directors at the local level, that frankly, they don't want
5 to be involved, and negotiation is a union issue, with
6 whether or not this is permissible, and those kinds of
7 questions, there's that kind of pressure on them, you do have
8 a national stewardship question, as well, I think.

9 CHAIR BATTLE: Well, to the extent -- I'm sorry,
10 John.

11 MR. BROOKS: Go ahead.

12 CHAIR BATTLE: I was about to say, to the extent
13 that the proposal that De and Maria are suggesting is one
14 that involves the law where it is in some jurisdictions on a
15 local level but certainly not on a state level anywhere at
16 present, I'm just wondering if we need additional study on
17 this issue.

18 The mandatory pro bono section came to us as a
19 result of our discussion the last time. It has not yet gone
20 through the working group, or was it discussed in the working
21 group?

22 MS. PERLE: It was discussed in the working group.

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1 CHAIR BATTLE: It was? Okay.

2 MS. PERLE: And I will tell you that -- well, I
3 think that the consensus of the working group is that there
4 are very few situations where it's really mandated. And, in
5 fact, there's lots of discretion with respect to what the
6 individual decides is part of his or her mandatory
7 responsibility, even though places where it is --

8 CHAIR BATTLE: The concern I've got, is it bumping
9 up against right now a situation where when we start to talk
10 about reauthorization and we have got Congress looking to
11 place greater restrictions -- I think we have to be careful
12 if we allow our attorneys to do anything outside of the
13 framework, based on the way our regulations are written.

14 MS. PERLE: I think that's right. And I think that
15 Mr. McCalpin's suggestion would clearly do that. My view
16 would be that we should leave it the way it is and send it
17 out for comment and see what we get.

18 MS. BERGMARK: And that is a way of settling it.

19 MS. PERLE: That is a way of settling it.
20 Absolutely.

21 MR. McCALPIN: I'll tell you what you're going to
22 get a lot of comment about, because the Bar reacts

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1 instinctively against mandatory pro bono. That has been the
2 history of mandatory pro bono. The Bar instinctively is
3 against it.

4 Let me offer this as a suggestion. If you go to
5 1604.4(c), and you go down to (iv), we have allowed the
6 recipient to have a full-time attorney participate and engage
7 in a specific case "if the attorney is participating in a pro
8 bono or legal referral program affiliated with or sponsored
9 by a Bar association or other legal organization or religious
10 community or charitable group."

11 Suppose we were to say there, "if the attorney is
12 satisfying a professional obligation with respect to pro bono
13 under the applicable rules" or whatever? Then, he couldn't
14 identify it with the -- because (b) doesn't identify the
15 case. And (c) is consistent with the responsibilities. But
16 "if the attorney is satisfying his professional
17 responsibility," which is included in the model rules, then
18 it ought to be permitted under 1604.4(c).

19 MS. PERLE: What about those states that haven't
20 yet adopted 6.1? Does that suggest that people can't do pro
21 bono -- participate in pro bono?

22 MR. McCALPIN: I think 6.1 as originally posited

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1 has substantially been adopted. They may not have adopted
2 the amendment to it, which quantifies the obligation.

3 CHAIR BATTLE: Edna? I think you had your hand up.

4 MS. FAIRBANKS-WILLIAMS: What's bothering me is
5 that you're saying that they can choose their own pro bono or
6 whatever. Now, everybody in my area knows that I hate
7 divorce. If they start using the things that are Legal Aid
8 for Her Story House for a rash of divorces, I'm going to be
9 one unhappy camper.

10 MR. McCALPIN: The director is the one who controls
11 it.

12 CHAIR BATTLE: Well, let me see if I can give some
13 shape to the argument where we are. If I understand what
14 you're suggesting, Bill, that is that 1604.4(c)(iv) now
15 covers pro bono work.

16 MR. McCALPIN: No.

17 CHAIR BATTLE: It covers pro bono or a legal
18 referral program affiliated with or sponsored by a Bar
19 association. Yes, it does. "Other legal organization or
20 religious, community, or a charitable group."

21 MR. McCALPIN: Yes, but it's the program that's the
22 restrictive factor. In other words, if there is no program,

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1 pro bono program in the particular area, then (iv) doesn't
2 apply.

3 CHAIR BATTLE: Right. And it seems to me mandatory
4 pro bono is going to be covered by a program. In other
5 words, either you're going to have a statute of something
6 that's going to guide mandatory, as well --

7 MR. MILLER: That's right. I think all Bill was
8 suggesting is, add a sentence to that section which specially
9 covers the "mandatory situation," but do so by using the
10 words "fulfilling a professional responsibility." And then,
11 if for that sentence, it kicks you over to the more liberal
12 usage standard that's in the court appointment section, I
13 would be comfortable with that just as stated.

14 Because as long as we use "fulfilling a
15 professional responsibility," that loops and captures the 6.1
16 situation. But it also, I think, would capture any other
17 situation where the person was obligated through the Bar.
18 And you could actually cover that in commentary, through the
19 Bar association membership thing, so that we get to the
20 same --

21 MS. PERLE: I just want to be sure I understand
22 technically what you're suggesting. Are you suggesting

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1 adding a (v), or are you suggesting adding another sentence
2 to (iv)? That's what I'm not sure of.

3 MR. MCCALPIN: I didn't hear you.

4 MS. PERLE: Are you suggesting adding a number (v)
5 -- I'm on page 9 -- adding a section (v), or just adding
6 another sentence?

7 MR. MCCALPIN: I think it could be melded into
8 (iv).

9 MS. PERLE: I think the only thing that bothers me
10 -- because I think the definition of "pro bono" could apply
11 to some of the activity that's in number (iii), not
12 necessarily --

13 CHAIR BATTLE: Why don't we add a (v) and try to
14 take that (v) and spell out the situation that Bill is
15 talking about, the aspirational program, and put provisions
16 in the comments that kind of indicate that that's what we're
17 intending by Subsection (v)?

18 And I think that that accomplishes a couple of
19 things. Number one, since aspirational is where things are
20 generally right now or if there is a Bar program that has
21 mandatory pro bono work, generally, those programs do give
22 you some flexibility.

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1 And the director would have the opportunity to
2 determine whether or not the representation is going to be
3 inconsistent with whatever it is that is being done by the
4 program generally for its clients. And it gives the level of
5 some local control over how that whole thing functions, which
6 is what I think we were looking for. So I think, Bill, that
7 what you've suggested is a good compromise position for now.

8 MR. MCCALPIN: Basically, what we're talking about
9 doing is writing the philosophy, the principle of 6.1 in
10 here, model rule 6.1.

11 MS. PERLE: If you have some suggested language,
12 maybe we can talk about it afterwards. I think that's fine.
13 I would prefer to be adding a (v), which would sort of make
14 it a catch-all, to say, "other representation that the
15 attorney is undertaking to meet a pro bono obligation," or
16 something like that.

17 CHAIR BATTLE: And also, if we're doing that, then
18 we're talking about striking the mandatory pro bono provision
19 in 1604.7.

20 MS. PERLE: Are we? I don't think so. I think
21 that we're still suggesting that there may be a difference
22 between pro bono that somebody undertakes to meet sort of a

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1 general aspirational pro bono obligation and 50 hours
2 mandatory pro bono. That may be down the road five or six
3 years down the road in many states and may be a fact now in
4 certain jurisdictions.

5 CHAIR BATTLE: John?

6 MR. BROOKS: Well, I think we have to be very
7 careful about the aspirational phase of this, because the
8 thrust of the Bar association rules, the ABA rules and so on,
9 is to get the ordinary practitioner into the pro bono field,
10 not to apply the rules to Legal Services' lawyers who are
11 already in the field doing what the Bar is clamoring for the
12 private lawyers to do to help the program lawyers.

13 MS. PERLE: And I think you'll get that reaction
14 from a number of people. And you'll just have to weigh --

15 MR. BROOKS: Yes. I think LaVeeda alluded to that
16 in relation to the Congress and I think in relation to the
17 Bar, as well. It somehow conflicts in my mind between the
18 support of Legal Services' programs to do the jobs that
19 they're hired to do and have the private Bar supplement that.

20 MS. PERLE: What about the situation -- I mean, in
21 D.C., we have many thousands of government attorneys. And
22 the D.C. Bar has made over the last several years a very

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1 large effort to get those government attorneys to participate
2 in a whole variety of pro bono activities outside of their
3 government work.

4 And the response has been -- from the federal
5 government for many years, although that has changed, and
6 from elsewhere -- "Our attorneys do public service. That's
7 what they do." I'm not sure that I see that in a very
8 different way from the argument about --

9 MR. BROOKS: That's a different kind of public
10 service, though. I think Legal Services' lawyers are doing
11 essentially pro bono work to start with, almost by
12 hypothesis. And to ask -- to give them too much --

13 MS. PERLE: And, in fact, some jurisdictions, I
14 think, specifically note in their commentaries to rules that
15 Legal Services' attorneys do do that work. But others do not
16 treat Legal Services' attorneys any different from private
17 attorneys. And I think we should wait and see what comments
18 we get.

19 MR. BROOKS: I'm just saying, I think we should go
20 very slow in going beyond the mandatory into the
21 aspirational.

22 CHAIR BATTLE: Why don't we as a compromise put

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1 both out for comment and receive the comments on it and then
2 take a look at it? That way, we'll have a good feel for
3 where constituents are on both issues. That's my suggestion.

4 MS. BERGMARK: Just one clarifying thing on (d),
5 the very last thing.

6 MS. PERLE: What page, Martha?

7 MS. BERGMARK: On page 10 at the bottom. One of
8 the applicable rules of professional responsibility -- what
9 it sounds to me like we're trying to address already is in
10 existence is some local rules and practices that when you use
11 the term "rules of professional responsibility" is, to some
12 degree, a term of art.

13 So if that needs to be -- I wouldn't want to see
14 that expanded too much to be whatever anybody wants to deem
15 mandatory because Judge So-and-So is going to hate us if we
16 don't -- you know, there's a limit here. But there might be
17 some language that could be put in so that it's not really
18 prospective.

19 I think Bill is right, that state rules with regard
20 to rules of professional responsibility don't yet require it,
21 but that De's and Maria Luisa's point is well taken.

22 MS. MERCADO: Just a grammatical correction in the

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1 whole Section 1604.7. It's entitled "court appointments and
2 mandatory pro bono." There is a couple of places where we
3 would need to add mandatory pro bono, I would think, where
4 you've got -- or I guess you're assuming like on (a)(i), in
5 such an appointment or case, you're assuming it's the
6 mandatory case?

7 MS. BERGMARK: Well, I would actually argue for
8 taking it out of the title. I would still call it "court
9 appointments" and avoid the use of the term "mandatory pro
10 bono." And we use the word "mandated" in (d). But that's
11 okay. That's not -- "mandatory pro bono" is becoming a term
12 of art in its own right, which we may want to not give
13 particular credence to here in our title.

14 MS. FAIRBANKS-WILLIAMS: And one thing we do, too,
15 in Vermont, they buy their way out if they don't want to do
16 pro bono for a strong arm, you know, they give us so much
17 money so as to hire some other young lawyer.

18 MS. PERLE: Force Legal Services' attorneys to give
19 back their salaries.

20 (Laughter.)

21 CHAIR BATTLE: I think, Martha, that point is well
22 taken, if we take it out of the title. But I had suggested

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1 using "court appointed" and taking "mandatory pro bono" out.

2 MS. PERLE: I think that's fine. I'm not sure that
3 I fully understand what Martha's suggestion is under (d).

4 MS. BERGMARK: I'm saying that if under the
5 applicable rules of professional responsibility, Legal
6 Services' attorneys are mandated -- I'm hearing Maria Luisa
7 and De say that it's not that the state rules of professional
8 responsibility require it, it's that there are these little
9 local provisions. So you may need some more --

10 MS. PERLE: How about if we say "the applicable
11 state or local rules"?

12 MS. BERGMARK: They're not really rules.

13 MS. PERLE: They're not really rules?

14 MR. MILLER: Without pinning it to specific
15 language, it could be "applicable state or local rules or
16 practices" or something.

17 MS. PERLE: "State or local rules."

18 MR. MILLER: And then we could just sort of try to
19 get our minds around practices a little bit.

20 MS. PERLE: Okay.

21 CHAIR BATTLE: Anything else?

22 (No response.)

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1 CHAIR BATTLE: We are on page 10, the last page of
2 1604, which is all that we thought we would be able to do
3 today, anyway. It is now 4:58. And I had projected at the
4 beginning of this day that our closing down time would be 5
5 o'clock. We are very close to on time.

6 What I'm hoping we can do tomorrow is pick up and
7 consider in tandem 1609 and 1610 in the morning and then move
8 quickly on to 1611. Bill has indicated to me that he has got
9 a 5 o'clock flight out. And what I would like to do is as
10 close to 3:00 or 3:30, close down to give him time to make it
11 to the airport to make that flight.

12 So if we can come back fresh and revived tomorrow
13 morning and well-rested, I hope that we'll be able to
14 complete our plate tomorrow.

15 MS. PERLE: Are we starting at 9:00 tomorrow?

16 CHAIR BATTLE: We're starting at 9:00. 9 o'clock.
17 I will now entertain a motion to adjourn or recess for today,
18 with the continuation of this meeting tomorrow.

19 M O T I O N

20 MR. BROOKS: So moved.

21 MR. McCALPIN: Second.

22 CHAIR BATTLE: It has been properly moved and

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