

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

MEETING OF THE  
OPERATIONS AND REGULATIONS COMMITTEE  
OPEN SESSION

Sunday, October 5, 2014

3:30 p.m.

Hilton Albany  
40 Lodge Street  
Albany, New York 12207

COMMITTEE MEMBERS PRESENT:

Charles N.W. Keckler, Chairperson  
Robert J. Grey Jr.  
Harry J.F. Korrell, III  
Laurie I. Mikva

OTHER BOARD MEMBERS PRESENT:

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

## STAFF AND PUBLIC PRESENT:

James. J. Sandman, President

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

Mark Freedman, Senior Assistant General Counsel,  
Office of Legal Affairs (by telephone)

Stefanie Davis, Assistant General Counsel, Office  
of Legal Affairs

Lynn Jennings, Vice President for Grants Management

Julie Kramer, Program Counsel, Office of Compliance and  
Enforcement

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

Janet LaBella, Director, Office of Program Performance

Lora Rath, Director, Office of Compliance and  
Enforcement

Carl Rauscher, Office of Government Relations and  
Public Affairs

Wendy Rhein, Chief Development Officer

David Richardson, Treasurer and Comptroller

Jeff Schanz, Inspector General

John Seeba, Assistant Inspector General for Audit,  
Office of the Inspector General

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

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

Marcos Navarro, Office of Government Relations and  
Public Affairs

Bernie Brady, LSC Travel Coordinator

Wendy Long, Executive Assistant, Office of Government  
Relations and Public Affairs

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

William J. Hawkes, Executive Director, Neighborhood  
Legal Services

C. Kenneth Perri, Executive Director, Legal  
Assistance of Western New York

Paul J. Lupia, Executive Director, Legal Aid Society  
of Mid-New York

## STAFF AND PUBLIC PRESENT (Cont'd):

Barbara Finkelstein, Executive Director, Legal  
Services of the Hudson Valley

Jeff Seigel, Nassau/Suffolk Law Services

Lillian M. Moy, Executive Director, Legal Aid Society  
of Northeastern New York

Michele Sleight, Legal Aid Society of Northeastern  
New York

Wendy Wahlberg, Legal Aid Society of Northeastern  
New York

Deb Collura, Legal Aid Society of Northeastern  
New York

Anne Malak, Legal Aid Society of Northeastern  
New York

Deanne Grimaldi, Legal Aid Society of Northeastern  
New York

Robert Romaker, Legal Aid Society of Northeastern  
New York

Robert Magee, Legal Aid Society of Northeastern  
New York

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

Robin C. Murphy, NLADA

Lisa Wood, American Bar Association Standing  
Committee on Legal Aid and Indigent Defendants  
(SCLAID)

## C O N T E N T S

OPEN SESSION	PAGE
1. Approval of agenda	5
2. Approval of minutes of the Committee's Open Session meeting on July 20, 2014	5
3. Report on updating population data for grants to serve migratory and other agricultural workers	6
Ron Flagg, General Counsel	
4. Report on Rulemaking Agenda	16
Ron Flagg, General Counsel Stefanie Davis, Assistant General Counsel Mark Freedman, Senior Assistant General Counsel	
5. Consider and act on 45 CFR Part 1614 -- Private Attorney Involvement	33
Ron Flagg, General Counsel Stefanie Davis, Assistant General Counsel Mark Freedman, Senior Assistant General Counsel	
6. Other public comment	95
7. Consider and act on other business	95
8. Consider and act on adjournment of meeting	96

Motions: 5, 6, 94, 96

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

2 (3:30 p.m.)

3 CHAIRMAN KECKLER: Noting the presence of a  
4 quorum, I'd like to call to order the duly noticed  
5 meeting of the Operations and Regulations Committee.  
6 As this is the first meeting of our quarterly meeting  
7 of LSC, I want to greet and welcome our visitors to our  
8 meetings. Thank you for coming.

9 Our first item of business is for me to seek  
10 an approval of the agenda. Do I have a motion for such  
11 a purpose?

12 M O T I O N

13 MR. GREY: Moved.

14 CHAIRMAN KECKLER: Second?

15 MR. KORRELL: Second.

16 CHAIRMAN KECKLER: All in favor?

17 (A chorus of ayes.)

18 CHAIRMAN KECKLER: The agenda is approved.

19 Our next item of business is the approval of  
20 the minutes of the Committee's previous quarterly  
21 session on July 20th. The minutes are found in your  
22 Board book. Do I have such a motion?

1 M O T I O N

2 MR. GREY: Moved.

3 CHAIRMAN KECKLER: Second?

4 MR. KORRELL: Second.

5 CHAIRMAN KECKLER: All in favor?

6 (A chorus of ayes.)

7 CHAIRMAN KECKLER: Without objection, the  
8 minutes are approved.

9 Our first item of substantive business is a  
10 brief report updating us on a piece of Committee  
11 business which has arisen over the last year, updating  
12 our population data for the grants that serve migratory  
13 and agricultural workers in the interest of realigning  
14 the grant funds with those workers.

15 And I will turn the matter over to our General  
16 Counsel, Mr. Flagg.

17 MR. FLAGG: Thank you, Mr. Chairman.

18 Just to put this in context, LSC in 2014 is  
19 awarding grants of roughly a little bit over \$11  
20 million in this sphere. We have approximately 34  
21 grantees, some serving single-state service areas,  
22 other serving multiple-state service areas. And the

1 size of the grants again today range from, at the high  
2 end, about \$2.4 million to below \$100,000 in some  
3 instances.

4 Management expects to present the Committee  
5 with a report at the January meeting proposing an  
6 update to the data to be used in determining both how  
7 big the total migratory and agricultural worker pie  
8 ought to be, and ultimately will also determine the  
9 allocation of the funding across the various service  
10 areas.

11 As we reported previously, the reason for this  
12 undertaking is that currently these grants are being  
13 awarded based on data that go back to about 1990, so  
14 they're almost 25 years old.

15 And second, those data were built on the  
16 then-existing population of migratory workers even  
17 though, going back even before those data, these grants  
18 have always been used to serve not just migratory  
19 workers but other agricultural workers who share the  
20 same specialized service needs and the same remoteness  
21 and isolation in terms of location and cultural and  
22 language characteristics.



1           So for those two reasons, Management believes  
2   that this is a good time to update these data and to  
3   allocate the grants based on the actual populations  
4   being served and not just migratory workers. So we  
5   plan to present the Board a report in January, and we  
6   will propose that the Board solicit public comment on  
7   what we're proposing, assuming that this Committee and  
8   the Board are agreeable with it.

9           Just to give you some brief additional  
10   information lest you think we have not been doing  
11   anything in the last year, we have over the course of  
12   the last year done intensive internal document review  
13   regarding these grants and their operations and  
14   services.

15           We have prepared a survey and circulated  
16   actually two surveys, one to the migrant and  
17   agricultural programs themselves and a second similar  
18   but slightly shorter version of that survey that was  
19   sent to all of our grantees, including the general  
20   field grantees. And we've gotten those surveys back  
21   and reviewed and analyzed them.

22           We've conducted discussions with several

1 federal agencies that administer programs targeted to  
2 migratory or agricultural workers. We've consulted  
3 with other parties that we consider to have useful  
4 information, including the ABA, academics, others with  
5 expertise.

6 We particularly consulted with the Department  
7 of Labor, who is going to be our source for the actual  
8 data that would be used, and we have a contract with  
9 the Department of Labor to get those data.

10 They have promised to provide the data we need  
11 to complete our report by November. We've already  
12 begun drafting the report, and after we receive those  
13 data, we'll be in a position to finish it in time for  
14 the January meeting.

15 CHAIRMAN KECKLER: Thank you, Ron.

16 Are there questions? Julie?

17 MS. REISKIN: Last time we were doing  
18 something with data, the field had concerns about not  
19 that it was going to change but the timing. I can't  
20 remember the details, but they wanted it over a certain  
21 number of years because some get more and others get  
22 less.

1           Have you thought about, will this be a big  
2 change, and if so, how would that be addressed?

3           MR. FLAGG: Since we don't have the data yet,  
4 I'm not certain as to exactly how the data are going to  
5 affect programs. And there are really two things,  
6 viewing this from 30,000 feet, that are going to  
7 happen.

8           One, this will have some effect on the amount  
9 going to the migratory and agricultural worker programs  
10 versus all of the other field programs. Without having  
11 seen the data and as a result with lots of caveats, my  
12 expectation is that amount will not change  
13 dramatically.

14           But then second, within this what is today  
15 roughly an \$11 million pie, if you will, there's an  
16 allocation across the country to different programs. I  
17 do expect that will change. And whether we'll want or  
18 need to do that over a couple-year period as we did  
19 with the census grant or not, we'll just have to look  
20 at.

21           CHAIRMAN KECKLER: Gloria?

22           PROFESSOR VALENCIA-WEBER: You mentioned that

1 there will be 2.4 million in grants. Are these grant  
2 applicants going to be primarily our grantees, or will  
3 there be other organizations with expertise in migrant  
4 labor?

5 MR. FLAGG: No. Today, in 2014, we allocate  
6 \$11 million, all of which goes to our grantees. Some  
7 of them in some instances are field grant  
8 grantees -- that is, and I off the top of my head can't  
9 give you an example, but there are grantees that have a  
10 grant for a particular state and they're also the  
11 migratory grantee for that state. There are some  
12 grantees that are solely migratory worker grantees,  
13 such as California Rural Legal Assistance, which is a  
14 notable one.

15 The \$2.4 million number is the largest single  
16 grant that we give today. California Rural Legal  
17 Assistance, just based on the population they serve,  
18 get a roughly \$2.4 million grant. Other  
19 grantees -- and again, I think the number is roughly  
20 34 -- get smaller amounts down to as little as  
21 something under \$100,000.

22 CHAIRMAN KECKLER: Father Pius?

1           FATHER PIUS: This is just a clarification in  
2 my own mind. These grants are administered as the  
3 other field grants are? They're competitive grants,  
4 and the amount of the money tracks the population, and  
5 of course that's why this is an issue --

6           MR. FLAGG: Correct. Correct.

7           FATHER PIUS: -- because we haven't been  
8 essentially tracking the population for some time?

9           MR. FLAGG: We have been using to track the  
10 population, but the data we have --

11          FATHER PIUS: Right, right, right, right. The  
12 data hasn't been tracking the population even if we've  
13 been tracking the data.

14          MR. FLAGG: Correct. Exactly.

15          FATHER PIUS: Thank you.

16          CHAIRMAN KECKLER: Thank you, Father.

17                 One of the things that comes up from your  
18 discussion has to do with the way that we make these  
19 grants, which are a little bit different than field  
20 grants in that they can cross state lines. We have a  
21 number of them.

22                 So one of the things that I've been thinking

1 about with this is as part of this process and part of  
2 the seeking of public input, I'm wondering what  
3 interest people have, and this includes Management, in  
4 using this public input process to solicit some ideas  
5 about how we organize these grants, and whether 34 is  
6 the right number or how we should maybe chunk them or  
7 maybe give an option for people to compete even for  
8 regional, or even if somebody wanted to try to present  
9 a plan for a national grant -- anyway, to think about  
10 that along with the public in a public input process  
11 into how we do our grant-making and thinking about it,  
12 making it conscious and deliberate.

13 MR. FLAGG: I'll just make one observation in  
14 that regard. And again, as the Committee and Board are  
15 aware, I haven't been here for the last 40 years. But  
16 what I've learned is that the configuration of the  
17 migratory grants has not been dictated by Management in  
18 the sense Jim Sandman didn't look at a map of the  
19 United States and say, hmm. I think it would make  
20 sense to divide, for the purposes of these grants, the  
21 country into 34 service areas.

22 This has been an iterative process over time

1 where in some sense the market has spoken in that  
2 grantees have stepped forward to compete for these  
3 grants. And in some areas, the population -- in some  
4 states, I should say, the population of migratory and  
5 agricultural workers was too scarce or dispersed to  
6 make it attractive to a grantee in that state.

7           And over time, what has evolved is what we  
8 have today as a result of, again in some sense, the  
9 marketplace speaking. But certainly I think, as you've  
10 suggested, Charles, this is something we'd want to look  
11 at.

12           And after we have these Department of Labor  
13 data which, as I said, are likely to result in some  
14 reallocation of dollars to different service areas,  
15 that may spark some different levels of interest in  
16 competition.

17           CHAIRMAN KECKLER: Thank you. I realize this  
18 has been a process that -- I think it's worth  
19 considering a couple of points. And part of the reason  
20 I suggested getting some public input is that I'm not  
21 sure exactly what the right grant-making proposal is.  
22 In a sense, the right grant-making proposal as a

1 current position is seem that responds to what's  
2 available and what people are willing to do.

3 But a couple of points. One is some of these  
4 grants are very small and yet there's lots of paperwork  
5 and there's lots of issues. And that doesn't support  
6 too many lawyers, \$100,000. But it still requires our  
7 oversight.

8 So there's a question of, is there a minimum  
9 viable size. And then there's the separate question,  
10 which might depend again on what people are willing to  
11 do and what kind of plans are presented of what the  
12 right size is. Is it regional? Is it national? What  
13 have you.

14 But anyway, I appreciate being open to  
15 thinking about that and as we use this as an  
16 opportunity to get some input from the public and from  
17 our grantees on what they're interested in and what  
18 they think.

19 Okay. The next item on our agenda is a report  
20 on our rulemaking agenda. And we have the current copy  
21 of the rulemaking agenda in here on page 16 of your  
22 Board book. And I will turn it back over to Mr. Flagg.



1           MR. FLAGG: Thank you. This is obviously a  
2 relatively brief memo, and this follows on a much  
3 longer memo that was presented to the Committee, I  
4 believe, at our last meeting.

5           The two primary draft persons were Stefanie  
6 Davis, who is here, and Mark Freedman, who I believe  
7 may be on the phone. And I will turn over the  
8 discussion of this document to Stefanie.

9           MS. DAVIS: Great. Thank you, Ron.

10           As you'll see in the two-page memo that starts  
11 on page 16, we have set a general proposed timeline for  
12 the three items that were identified by both Management  
13 and the Office of the Inspector General as being the  
14 highest priority items on the rulemaking agenda.

15           Based on the interest of having clear rules on  
16 1610 and 1627 regarding transfers and subgrants for the  
17 next possible grant year, which would be 2016. We've  
18 prioritized that one up front.

19           That is one that is currently in  
20 process -- and I realize I'm out of order -- but we  
21 have started working with the Office of Program  
22 Performance and the Office of Compliance and

1 Enforcement to start detailing proposals for, or at  
2 least start fleshing out the issues that we think need  
3 to be addressed, through this rulemaking.

4           One of them is already on the table from 2012,  
5 which was to clarify when the transfer and subgrant  
6 rules apply to third party transactions since there had  
7 been some concern or ambiguity regarding the rule as  
8 it's currently written.

9           We are also going to be focusing on whether  
10 in-kind support should be treated as a subgrant or  
11 transfer within the meaning of Section 1610 and 1627.  
12 So this would govern whether recipients are donating  
13 space to another entity, how we think that should be  
14 covered, whether that should be considered the same as  
15 a cash transaction or whether that needs to fall under  
16 some other sort of oversight.

17           Another issue was raised during the Part 1614  
18 rulemaking. That was a recommendation that we increase  
19 the subgrant limit above \$25,000. Currently recipients  
20 have to receive prior approval from LSC if they want to  
21 give a PAI subgrant that exceeds \$25,000.

22           One commenter suggested that we increase that

1 limit. We felt like that was outside the scope of the  
2 1614 rulemaking and more appropriately dealt with here  
3 in 1610 and 1627. So we anticipate considering that  
4 proposal in that rulemaking.

5 CHAIRMAN KECKLER: Stefanie, let me pause you  
6 right there.

7 MS. DAVIS: Yes?

8 CHAIRMAN KECKLER: This is part B on the memo?

9 MS. DAVIS: That's correct.

10 CHAIRMAN KECKLER: The subgrant rule. And we  
11 have a final rule scheduled for this time next year.  
12 And when would it need to be in place for the grant  
13 cycle?

14 MS. DAVIS: My understanding, from talking to  
15 OPP and OCE, is that if we were to publish this and  
16 have it in place by next November, that that would be  
17 adequate. That would give enough time for everyone to  
18 know what they need to know.

19 CHAIRMAN KECKLER: Okay. Thanks. Please go  
20 ahead.

21 MS. DAVIS: Sure. I skipped over one thing,  
22 the very first item, because it seems like a more

1 ministerial kind of task, and that is the proposal to  
2 revise Section 1640.2, which provides the list of  
3 federal laws relating to the proper use of federal  
4 funds for which LSC can summarily terminate a grant if  
5 a recipient is found to have violated one of these  
6 statutes.

7           Earlier, through conversations with the IG  
8 during the grant assurances process, we discovered that  
9 there are some statutes that had been left out of Part  
10 1640. We did some additional research and determined  
11 that there are other rules governing fraud, waste, and  
12 abuse that have been passed by Congress since Part 1640  
13 was originally promulgated that we think should fit  
14 within its scope. And so we propose to amend Part 1640  
15 by redrafting it in a way that will capture all of the  
16 relevant statutes.

17           CHAIRMAN KECKLER: Stefanie, this applies to  
18 that rule, but also to some extent, I suppose, to the  
19 subgrant rule. It seems to me these are common, as we  
20 know, grantmaking issues, common across different  
21 entities and agencies.

22           I'm wondering if there's been an inquiry or a

1 scoping on other regulations on these topics because I  
2 feel, especially with the first one, that there ought  
3 to be. I haven't done the research myself so I feel a  
4 little bit awkward in asking about it.

5 But it seems to me that there ought to be  
6 other agencies having regulations that are parallel to  
7 this, and hopefully also have updated in parallel to  
8 certainly the 1640 one and possibly also to the  
9 subgrant issue.

10 MS. DAVIS: That's a really good observation.

11 I would say, with regard to 1640, because we are in  
12 this strange circumstance where we have had Congress  
13 tell us, through our appropriations -- this is in  
14 Section 504(a)(19) of the 1996 appropriations, where  
15 Congress said your funds are federal funds for purposes  
16 of this specific universe of statutes.

17 Federal agencies and federal grant programs  
18 don't list these statutes out because it's understood  
19 that they've covered by them, and everyone knows if you  
20 get federal funds, you are expected to comply with all  
21 of the federal regulations and the federal statutes  
22 that apply to those. So there's not really a need for

1 federal government agencies to list those out.

2           With regard to 1610 and 1627, we have done  
3 some comparisons with the super-circular and with the  
4 general rules that govern, for instance, the Department  
5 of Health and Human Services grant programs because  
6 that's where I came from so those are the ones that are  
7 most familiar to me, and probably also very similar to  
8 the kinds of requirements that we would institute for  
9 our grants because they tend to be discretionary grants  
10 for specific projects.

11           We run things a little bit differently here,  
12 so there isn't an exact fit between those two rules.  
13 But we are looking at them as a way to -- we don't want  
14 to duplicate agencies' rules. We also don't want to  
15 have them be slightly different so that there are  
16 different and confusing rules that govern their various  
17 funding streams.

18           CHAIRMAN KECKLER: That's good to know,  
19 Stefanie. And I think it also -- probably have taken a  
20 look at it, and don't know what the rule is. The DOJ  
21 rules on this issue probably we should also look at,  
22 partly for guidance and partly also because our

1 grantees do get some grants from them and subgrants.  
2 And so for the reasons you've stated, if we can create  
3 some level of harmony for our grantees, that might be  
4 good.

5 MS. DAVIS: Sure. The last issue on the last  
6 major rule that we have on the agenda is amendments to  
7 Part 1630 and the property acquisition and management  
8 manual, both of which have been around for at least 14  
9 years and are in need of some revision.

10 There are some inconsistencies in important  
11 parts of the rules, such as the requirement between  
12 when a grantee needs to seek prior approval for a  
13 purchase and when they don't.

14 Also, neither the PAM nor Part 1630, cover  
15 services contracts, which have become used a lot more  
16 frequently since these rules were promulgated, and  
17 frequently in large dollar amounts. So we feel like we  
18 want to consider whether or not we need to be including  
19 services contracts within the scope of these two rules.

20 We are considering some revisions of the  
21 definition of personal property to determine whether  
22 software licenses and intellectual property need to be

1 captured in there, and if so, how.

2 And we are also looking at Section 1630.7(b),  
3 which establishes the five-year limitation on when LSC  
4 can recover costs from a grantee. Currently, the way  
5 the statute is written, if a recipient incurs a cost in  
6 year one and LSC decides to question it in year seven,  
7 it can't question the costs from years one and two  
8 because those fall outside this five-year window.

9 It's one that bears investigating because it  
10 would possibly improve the Corporation's flexibility to  
11 recover properly questioned costs for a wider time  
12 frame. So we'll be working with the Inspector  
13 General's office on that particular issue as well.

14 CHAIRMAN KECKLER: I think that's really  
15 promising, Stefanie. And also, with regard to that  
16 issue, I think the intellectual property issue is one  
17 that I've thought about on occasion but very regularly  
18 ever since I've gone on the Board.

19 More and more our grantees, in part inspired  
20 by the things that we do, are developing software. And  
21 I think we need to think about how that goes.  
22 Sometimes it's things that we develop. Sometimes it's



1 things they develop on their own.

2           Anyway, we used to say things about  
3 intellectual property and software, that that's the  
4 future. But it's not the future any more. It's  
5 already the present and the past. So that's very good.

6           The one question I had about that rule,  
7 though -- and I'll let the rest of the Committee if  
8 they have questions, too -- is that one is extensive,  
9 the PAM plus the other issues in 1630.

10           There's a wider scope of that, and I think  
11 alone among these three rules, I'd be interested in not  
12 necessarily the full panoply of devices that we did for  
13 PAI, but some level of forward activity to think  
14 through the scope of the rulemaking seems like it might  
15 be appropriate. We have some time lead before we get  
16 to that. But I'm opening up that idea for suggestion.

17           Julie?

18           MS. REISKIN: Along those same lines, I have a  
19 little concern about the first rule and the time frame  
20 because even though it may look administrative, my  
21 observation is that it's not going to be, and that  
22 there may be concern and there may be a need to have

1 more public engagement.

2 I don't know if there was a plan to have some  
3 telephonic meetings. But January's our next meeting,  
4 and I was just concerned that that might not be enough  
5 time. Because a lot of times, again, it might seem  
6 administrative, but there's different interpretations.

7 That's just my --

8 CHAIRMAN KECKLER: Yes. That is an NPRM, so  
9 that we will have a comment period after that, I think.

10 MR. FLAGG: Yes. And also, these dates, these  
11 are what we currently contemplate. And particularly  
12 where we publish something for public comment, one of  
13 two things will happen.

14 Either public comment will cause us to say  
15 we're pretty close to right here, and with a few  
16 changes here and there, we can go to a final rule; or  
17 alternatively, public comment may cause us and the  
18 Committee to conclude, gee, there's some pretty changes  
19 here, so we ought to, if we think those changes and you  
20 think those changes are appropriate, make those changes  
21 and then ask for further public comment.

22 So putting these dates in here are not meant

1 to lock you into a particular schedule. This is how we  
2 would proceed, but without trying to play out every  
3 alternative scenario.

4 MS. REISKIN: It's more about the order.

5 MR. FLAGG: Right. The order across these  
6 three. We're proposing to deal with these three rules  
7 in this order and in this approximate time frame,  
8 recognizing that the specific time frames could vary  
9 depending on people's comments.

10 CHAIRMAN KECKLER: So when I look at  
11 this -- and I don't think I'm quite ready to propose  
12 this formally to the committee, but I think it's  
13 something to think about as you do this -- on C on 1630  
14 in the PAM, when we have a bullet that says summer  
15 2015, preliminary research and internal discussions  
16 with staff, that's obviously fine.

17 But some time around there, perhaps it would  
18 be appropriate to put out an ANPRM and start that  
19 broader discussion so that you're getting information  
20 internally. And, to the extent that we understand a  
21 basic proposal at that time, it might be appropriate to  
22 scope it out and say, this is what we're doing.

1           Simply by having this discussion and having a  
2 rulemaking agenda, of course, we are saying, this is  
3 what we're doing. This is what we're thinking about.  
4 Please start developing your ideas. We're saying that  
5 right now. I'm saying it, and we're saying it in this  
6 Committee.

7           But I think that some time next year it might  
8 be appropriate to crystallize our thoughts about what  
9 we'd like public input on and go ahead and gather  
10 information by that channel.

11           Father Pius?

12           FATHER PIUS: Maybe you addressed this and I  
13 just missed it. But the memo from last time mentioned  
14 two other options, the regulations and 1603 about the  
15 state advisory councils.

16           I assume this just means those aren't on the  
17 initial priority and we'll be dealing with those later;  
18 it's not meant that we're not going to address them at  
19 all, but this is just the things over the next two  
20 years and those will be pushed off until later?

21           MS. DAVIS: I think that's sort of correct.

22           As far as we understand them, they are still on the

1 table to be worked on as time permits. I can tell you  
2 that we have done a significant amount of research into  
3 Section 1603 on the state advisory councils and are  
4 working on a memo.

5 One of our law fellows did, in fact, dig into  
6 the history, the legislative history of the rule and  
7 some of the events following the promulgation of the  
8 rule. So we are working on that. And we intend to  
9 have, or at least we anticipate having, an  
10 informational report to you some time possibly by  
11 January. That's still in the works. So that's up  
12 there.

13 But other things, the other rules, we will  
14 look at as time permits.

15 CHAIRMAN KECKLER: Thank you, Father.

16 Yes. The conclusion of the last Committee was  
17 that those are generally worthy goals. They're not  
18 ruled out. But we're focusing on setting up an agenda  
19 and a work plan so that we get these things done.

20 I think it's great exactly that we followed up  
21 with having somebody come in with a discrete project  
22 like that and move forward. And certainly the idea in

1 my own mind of this Board having the opportunity and  
2 using its experience to revise the rulemaking protocol  
3 at some time and leave that as a legacy for the next  
4 Board is something that -- I think that that's also  
5 there, but it's not particularly scheduled.

6           Okay. If there are no more questions about  
7 the -- oh, I did have one more question about the  
8 rulemaking agenda, a process question, which is -- and  
9 we don't have to answer this immediately, and it's a  
10 Management and Committee issue -- when are we going to  
11 cycle through the approval of the agenda? What Board  
12 meeting will we consider -- we approved it last time.

13           And is that what we think is the time to do  
14 it, is the summer meeting will be the time when we set  
15 the agenda? Or should it be at the annual meeting?  
16 That's somewhat my question.

17           MR. FLAGG: Yes. Part of the timing in this  
18 instance was because we'd had three or four rulemakings  
19 which were completed prior to the last meeting. So it  
20 made sense at that point to say to you and for you to  
21 consider, well, now that we've completed this large  
22 body of work, cutting across three or four different

1 regulations, what do we want to turn to next?

2           So my suggestion would be -- we can think  
3 about doing it annually at the time we've done this.  
4 But I think it ought to be more organic in the sense  
5 that I think if we got through the items that are  
6 listed in this memo in the time frame suggested by this  
7 memo, then it would be timely for next July to come  
8 forward with a new rulemaking agenda if we were, next  
9 year or in another year, in the midst of two or three  
10 large rulemakings where it probably wouldn't make sense  
11 to think about what we want to do next.

12           So I think it's a good idea to annually think  
13 about what should be on the agenda. And so I think as  
14 I'm talking, I'm talking myself into saying, yes, we  
15 should report back next July, with the possibility that  
16 you will conclude -- although on this agenda I'm not  
17 sure that will be the case -- but that you could  
18 conclude, we've got enough on our plate right now.  
19 Let's finish what we have on our plate.

20           But I think, as a general practice, it is a  
21 good idea for the Operations and Regulations Committee  
22 to annually think about what's on the agenda as long as

1 you remain free to say, we've got our hands full now  
2 and let's do a good job of finishing what we're working  
3 on.

4           CHAIRMAN KECKLER: I agree with you, Ron. And  
5 I think we should do it annually. We should try to  
6 make it to check back in in a formal way. We do have a  
7 process whereby this Committee self-reports annually at  
8 the annual meeting in January.

9           But in a sense, besides the fact that it seems  
10 like we just did it, it's not appropriate to do it at  
11 the annual meeting, although it's the beginning of the  
12 year and always seems appropriate, but because I want  
13 to look at the feedback that I receive from the  
14 Committee members about the things that we should do,  
15 and we should talk about that, and that that should  
16 feed into a process.

17           So the earliest that we could do it,  
18 incorporating that feedback from our annual surveys and  
19 our annual meeting, would be the spring meeting. And I  
20 don't think we need to be particularly wedded to that.

21           But I think, given what we have, we should try to do  
22 it annually.



1           I think there's an argument, and I will just  
2   leave it for now, whether it should be at the spring  
3   meeting or the summer meeting. Maybe it should be in  
4   the summer meeting next year just for the organic  
5   reasons you mention, but perhaps in the future move  
6   towards doing it at the spring meeting.

7           Anyway, that's something to think about. But  
8   I think we should do it annually, and probably we will  
9   do it either at the spring or the summer meeting.

10   Okay?

11           With that, let us move to our next item, item  
12   5, our rule, the private attorney involvement rule that  
13   we've been working on and has been mentioned and is in  
14   your Board book.

15           Before turning it back over to Ron and  
16   Stefanie for discussion, I want to go ahead and express  
17   my own thanks to both the staff as well as to everyone  
18   who comments on this rule through this extended  
19   process, and the work of the Pro Bono Task Force and  
20   the work of our grantees in providing many thoughtful  
21   comments, and to others that have provided their  
22   thoughtful comments as well. It's all been helpful and

1 all been part of a good process.

2           So with that, I'll turn it over to Ron and  
3 Stefanie.

4           MR. FLAGG: Thank you, Charles. You actually  
5 read my mind because I wanted to thank everybody you  
6 thanked and add to the top of that list this Committee  
7 and the Board because this has required an enormous  
8 amount of work on this Committee's part, starting with  
9 the planning of the regulation, which took considerable  
10 effort, and then holding at least two very time- and  
11 labor-intensive outreach programs, I think one in  
12 conjunction with one of our Board/ Committee meetings  
13 and one that we held separately in Washington.

14           And I know many of you participated directly  
15 in those. They were very helpful in helping to inform  
16 the process. They took a lot of time. But I believe  
17 that that work has contributed to what Management  
18 believes is a very good step forward in terms of  
19 promoting pro bono work to help close the justice gap.

20           Within LSC, quite a number of people have  
21 worked on this. I won't mention them all by name. But  
22 within our organization, Mark Freedman and Stefanie

1 have taken the lead. And again, I'll turn the  
2 microphone over to Stefanie.

3 MS. DAVIS: Thank you, Ron.

4 So we are here presenting what we hope is the  
5 final rule for Part 1614, private attorney involvement,  
6 which as has already been said is the culmination --  
7 again, we hope -- of a long and thoughtful process that  
8 involved a lot of input from a lot of parties. And I  
9 think that was very helpful in reaching the place that  
10 we did.

11 We did not, I think, accommodate every desire  
12 that was brought to us. But I think we did a good job  
13 of listening and explaining where we differed, why we  
14 differed, and where we could make things happen, we  
15 did.

16 So you would like, I'm sure, a very brief  
17 rundown on the comments that we got. Commenters  
18 generally supported the revisions that expanded the  
19 opportunities to engage not just private attorneys but  
20 also law students, law graduates, and other  
21 professionals in the delivery of legal assistance to  
22 eligible clients and in providing legal information.

1           Commenters also very much appreciated the fact  
2           that we exempted attorneys who had participated in  
3           incubator projects, where they worked with our grantees  
4           to develop some legal skills and then took on PAI cases  
5           after they have left the incubator project. We  
6           exempted them from the two-year blackout period on  
7           being able to receive PAI payments, small referral  
8           fees, and have those fees count toward the PAI  
9           requirement.

10           And probably the most popular change that we  
11           made was in response to a recommendation of the Pro  
12           Bono Task Force, and that was the recommendation that  
13           we reverse the requirement that recipients accept as  
14           their own clients people who were assisted through  
15           clinics or through screening and referral programs.

16           Recipients can now allocate costs for  
17           participating in clinics or in programs that screen and  
18           refer clients to private attorneys to their PAI  
19           requirement, even if they don't accept those  
20           individuals as their own clients. They still may, but  
21           they're not required to.

22           So we did make a few changes in the rule from

1 the text that was proposed in the NPRM. We made some  
2 technical and clarifying changes in response to  
3 discussions that we had internally. I'm not going to  
4 spend a whole lot of time discussing those. They are  
5 discussed in full in the preamble.

6 We received a written comment yesterday on the  
7 draft text of the final rule or on the text of the  
8 final rule that requested some clarification on the  
9 definition of private attorney, just requesting that we  
10 restructure the definition so that it's easier to  
11 understand. It's not a substantive revision. But  
12 we'll take a look at that and determine whether we need  
13 to do anything, whether we're going to accept that  
14 comment.

15 And that is the starting point for our first  
16 change, which is in 1614.3, which is the definitions  
17 section. This is subsection (i), which was formerly  
18 (h), and it's the definition of private attorney.

19 We received a lot of comments on the  
20 definition of private attorney. One of the main  
21 comments that we got was that the definition excluding,  
22 as it did, non-LSC-funded legal services providers who

1 were acting within the scope of the employment, so in  
2 other words representing people that they were  
3 representing through their own employment, would not  
4 count at private attorneys.

5           We narrowed that definition or we narrowed  
6 that exclusion some in response to comments, public  
7 comments that we received, suggesting a somewhat  
8 narrower exclusion, and in response to comments  
9 in-house.

10           So that exclusion now more narrowly excludes  
11 attorneys who are working for non-LSC-funded legal aid  
12 agencies or organizations whose primary purpose is  
13 delivering legal services to the poor. That's what we  
14 were really trying to get at.

15           We weren't trying to exclude people who work  
16 for organizations like AARP's Legal Counsel for the  
17 Elderly, who provide legal assistance to poor people,  
18 but that's not the only population that they focus on.

19           And we did not want to rule those people out from  
20 being private attorneys.

21           We also looked very closely at organizations  
22 that are broader, such as Bread for the City in

1 Washington, D.C., that are overall geared at providing  
2 social services to poor people, and said that the legal  
3 component of Bread would not constitute -- those  
4 attorneys acting within the scope of their employment  
5 would not constitute private attorneys because the  
6 organization focuses on providing free services to low  
7 income people.

8           If a Bread for the City attorney wanted to  
9 volunteer outside of his or her employment at a clinic  
10 that one of our recipients was supporting, that  
11 person's volunteerism would count as private attorney  
12 time.

13           We made one other revision to the language in  
14 the definition of private attorney, and that was to  
15 narrow the definition of legal services provider to  
16 clarify exactly who it was that we were talking about.

17           We received some comments saying the term legal  
18 services provider was ambiguous, and so we clarified  
19 that language.

20           We think all of these changes are consistent  
21 with our focus on engaging attorneys who aren't  
22 normally engaged in the delivery of legal information

1 or legal assistance to eligible clients. And I know  
2 that that was kind of complex, so I'll stop here if  
3 anyone has questions or comments.

4 Yes?

5 FATHER PIUS: I'm sorry. Just to clarify,  
6 you're not saying that you're proposing more changes  
7 other than what we have before us?

8 MS. DAVIS: That's correct.

9 FATHER PIUS: You're just clarifying the  
10 changes that are in the text in front of us?

11 MS. DAVIS: That is correct.

12 FATHER PIUS: Good. Because if you do have  
13 more changes, I need to see them written.

14 MS. DAVIS: Of course. I understand.

15 Yes, Julie?

16 MS. REISKIN: Just going back on -- I'm on  
17 page 24, when you're in the preamble, talking about  
18 your process -- you say, "LSC is not making significant  
19 revisions to the proposed rule." But then you go  
20 on -- there's a lot of things that did get changed  
21 based on comments.

22 So do you mean you're not making significant



1 changes to this, or you're not changing it at all?

2 Because the whole Task Force wanted changes in the PAI.

3 MS. DAVIS: Right. What I meant was we're not  
4 making significant changes within the final rule. All  
5 of the changes that we propose to make in the final  
6 rule we think were related to things that we sought  
7 input on, already in the rule. So it's more  
8 fine-tuning and explaining what it is that we actually  
9 meant.

10 So in the definition of private attorney, some  
11 of the comments we got pointed out that the language  
12 was broader than we had intended it to be. So we're  
13 not making, I think, significant changes. We are more  
14 closely explaining what we intended.

15 MR. FLAGG: The benchmark that's referenced  
16 there is the rule that was proposed in the notice of  
17 proposed rulemaking. That rule totally rewrites the  
18 PAI regulation, what was proposed in the NPRM. Between  
19 the NPRM and this proposed final rule, the changes are  
20 more modest. And that's what's being described as  
21 modest changes. Everything that Management proposes is  
22 before you today.

1 MS. REISKIN: Thank you.

2 CHAIRMAN KECKLER: Are there other questions?  
3 Father?

4 FATHER PIUS: Are you done with your  
5 presentation?

6 MS. DAVIS: Oh, no.

7 CHAIRMAN KECKLER: Go ahead, then.

8 MS. DAVIS: Sure. So the next change is also  
9 in the definitions section. This is Section 1614.3(k).  
10 We introduced a definition of the term sub-recipient  
11 because as we were discussing this internally, we  
12 realized that because we were including sub-recipients  
13 in some of this language in the rule, that because  
14 there is a category of sub-recipients who are getting  
15 subgrants of more than \$25,000 specifically in order to  
16 do PAI, that the rule could be seen as excluding those  
17 individuals, individuals employed by those providers,  
18 as private attorneys. And that seemed to us like it  
19 didn't make any sense because the entire reason they  
20 were getting the subgrant, was to do PAI work.

21 So we just proposed a definition of the term  
22 sub-recipient that incorporates the definition of

1 sub-recipient that is stated in Section 1627, or in  
2 Part 1627, but excludes organizations that are  
3 getting \$25,000 or more to do PAI work.

4 The next change is -- yes?

5 MS. REISKIN: On law graduate -- that's  
6 3(c) -- does it matter when they graduated? It says  
7 basically they have the training, but they haven't  
8 taken the bar. Right?

9 MS. DAVIS: It says an individual who within  
10 the last two years has completed the education and  
11 training requirements but hasn't taken the bar. That's  
12 in the rule text on page 61.

13 MS. REISKIN: Oh, okay. I was just looking at  
14 the wrong place, I guess. I didn't see the two-year  
15 piece.

16 CHAIRMAN KECKLER: Does it say that they can't  
17 have taken the bar? It says they've done what they  
18 needed to do to take the bar. But does it exclude them  
19 from having taken the bar or having passed it?

20 MS. DAVIS: When we drafted the rule  
21 previously -- I think it was earlier this  
22 spring -- that was a question about whether the term

1 law graduate specifically included people who had  
2 failed the bar.

3 And so we drafted the requirement or the  
4 language to simply say that it was someone who had,  
5 within the last two years, completed whatever they  
6 needed to do to become admitted to the bar, and we  
7 didn't take a position on whether they had taken it or  
8 had taken it and failed. We specifically left that  
9 open because --

10 FATHER PIUS: What we should take a position  
11 on is that they are not in fact an attorney.

12 MS. DAVIS: That's correct.

13 FATHER PIUS: So that should be part of the  
14 definition, is that the person is not an attorney in  
15 the given jurisdiction but has done everything else.  
16 Right?

17 MR. FLAGG: That's been done. There's a  
18 definition of attorneys --

19 FATHER PIUS: Oh, that's right. That's right.

20 MR. FLAGG: -- and so it by definition  
21 excludes people who are not attorneys.

22 FATHER PIUS: But the law graduate doesn't, is

1 the point.

2 MR. FLAGG: No, because we don't say after law  
3 students, we don't say after other professionals, these  
4 are not attorneys.

5 FATHER PIUS: Right, right, right.

6 MR. FLAGG: We have a definition of attorneys,  
7 and everybody else who's not an attorney is not an  
8 attorney. We really did try to, where we could -- it  
9 may not be evident, but we did try to keep this short.

10 CHAIRMAN KECKLER: I think by  
11 interpretation -- again, though I admit it requires  
12 application of the typical statutory  
13 interpretation -- also somebody who had passed the bar  
14 in another state within the last two years would be an  
15 other professional and not a law graduate.

16 So if I had passed the Illinois bar but I then  
17 decamped to New York and wasn't -- I'm not sure about  
18 the reciprocity rules, but anyway, let's say I wasn't  
19 authorized to practice law in New York, I would be an  
20 other professional rather than a law graduate.

21 MS. DAVIS: I think that may be right. I'm  
22 not sure that, as a practical matter, it makes a

1 difference since with regard to their inclusion,  
2 they're not treated any differently. I understand that  
3 they may fall into more than one category as it's  
4 drafted.

5 MR. FLAGG: Yes. The most important  
6 distinction, and I think it was what was suggested by  
7 Father Pius, is whether somebody is an attorney who can  
8 practice law in a jurisdiction. And some people are  
9 and some people aren't. And some people may be a  
10 member of a bar of another state.

11 And in some states, the local rules or the  
12 court rules are written to permit that person -- for  
13 example, if they're working in a corporate law  
14 department -- to do pro bono work. And for the purpose  
15 of our rules, they may be treated as an attorney  
16 admitted to practice, at least for the purpose of the  
17 case which they're assisting, as an attorney.

18 And if they're not, then if they're going to  
19 render assistance that will generate an PAI accounting,  
20 they either have to be an other professional or a law  
21 graduate. And Stefanie's point, which I think is  
22 right, is yes, for two years they might fall in both

1 categories.

2           We don't see any reason, if this ever arises,  
3 to try to -- we don't see any reason to try to add so  
4 much language to all these definitions that we can  
5 eliminate any overlap. But the main thing we've tried  
6 to do is very clearly state who attorneys are and what  
7 we mean by that, and then more broadly define the other  
8 categories.

9           CHAIRMAN KECKLER: Laurie?

10           MS. MIKVA: I thought I saw it but now,  
11 looking back -- so where are attorneys who are licensed  
12 to practice in a different jurisdiction covered? I  
13 thought I knew that, but now I don't know it any more.

14           MS. DAVIS: If they are licensed in another  
15 jurisdiction and don't have permission, either through  
16 a pro bono rule or some other way, of practicing law in  
17 the state where they want to do PAI work, they would be  
18 covered as other professional.

19           MS. MIKVA: Okay. It says, "An individual not  
20 engaged in the practice of law" in this, but --

21           MS. DAVIS: Does that make sense?

22           MR. FLAGG: I think a guiding principle here

1 is we are not trying to define who is admitted to  
2 practice in any jurisdiction. What we are saying is,  
3 if you are admitted to practice in a jurisdiction,  
4 whether you're generally admitted to practice or you're  
5 admitted to practice for the purpose of a particular  
6 sort of pro bono case or to get a court appointment,  
7 then you're admitted to practice and you're an  
8 attorney.

9           And we don't define that. That's defined by  
10 the jurisdiction. If you fall within that category for  
11 the purpose of our rule, you're an attorney.

12           If you don't fall within that rule, either  
13 because you're out of state or you've retired or what  
14 have you, then you're likely an other professional.  
15 And grantees can properly allocate expenses to this PAI  
16 program for the assistance of these other professionals  
17 in the exact same way they do vis-a-vis attorneys other  
18 than for recordkeeping purposes. They probably note  
19 that the assistance in a particular case was rendered  
20 by an other professional or a law student as opposed to  
21 an attorney.

22           CHAIRMAN KECKLER: Okay. Go ahead and



1 continue on.

2 MS. DAVIS: The next change that we made was  
3 in Section 1614.4(b), which describes the support  
4 activities for which recipients can allocate costs to  
5 their PAI requirement.

6 We introduced a new Section 1614.4(b)(4) and  
7 pushed everything else back one number. And this  
8 particular section describes when recipients can  
9 provide support to pro bono associations or to  
10 courts -- I'm sorry, or bar associations -- who have  
11 requested their assistance in setting up a pro bono  
12 clinic.

13 We received a comment from the ABA suggesting  
14 that this type of assistance should be permissible  
15 under the PAI rule because while it did not involve  
16 providing services directly to clients, it was the kind  
17 of collaboration with bars and with courts to expand  
18 the availability of legal assistance to people who  
19 cannot otherwise afford it that we've encouraged and  
20 that is becoming more common, and the kind of  
21 collaboration that we want to see happen.

22 We concurred with that recommendation and have

1 put that language into new 1614.4(b). If the clinic,  
2 after it's been set up, meets the requirements for PAI  
3 clinics that are in the following section, the  
4 recipient can also allocate costs associated with its  
5 support of that clinic. But they would still have to  
6 meet the 1614.4(b)(5) requirements.

7 Yes?

8 CHAIRMAN KECKLER: Yes. Stefanie, I almost  
9 hate to ask this question because I absolutely  
10 agree -- and I thank the ABA for its comment -- I  
11 obviously agree that this is a great thing that our  
12 grantees can do.

13 But is there some necessity -- because there's  
14 such a legal need in all income categories -- is there  
15 a need for these clinics to have some aspect that's  
16 related to serving low-income people? Other times we  
17 say it's primarily for low-income people.

18 I don't know whether we need to say that. Is  
19 there something that we need to condition the nature of  
20 these legal clinics on so that we're knowing that the  
21 grantees are acting indirectly, at least, in the  
22 service of the poor?

1           MS. DAVIS: That's a great question. It's  
2 one, I think, that we tossed around while we were  
3 discussing this provision because one of the things we  
4 were thinking about, or some of the things we were  
5 thinking about, were who's going to be helped by this?  
6 Are they going to be pro bono clinics?

7           And part of the ABA's comment was they've  
8 asked for the recipients' assistance setting up these  
9 clinics because the recipients are the experts. They  
10 know how to reach this population. So I think it's  
11 probably fair to say that there's an assumption that  
12 that's the population they're going to serve because  
13 that's who comes into the counts with the need, and  
14 that's who the recipient knows how to serve.

15           So the answer to your question is, we didn't  
16 specifically think that we needed to outline indicia  
17 that the clinic itself would be serving only low-income  
18 individuals. We took into consideration the nature of  
19 the ask and made the judgment that we thought in  
20 virtually every instance it was likely that that's who  
21 the bar and the court would be wanting to serve, or the  
22 people who are coming into the court without assistance

1 and asking for it there at the courtroom because they  
2 need it and can't get it elsewhere.

3 CHAIRMAN KECKLER: Father Pius?

4 FATHER PIUS: I think that's a good point.  
5 But I think one of the problems we're dealing with is  
6 the paucity of data on all this stuff. And certainly  
7 some of these things -- as we go through and amend the  
8 PAI, to the extent that we can get more data from  
9 grantees exactly how the PAI is being allocated.

10 So, for example, if all of a sudden we see  
11 that all of a sudden there's this huge shift to  
12 providing these kinds of forums for courts, and that's  
13 sucking up a huge chunk of the PAI from these people,  
14 which is not really what we intend, then that might  
15 cause us to rethink some of these things.

16 So I certainly hope -- and certainly I think I  
17 can say it's the understanding -- that there would be  
18 some followup with some of these changes to get a  
19 little bit more data to see exactly how these things  
20 are spent, so that we should not just pass the rule but  
21 within a couple years review what's happened in PAI and  
22 see if there needs to be further allocations made.

1           And this is one of the things that we should  
2 asterisk to make sure that we're not diverting too much  
3 to activities that are not helping the poor.

4           CHAIRMAN KECKLER: Yes. I think the  
5 reasoning -- that something that you've outlined is  
6 generally sound, that it's very unlikely that -- I can  
7 spin hypotheticals of a business bankruptcy clinic or  
8 something on Wall Street that wouldn't have -- but I  
9 think as a general matter, it is going to be something  
10 that, at the very least, is going to have a substantial  
11 number of low income clients -- not everybody, but a  
12 lot of people.

13           And the fact that this clinic exists is going  
14 to help the poor. And as we've commented before about  
15 other rules and other changes and things that our  
16 grantees -- the fact that it helps other people is  
17 fine. As long as it is helping them, it's certainly  
18 fine with me.

19           But anyway, you're right, Father Pius. It's  
20 something to think about. It's something in our mind  
21 to keep awareness about.

22           Go ahead.

1           MS. DAVIS: So then that brings us to the new  
2 1614.4(b)(5) on PAI clinics themselves.

3 Unsurprisingly, we received a lot of comments -- in  
4 fact, the most comments -- on this section of the rule.

5 The comments were very helpful because they brought to  
6 light for us a part of the rule that was ambiguous and  
7 was being read in a way that we had not intended.

8           So we clarified, I hope, the rule to say that  
9 for those hybrid clinics where a recipient is providing  
10 support and the clinic provides both legal information  
11 and legal assistance, the recipient can allocate to its  
12 PAI requirements the costs associated with the legal  
13 information portion of the clinic regardless of whether  
14 the legal assistance portion screens.

15           Obviously, if it doesn't screen, they can't  
16 support the legal assistance portion of the clinic.  
17 But if the legal assistance portion does screen, then  
18 the recipient can allocate costs for both the legal  
19 information and the legal assistance section to their  
20 PAI requirement.

21           We also added a new section to address the  
22 ABA's comment with regard to whether or not recipients

1 could support a legal assistance clinic in which  
2 clients essentially entered through two doors, an  
3 LSC-eligible door and not-LSC-eligible door. And so  
4 the recipient can support the screened part. They can  
5 participate in a clinic that has that kind of screening  
6 and allows for that kind of separation in clients.

7           We included a clear statement of what we  
8 expect recipients to provide with regard to screening,  
9 and we'll be providing guidance on that when we publish  
10 the rule or around the time we publish the rule.

11           We did not concur with the comments and the  
12 recommendations that we approve limited screening in  
13 clinics. We stayed with the requirement that we  
14 established in the NPRM, that if a recipient is going  
15 to provide legal support to a clinic at which  
16 individualized legal assistance is provided to clients,  
17 they must screen for eligibility in the same way that  
18 they screen for clients that they're serving in-house.

19           So we did not add any new requirements. We  
20 did include language in the preamble saying that we  
21 weren't establishing any new requirements, and pointed  
22 to the definition of screen for eligibility as evidence

1 of that because that language specifically says, we  
2 want you to do here what you're doing in-house. So  
3 those are --

4 MR. FLAGG: I just want to underscore that  
5 because this has come up a couple times. We've not  
6 changed the standards. We couldn't just say, we're not  
7 changing the standards, period. We elaborated on what  
8 the process needed to be, and we elaborated to clarify  
9 the questions that the commenters raised, and we  
10 thought it appropriate to clarify that.

11 But I think we've made clear that the  
12 standards remain the same. And I think Father Pius,  
13 you raised that at the last meeting.

14 FATHER PIUS: Yes. That's what I said. And  
15 I'm very grateful, especially your comments at the  
16 beginning and your explanation. I thought that was  
17 very good and very helpful. So I certainly read that  
18 carefully and was very appreciative of it, and I'm very  
19 happy with your approach. So thank you.

20 MS. DAVIS: Are there any other questions or  
21 comments on the clinics portion? Yes, Julie?

22 CHAIRMAN KECKLER: Julie?



1           MS. REISKIN: Yes. It was clear the way you  
2 wrote it. What I'm still a little confused about is  
3 what I keep hearing -- pro bono is not just meant to  
4 supplant. It's meant to supplement and compliment, and  
5 it's not supposed to be the same thing.

6           We have our programs and our staff attorneys,  
7 and that's one thing. And pro bono is not supposed to  
8 be the exact same thing, but in a different setting.  
9 So that's why it's a little confusing of why we're  
10 trying to make it so much alike.

11           MR. FLAGG: Well, because -- they're not  
12 alike, obviously, or if they were, we wouldn't have  
13 20-page regulations trying to promote it. But I think  
14 the issue is federal dollars going to support activity.

15           The point you make is an excellent one. Pro  
16 bono lawyers and pro bono assistance beyond lawyers is  
17 something we're trying to promote, and we want our  
18 grantees to do that. But in order to promote those  
19 activities, they have to spend federal dollars.

20           And what we are saying is, there are two  
21 models. If they're just providing information and if  
22 the pro bono lawyers are just providing information,

1 then just as is the case when the grantees themselves  
2 are simply providing information, then they don't have  
3 to screen.

4           If what is being provided is, as Stefanie  
5 described, individual assistance in an instance where,  
6 if the grantee were to do it themselves, they would  
7 have to screen, if the grantee is providing support for  
8 a pro bono lawyer to provide that assistance, then we  
9 feel compelled by the language of our statute to  
10 require that there be screening.

11           So it's not a matter of LSC saying, gee, we  
12 think the right policy is because there's a difference  
13 between pro bono lawyers and in-house grantee lawyers,  
14 that we can draw a line. We don't see the statutory  
15 language permitting us to draw a line in terms of when  
16 there is screening.

17           As long as federal dollars are being used to  
18 support an activity, here the activities of pro bono  
19 lawyers, then we believe we have no alternative but to  
20 require that there be some individual screening.

21           We can allow the screening to be done in a way  
22 that's efficient, and we try to do that. We try to do

1 that when grantees are doing their own representation.

2 But there does have to be, we believe, individual  
3 screening.

4 This is a significant issue, and it was  
5 identified as a significant issue way back when Charles  
6 and this Committee held the first of their information  
7 sessions. And in each instance, we said, we  
8 understand, people, that there's a cost in terms of  
9 time and resources to screening. And everything else  
10 being equal, people would prefer to avoid those costs.

11 We understand that, too.

12 But we have a statutory mandate, and we  
13 specifically and repeatedly said to people, we  
14 understand you don't want to do this screening  
15 necessarily. Please articulate an interpretation of  
16 our statute that would permit that.

17 And nobody, nobody, identified an  
18 interpretation of our statute that would permit that.  
19 They in some instances expressed a desire for that  
20 result, and we can understand that. But nobody said,  
21 here are the words of the statute and here's how you're  
22 complying with the statute by not screening.

1           MS. DAVIS:  And just to follow on Ron's  
2    comments, I would note that when Congress has noted the  
3    report of the Pro Bono Task Force and spoken in its  
4    conference reports on LSC's efforts to improve pro  
5    bono, it has said, we encourage LSC to continue its  
6    efforts to expand pro bono services or Legal Services  
7    to their clients.

8           And because Congress spoke so specifically  
9    about serving the recipients' clients, we understood  
10   that Congress meant people who are eligible for  
11   LSC-funded legal assistance.

12           MS. REISKIN:  Just one followup, then.  Should  
13   we be promoting, then, more our grantees getting  
14   lawyers to work to be their volunteers moreso than  
15   helping courts?

16           It seems like there's a lot of emphasis in  
17   clinics on doing stuff that really is maybe helping  
18   courts and making them more orderly.  Would it be more  
19   with the intent of Congress to say, what we really need  
20   to be doing is encouraging our grantees to get lawyers  
21   to come volunteer for them, like at their offices?

22           MR. FLAGG:  I think your comment dovetails

1 with the comments that were made before. The new  
2 language vis-a-vis -- and I think it's only in one  
3 paragraph of this 20- or so-many page document that you  
4 could use your PAI funds for supporting a bar  
5 association- or court-based clinic.

6           If as a result of that paragraph our grantees  
7 in droves abandoned direct service with the assistance  
8 of pro bono attorneys to individual clients, I think  
9 that would be not the intent of what we have here. And  
10 that is exactly what we intend to have a robust set of  
11 data on who is being served by this.

12           We're trying not to in advance say, in  
13 carrying out this program, 95 percent of the work you  
14 do should be with attorneys as opposed to law students  
15 or other professionals, or 80 percent of this should be  
16 direct representation and 20 percent can be clinics, or  
17 95 percent of this should be assistance to individuals  
18 and not the assistance to courts or bar associations,  
19 simple for a number of reasons.

20           One, I'm not sure what the right percentages  
21 would be, and so I think we want to see how this plays  
22 out. And if in fact people seem to be spending a lot

1 of their resources assisting on clinics which are  
2 proven to fall in the category of corporate welfare as  
3 opposed to helping poor individuals, I would imagine  
4 this Committee and the Board and Management would say,  
5 hmm. That's not what we had in mind, and we'll have to  
6 make a change.

7           But rather than try to anticipate all those  
8 things, I think our intention is to make these  
9 regulations as flexible as they can be consistent with  
10 our statutory mandate, and then have a robust set of  
11 data collection to see how this is working in practice,  
12 and make adjustments based on data rather than on  
13 either assumptions or prejudgments.

14           CHAIRMAN KECKLER: Julie -- and Ron, correct  
15 me if I'm wrong about this -- I think that there's not  
16 necessarily this dichotomy about court and the  
17 court-based clinics and our grantees in the sense that  
18 if the grantees were to continue to be engaged in these  
19 clinics, as I think most of them probably would be,  
20 that would become a vehicle for further PAI. And so it  
21 would be a clinic that our grantees would help run and  
22 then help staff, and then some of that would be

1 attributable to PAI.

2 MR. FLAGG: Yes. As a practical matter,  
3 that's a great point. Another way of saying what  
4 Charles just said is if a court or a barrier  
5 association said, we want to set up a clinic to help  
6 poor people in our community; you have some experience;  
7 help us structure this in a way that makes sense, that  
8 kind of project is going to be of limited duration, by  
9 definition.

10 Where the hours are really going to accumulate  
11 and where the costs accounted towards PAI would mount  
12 up is if that grantee actively participated in the  
13 implementation of that clinic.

14 But if it did that, then clearly it would have  
15 to be serving individual people, and to the extent it  
16 was providing anything beyond limited information, it  
17 would have to do screening so we would be quite certain  
18 that they were serving eligible clients.

19 CHAIRMAN KECKLER: Okay. Let's move forward.

20 Do we have anything before 1614.10?

21 MS. DAVIS: I just wanted to point out that we  
22 had made some technical changes in 1614.5. Most

1 notably, we replaced old language regarding PAI funds  
2 because we rephrased it to costs allocated to the PAI  
3 requirement for two reasons.

4           One is that this regulation is really a cost  
5 allocation rule rather than a rule that speaks to the  
6 spending of particular funds, and particularly now that  
7 we have the Pro Bono Innovation Fund grants, we didn't  
8 want there to be confusion.

9           The other is that we simplified 1614.5 by  
10 moving the description of incubator projects to the  
11 definitions section because with the way that we  
12 changed the PAI funds language, it just got unwieldy  
13 and difficult to understand. So we did a little bit of  
14 cleanup.

15           And that does bring us to 1614.10. We made  
16 two changes here in response to comments that we  
17 received. We were very interested to receive comments  
18 on this section because we're not aware that this  
19 section has ever been used. And so some of the  
20 questions that we had were kind of novel and required  
21 some thinking through.

22           So in 1614.10(a) -- that's the section that



1 discusses withholding of funds if a recipient fails  
2 without good cause to request a waiver -- we received a  
3 comment from NLADA expressing concern that that portion  
4 of the rule didn't seem to allow for any process to  
5 appeal a determination that a recipient had failed  
6 without good cause to seek a waiver of the PAI  
7 requirement, and that the recipient could lose funds  
8 without having the ability to appeal.

9           So we determined that that inquiry was most in  
10 line with the questioned cost proceedings in Section  
11 1630.7, and so we've essentially adopted most of the  
12 Section 1630.7 process in this rule. So recipients  
13 will get notice. They will be able to appeal it. And  
14 they will be able to eventually appeal it to the  
15 President if they believe that they need to do that.

16           The other comment that we received was with  
17 regard to the proposed expansion or the allowance for  
18 the Corporation to compete any withheld funds out for  
19 any basic field purpose, including PAI. If someone  
20 were withheld, the ABA commented that they felt like  
21 that would defeat the purpose of PAI. It would serve  
22 as a negative incentive if there were basically more

1 funds available to spend on basic field purposes rather  
2 than being redirected to PAI.

3 So we left in the requirement that was  
4 proposed to allow the Corporation to expand the  
5 competition beyond the service area from which the  
6 funds were withheld if the recipient from which they  
7 were withheld is the only applicant for the funds. So  
8 we can compete them to outside service areas, but the  
9 funds must be spent on PAI purposes.

10 Yes?

11 CHAIRMAN KECKLER: So a quick question about  
12 that specifically. I'm looking at the language here,  
13 and here's what it says. It says, "Competition for these  
14 funds may be held in the recipient's service area, or  
15 if the recipient from whom funds are withheld is the  
16 only LSC recipient applying for the funds in the  
17 competitive solicitation, in another service area."

18 But what I think I heard you just saying and  
19 what I think we meant was that it could be held across  
20 multiple service areas.

21 MS. DAVIS: Where are you looking?

22 CHAIRMAN KECKLER: I'm looking at

1 1614.10(a) -- it's the page 77 of the Board book, 18 of  
2 the rule. And I'm looking at (c)(1), yes, the last  
3 sentence in (c)(1).

4 MS. DAVIS: Right.

5 CHAIRMAN KECKLER: So do we mean -- not  
6 thinking about the regulatory language for a second,  
7 but its substance -- do we mean that if there's just  
8 the same grantee who had the problem, then we would  
9 open up the competition to include -- that person could  
10 compete for it, but we want more than just that person  
11 competing for it. So it seems as though what we're  
12 saying is we would have it across multiple service  
13 areas.

14 FATHER PIUS: But the funds would stay in the  
15 service area. Right? My question was, we don't have  
16 the authority to move funds from one service area to  
17 another. That was the first thing I thought reading  
18 that.

19 CHAIRMAN KECKLER: Yes. I don't think that's  
20 so, but go ahead.

21 MS. DAVIS: Oh, no. I think, Charles, you're  
22 right that that is what we intended because there was

1 great concern that if the only organization competing  
2 for these funds was the one that had not spent them  
3 properly in the first place, that didn't actually seem  
4 like a useful sanction or a guarantee that the funds  
5 would be spent for the purposes for which they were  
6 supposed to be.

7 CHAIRMAN KECKLER: Right. So we have to  
8 disburse the funds according to criteria. But these  
9 are funds that have been withheld as a consequence of a  
10 problem.

11 FATHER PIUS: So we have big blue square state  
12 in the middle of the country. We have one grantee. It  
13 doesn't meet its PAI requirement, so we've got 12-1/2  
14 percent of its budget. And so we put it out for  
15 competition.

16 But it still has to be spent in big blue  
17 square state area?

18 CHAIRMAN KECKLER: I don't think that's the  
19 case.

20 MR. FLAGG: No.

21 FATHER PIUS: We're not required by statute to  
22 keep it in the service area?

1           MR. FLAGG: Not if the money has, in essence,  
2 come back to us, which is what has happened here. What  
3 has happened here is money has come back to us. And  
4 money that has come back to us is no longer attributed  
5 to that service area.

6           So what we'd like is, in the first instance,  
7 we'd like to compete -- again, this has never happened;  
8 we're dealing with it, so I don't want to spend an  
9 enormous amount --

10          FATHER PIUS: I understand we're dealing with  
11 hypotheticals, yes.

12          MR. FLAGG: -- but ideally what we'd like is  
13 multiple competitors within the troubled service areas  
14 to come up and say, oh, here's a PAI program that could  
15 work, and spend it in this service area.

16          That might not happen. But for the reasons  
17 that have been articulated, we want this money spent on  
18 PAI activity. So as a second best, it would be spent  
19 on PAI activity somewhere else.

20          And obviously, again, the first choice would  
21 be to have there be competition to have the PAI money  
22 spent in the originally assigned service area. But

1 now, when monies are forfeit back to the Corporation,  
2 we are not necessarily bound to use those in the  
3 original area in which they were allocated because they  
4 were allocated there and then they came back to us.

5 FATHER PIUS: So long as we're comfortable  
6 that we have the legal authority to do that. The first  
7 time I read that, I was a little uncomfortable with  
8 moving money out of a service area.

9 MR. FLAGG: Right. That's --

10 FATHER PIUS: Because the thing to keep in  
11 mind is this PAI requirement is not statutory. Right?  
12 It's entirely a creation of this Board. And so that's  
13 what at least gave me pause. And I'm made comfortable  
14 by your assurances, and by the fact this is going to be  
15 so extraordinarily rare that we're not talking about --

16 MR. FLAGG: Yes. The example or analogy is  
17 where we've had dollars come back to the Corporation.  
18 Obviously, they always come back from a grantee, so  
19 originally those dollars had some geographic  
20 specificity to them.

21 When they come back to us, in the past they've  
22 at times been used for disaster relief. The disaster

1 relief assistance is not restricted to the original  
2 locations where those dollars had been allocated before  
3 they came back.

4           And so this in essence would be similar in  
5 that these dollars are coming back here. They're not  
6 going to go for disaster assistance; to carry out this  
7 PAI intention, we're going to grant them out for  
8 further PAI activities. But in the absence of  
9 competition in the original service area, we're  
10 willing, reluctantly, to see them go elsewhere.

11           FATHER PIUS: I understand. Thank you.

12           CHAIRMAN KECKLER: This is also an aspect of  
13 the lesser sanctions rule that we have this. But I  
14 think, from a practical standpoint, now my question is  
15 that since I've clarified what we were intending to  
16 do -- just a second, Gloria -- my question then is, is  
17 that phrase "in another service area," is that  
18 accurately reflecting what we want to do?

19           Gloria, did you have a question?

20           PROFESSOR VALENCIA-WEBER: I think Ron has  
21 explained it because in a parallel way, when we've have  
22 some trouble, grantees, when we've shut them down, the

1 money comes back to us and we disburse them in other  
2 ways, not necessarily to the area in which those funds  
3 were originally allocated.

4 MR. FLAGG: I think the answer to your  
5 question, Charles, is yes. The intention is that we  
6 would solicit competition in other service areas if the  
7 original recipient was the only competitor in that  
8 service area.

9 CHAIRMAN KECKLER: But what we really mean is,  
10 we mean in that area and other service areas.

11 MR. FLAGG: No. I think the intention would  
12 be -- and again, we haven't worked out a detailed set  
13 of solicitation arrangements because this has never  
14 come up, and again, in the interest of keeping this  
15 regulation manageable, we haven't spun out all of the  
16 procedures -- but I think what we would do is if money  
17 came back because somebody had not carried out their  
18 PAI responsibilities, we would say to ourselves and to  
19 the public, these monies came from this service area.  
20 We'd like to see PAI activities properly carried out in  
21 this service area. Please give us a proposal.

22 If we didn't get a competitive proposal for



1 that service area, we would then, as the language here  
2 says, seek competition for PAI activities in other  
3 service areas.

4 CHAIRMAN KECKLER: But what I'm suggesting  
5 here is that if the money was with our grantee; we took  
6 it back; the grantee and somebody else in the big blue  
7 state the Father Pius said both say, oh, we have a plan  
8 to use this program, that would be fine and would allow  
9 the grantee from whom the funds are withheld to be part  
10 of that competition if there was another entity also  
11 providing a competitive bid within the state.

12 But the question then is if it turned out that  
13 only the grantee from whom the funds were withheld  
14 competed from within that state, the way that I read  
15 that language is then the money would actually go over  
16 to another service area, and then that grantee seems as  
17 though they would not be able to compete for the money  
18 because it would be in another service area and not in  
19 the original service area.

20 MR. FLAGG: No. I think --

21 FATHER PIUS: What if it said "additional  
22 service areas?"

1           CHAIRMAN KECKLER: Additional. Yes. In  
2 additional service areas.

3           MR. FLAGG: The intent is to introduce  
4 competition from other service areas. And it's not  
5 meant to negate the possibility of it going back to the  
6 original recipient so long as there's competition.

7           Our first desire is there to be competition  
8 within that service area. Failing that, we'll invite  
9 competition from other service areas. But the original  
10 recipient could be the winner of that competition.

11          FATHER PIUS: Yes. So it would be changing  
12 the language from "in another service area," which  
13 implies exclusivity, to "in additional service areas."

14          CHAIRMAN KECKLER: So the proposal is  
15 that -- thank you, Father Pius -- the proposal is to,  
16 in the last sentence of 1614.10(c)(1), change the  
17 phrase "in another service area" to "in additional  
18 service areas." Okay?

19          And so is there any discussion, or that seems  
20 like a good -- I'm now satisfied with that myself. So  
21 without objection from the Committee, I'm going to  
22 suggest that amendment.

1           Please continue, Stefanie.

2           MS. DAVIS: I'm done.

3           CHAIRMAN KECKLER: Very good. I have one  
4 other question regarding the preamble. As you noted  
5 last time, we had two issues that were raised from our  
6 last discussion on the issue of additional eligibility  
7 requirements, which I think were discussed.

8           And then I also raised the issue about data,  
9 which is also discussed in the preamble. And it's  
10 discussed particularly in light of the comments by the  
11 Office of Inspector General.

12           And it's a difficult issue in the sense that  
13 we all anticipate that there's going to be data  
14 guidance, and we all that there's going to be a need  
15 for data, in part because we're relaxing this issue  
16 that you have to take it on as a client case. So how  
17 are you knowing what's going on? It's no longer your  
18 case. How are you going to understand the  
19 effectiveness of the PAI activity?

20           So I think the discussion is good. And I  
21 think that I'm convinced more or less, finally, that we  
22 can't really use the regulation in anticipation of

1 guidance that we haven't developed yet. And it might  
2 have been better if we know that, but in some sense  
3 we're learning. We're going to learn through doing  
4 this, and we're going to be learning through discussing  
5 it.

6 But what I was interested in is whether it  
7 would be possible to add another sentence -- and it  
8 could be the last sentence of the preamble so it would  
9 be easy to find -- which is a sentence something along  
10 the lines of the following -- I'm open to revisions or  
11 refutations, but I think that this isn't said in there,  
12 quite.

13 And this is the sentence: "LSC anticipates  
14 that forthcoming guidance will satisfy the substance of  
15 OIG's concerns as expressed in their comment." I think  
16 we almost say that several times, but I don't think we  
17 actually say it.

18 MR. FLAGG: Yes. And to be frank with the  
19 Committee, Charles and I and Stefanie discussed this,  
20 and I didn't respond at the time. And now I wish I had  
21 because at the time I thought it sounded better than it  
22 now sounds to me.

1 (Laughter.)

2 MR. FLAGG: What we say now is, "LSC agrees  
3 with the Office of Inspector General regarding the  
4 importance of data LSC seeks from recipients, and  
5 intends to solicit OIG's input as it develops  
6 additional data collection requirements for PAI."

7 We certainly, as we almost always do, seek the  
8 views of the IG, seek to reach a point where the IG is  
9 satisfied with what we do. I don't want to suggest  
10 that we're somehow -- one, I don't know exactly what  
11 they want to do, and two, I can't promise that what we  
12 do will satisfy them, although that's what we strive to  
13 achieve.

14 So other than saying we strive to achieve  
15 that, which I think is already said, I'm a little  
16 reluctant to say in the preamble, we will satisfy the  
17 IG's concerns.

18 CHAIRMAN KECKLER: Right. That's why I said  
19 "in their comment." There's going to be new concerns  
20 as things go along that could come from anything.  
21 That's just totally understandable.

22 The question is whether the substance of their

1 comment is something that -- because we can't satisfy  
2 it here. But we're saying, in a sense, that we  
3 understand the comment. We wish we could satisfy it,  
4 but we have this separate process. But the question  
5 then is, do we anticipate that that separate process  
6 will address their concerns --

7 MR. FLAGG: I think we could say, "LSC  
8 believes that the process described here addresses  
9 LSC's and the OIG's desire for adequate reporting  
10 requirements."

11 CHAIRMAN KECKLER: Right. I understand the  
12 issue of saying the satisfy because the satisfy in a  
13 sense is not up to us; the satisfy is up to the  
14 commenter, in this case the Office of Inspector  
15 General. However, we could say in some phrase that it  
16 will address the concerns, or we will address the  
17 issues as you put it, Ron.

18 Robert?

19 MR. GREY: Charles, I think, sometimes trying  
20 to get it perfect makes it difficult. And this feels  
21 like that to me because I think that it is the  
22 expectation that we would do that. I think just in the

1 natural order of things, that is the expectation. And  
2 I think it's that old trial adage, "There's one more  
3 question that will sink the boat" kind of thing.

4           This is not the case in this. But I do  
5 believe that this is almost too perfect, I guess, the  
6 idea that there is an expectation that we would want to  
7 do things that would satisfy the IG, but then that we  
8 must anticipate that they were going to do things to  
9 satisfy them as well. It's just one more step  
10 that -- not complicates it, but is almost redundant in  
11 this case.

12           MR. FLAGG: I just think, again, I don't want  
13 to hold ourselves to a standard we can't fulfill which  
14 is that, again, we strive to reach a consensus with the  
15 IG on these sorts of issues. It's in everybody's  
16 interest to do that.

17           At the end of the day, the IG will be the  
18 first to say, these issues are Management issues and  
19 we're not Management. Management can't say that we  
20 will necessarily at the end of the day agree with the  
21 IG on any specific issue.

22           The most we can say, which is what we've said,

1 we will seek their guidance, seek their input, listen  
2 carefully, and seek to reach an accommodation, which is  
3 what we do. But we can't at the end of the day say, we  
4 will not go forward until the IG says this proposal  
5 meets with our stamp of approval. That's just not how  
6 we operate.

7           CHAIRMAN KECKLER: No. I know. Of course  
8 not, and that was not my intention. Right. I'm trying  
9 to think of a formula of words that would express it.  
10 But in a sense, this discussion has put on the record  
11 our expectations.

12           If we put something in there that says what we  
13 can guarantee that we will do, which is that we will  
14 attempt to address, that doesn't sound very strong, we  
15 will attempt to address. We will, and we know that we  
16 will, and that's something that is under our control,  
17 is an attempt to address. But whether that would be  
18 helpful to put in the preamble, I've begun to doubt.

19           So are there other questions? Father Pius?

20           FATHER PIUS: A couple things. On the very  
21 first page in the very first line in the very first  
22 word, it should be, as I'm sure you've noticed, "legal"



1 and not "egal." You always miss the header. At the  
2 very top, the very first character on the page --

3 CHAIRMAN KECKLER: The very first letter.

4 FATHER PIUS: -- which is missing.

5 MS. DAVIS: We're moving into wildlife.

6 (Laughter.)

7 FATHER PIUS: So just in case nobody noticed  
8 that, if that L can be back in.

9 The second one is more of a substantive  
10 question, and I just don't know. For example, in the  
11 last fiscal year, how many waivers to the PAI  
12 requirements did we grant? Do we know?

13 MS. RATH: Approximately 22.

14 FATHER PIUS: Twenty-two? And that's 22  
15 different grantees?

16 MS. RATH: Yes.

17 FATHER PIUS: Okay. It's a helpful background  
18 to know the extent to which people can or cannot meet  
19 this requirement, and loosening this up, I think, is  
20 helpful.

21 The third is just more a general comment, and  
22 I made this before. But to emphasize, remember, this

1 PAI requirement is entirely a creation of the Board.  
2 The original proposal when this was first proposed was  
3 10 percent.

4 We picked 12-1/2 percent. I have no idea why.  
5 Nobody has any idea why we picked 12-1/2 percent  
6 rather than 10 percent. We're sticking with 12-1/2  
7 percent. I'm still not quite sure why. It's a number  
8 everybody's used to. It seems like a nice number, half  
9 of a half of a half.

10 And we haven't really touched it, and probably  
11 we shouldn't open that can of worms. And I'm certainly  
12 not suggesting that we eliminate the PAI requirement;  
13 Carol would be quite upset, I am sure. It would make  
14 her job ten times harder if we got rid of it.

15 But really, to remind ourselves that it is  
16 simply a requirement of the Board, and that we do have  
17 a goal, and I'm happy that we've concretized the goal a  
18 little bit more. And just to emphasize that, going  
19 forward, I really want to make sure that we're  
20 adjusting and that we're evaluating what we do based on  
21 that goal, and even the thought about whether or not we  
22 need to adjust the 12-1/2 percent to some other number

1 that we throw a dart on the dartboard at.

2 MR. FLAGG: I would just say one thing on top  
3 of that. While you're absolutely right that this was  
4 at the outset a policy established by the Board, in  
5 recent years Congress has strongly endorsed that policy  
6 repeatedly. So while the Board in some sense has the  
7 discretion to retract its prior policy -- and I'll  
8 leave this to Carol -- we'd probably suffer some  
9 repercussions.

10 CHAIRMAN KECKLER: Father Pius, the  
11 substantive point you make is a very good one. At the  
12 beginning of this process, we made a specific goal to  
13 center our reforms on the recommendations of the Pro  
14 Bono Task Force.

15 But as you say, this does not mean  
16 that -- this is 12-1/2 percent of our funds. So the  
17 fact that we spent substantial time, and we may spend  
18 time going forward, is perfectly appropriate. And this  
19 includes the issue of how best our funds are spent.

20 If we are getting this leverage and the  
21 marginal dollar spent on PAI that goes above 12-1/2  
22 percent, well, then, that changes, and it should be

1 higher. If, on the other hand , the marginal dollar  
2 would be better spent outside PAI, then perhaps it  
3 would be smaller, and perhaps it varies by grantee.

4           The level of granularity on data is something  
5 we don't have yet. Even the basic knowledge that a  
6 particular dollar for a particular grantee is best  
7 spent in terms of economy and efficiency in PAI or in  
8 other services is something that we don't know. We  
9 ought to know. I hope we will know. And when we do  
10 know, it's something that's going to affect our  
11 rulemaking going forward.

12           FATHER PIUS: My final comment is this, is  
13 that I was surprised by the number of grantees whose  
14 comments were, well, if you don't define clinic to  
15 include this, then we'll never be able to do it.

16           Your response was wonderful. And I certainly  
17 want to make clear to the grantees, and I hope that  
18 they're listening, just because it doesn't meet your  
19 PAI requirement doesn't mean you can't do it. You just  
20 can't count it as PAI requirement.

21           So these definitions should not be absolute in  
22 terms of what they can and can't do, only what they can

1 and can't count as PAI. And the confusion on that  
2 concerned me a little bit, and I was grateful as to the  
3 way in which the Legal Office addressed that. And I  
4 hope that's picked up by the grantees and that's  
5 understood, that just because it's not PAI doesn't mean  
6 you can't do it.

7 CHAIRMAN KECKLER: Harry, then Gloria.

8 MR. KORRELL: Thank you, Charles.

9 This is directed at Management and those who  
10 are going to be promulgating the guidance for the  
11 grantees. This change grew out of requests from the  
12 grantees, of course, that we revisit the PAI rule. But  
13 my view of this is the purpose of this change isn't  
14 just to make life easier for the grantees. This really  
15 is to expand the amount of pro bono work.

16 And what I really don't want to see is this  
17 loosening, if you will, or modification of the PAI rule  
18 to allow grantees to just now count as PAI stuff they  
19 were already doing. That doesn't improve or increase  
20 the amount of pro bono legal work that gets done. This  
21 really is designed, in my view, to create more ways,  
22 recognize more ways, that grantees can use the funds

1 they get to get more pro bono work done.

2 And if we're not getting more pro bono work  
3 done, we're just ticking off clinic hours or something  
4 and we haven't accomplished what I think we set out to  
5 accomplish with this rule. And I would hope that in  
6 the promulgating guidance, that we keep that in mind.

7 MR. FLAGG: Yes. I think it's going to be  
8 critical for us to look at that because, for example,  
9 actually the exact opposite of what you said could  
10 happen, that is, by not requiring pro bono cases, PAI  
11 cases, to be counted as grantee cases, where today if a  
12 grantee screens and sends to ten pro bono lawyers ten  
13 cases, those show up as potentially ten closed cases  
14 for that grantee under our current accounting system  
15 and current rules.

16 We're in this rule saying to them, okay, we've  
17 heard you. There's a cost, an administrative cost, to  
18 keeping this as your case. And we're going to release  
19 you from that cost in the hope that the time and effort  
20 and money you spent keeping track of this will now be  
21 spent better.

22 And so the hope is tomorrow, under a new of

1 rules, there will be 15 cases screened and sent off to  
2 pro bono assisters, be they attorneys or otherwise.  
3 But they're no longer going to be counted as closed  
4 cases because they're no longer -- so we're going to  
5 have to come up with a metric that captures that  
6 increased amount of pro bono work even though, in our  
7 old statistics, it will look like, gee. Yesterday you  
8 had ten cases that were closed; today you have none in  
9 those original statistics.

10 So we're going to have to come up with new  
11 metrics to capture what we hope will be an increased  
12 amount of pro bono work.

13 CHAIRMAN KECKLER: Yes. There will be data  
14 guidance. It has to be the case. It's implicit in the  
15 changes that we're having because the data going  
16 forward won't be comparable with the data going  
17 backward.

18 Gloria?

19 PROFESSOR VALENCIA-WEBER: I see this as the  
20 goal already stated, that is, to expand the actual  
21 participation of PAI attorneys.

22 At the same time, the process we've gone to

1 did give some legitimacy and recognition to what had  
2 been some long-time statements from our grantees about  
3 on the ground, you have us doing this, but it doesn't  
4 really work very well.

5           And it could work better and still increase  
6 the actual services that we provide to people who our  
7 own attorneys cannot represent. And I'm thinking  
8 particularly that category of other professionals and  
9 of law students.

10           This makes it much more worthwhile and easier  
11 for the grantees to work, for instance, with law  
12 schools to deal with how one sets up and uses them  
13 effectively. And the on-the-ground experience of some  
14 of our grantees was that we just were much too rigid,  
15 and when they brought some of their concerns forward,  
16 that they just hit this sort of blank wall: Well,  
17 that's what the rule says.

18           Well, we listened to them. Remember, we had  
19 those two workshops. And I do think that a  
20 collaborative approach to the revision of the rule is  
21 very commendable regardless of what the subject matter  
22 would be.



1           CHAIRMAN KECKLER: Thank you, Gloria.

2           If there are no other comments immediately  
3 from the Board -- we'll have a chance to further  
4 discuss it before voting -- public comment has also  
5 been indicated on the agenda for prior to any vote of  
6 the Committee on the rule.

7           Is there any public comment prior to the  
8 Committee's discussion in anticipation of voting?  
9 Please sit, and announce yourself.

10          MS. WOOD: Hi. I'm Lisa Wood from the ABA  
11 Standing Committee on Legal Aid and Indigent  
12 Defendants. And I'm here to commend you for the rule  
13 that you've come up with and the process. We've really  
14 appreciated the collaborative approach and appreciated  
15 the opportunity to contribute.

16          There was one new definition in the rule that  
17 we received on Thursday that we had not yet seen  
18 before, and that is the definition of an incubator  
19 project, which is something that the ABA has been  
20 working very hard to encourage law schools to develop  
21 programs on incubator projects.

22          So we have a couple of very minor comments,

1 and I hesitated to even offer this because I know how  
2 hard you've worked on this. But I think these are  
3 issues that really wouldn't change what you're trying  
4 to do and are just in the nature of unintended  
5 consequences.

6           It's such a new concept, incubator projects,  
7 and I think it's so important, or at least we at the  
8 ABA think it's very important. And I wouldn't want to  
9 have your definition limit what would be recognized as  
10 a legitimate incubator project.

11           So the definition that is in the draft is,  
12 "Incubator project means a time-limited program that  
13 provides legal training to law graduates or newly  
14 admitted attorneys who intend to establish their own  
15 independent law practices."

16           Our comment is that the programs are not  
17 time-limited. Participation is time-limited. But we  
18 hope that these programs stay and become a permanent  
19 feature of legal education in the United States. So  
20 that's just an unintended drafting snafu, I think.

21           Incubator projects may also involve law  
22 students or law graduates not yet attorneys who are

1 practicing pursuant to whatever their jurisdictional  
2 rules allow in the way of study practice.

3           So again, I don't think you intended that, but  
4 I just think it should be broader to make sure that any  
5 incubator project that is appropriate under its state  
6 practice rules be included. And we'd be happy to  
7 provide technical drafting assistance on the side and  
8 not through this somewhat cumbersome forum of a  
9 microphone.

10           CHAIRMAN KECKLER: Thank you.

11           MS. MURPHY: Hello. My name is Robin Murphy,  
12 and I'm with National Legal Aid and Defender  
13 Association. And I'm also here to thank both this  
14 Committee, the Board, and the staff for the revisions,  
15 the tremendous time and effort that was taken with the  
16 pro bono revenues to 1614.

17           As you are all aware, acutely aware, there's  
18 really a critical unmet need for legal services for  
19 poor people. Thousands of people are deprived of  
20 receiving equal access to justice, veterans, victims of  
21 domestic violence. People are homeless due to the  
22 recession by foreclosures. And I could go on. The

1 evidence of this is replete in the LSC reports, in the  
2 presentations at these meetings, and at our LSC  
3 anniversary gathering.

4           We greatly appreciate the process that was  
5 used here to expand this pro bono work that can  
6 supplement the work of the field offices, starting with  
7 the Pro Bono Task Force over two years ago. This was a  
8 very thoughtful, deliberative, inclusive, and  
9 transparent process, and we thank you, LSC and the  
10 Board, for engaging and spending so much time and  
11 effort to reach this point.

12           There are a number of revisions that will open  
13 up new opportunities, and the rule allows increased  
14 flexibility in a number of areas for pro bono  
15 participation. There's new opportunities for  
16 collaboration. It allows flexibility and innovative  
17 that was the strong recommendation of the Pro Bono Task  
18 Force.

19           Overall, the revisions substantially address  
20 the concerns raised in the comments by NLADA, the  
21 field, ABA, and other stakeholders. It is clear and  
22 very much appreciated that LSC, including Stefanie and

1 Ron and the Office of Legal Affairs, gave very  
2 thoughtful and careful consideration to all the  
3 comments that were made.

4 NLADA has already received many comments from  
5 the field that are so pleased with these revisions. We  
6 are especially pleased that the recommendations made by  
7 NLADA have been adopted in the field, such as the  
8 definition of private attorney, which allows continued  
9 collaboration with important stakeholders and opens new  
10 doors for collaboration with other professionals.

11 As to the clinics, well, we had hoped for a  
12 relaxation of the screening requirement. We are aware  
13 that LSC has taken a position regarding the full  
14 screening, and acknowledge that careful consideration  
15 was given to this, and that LSC, based on comments, has  
16 revised the prior revision of regulations.

17 We are also pleased to see, as to 1614.10, LSC  
18 is making clear that the due process protections apply  
19 in this area.

20 While we still have many miles to go in  
21 meeting LSC's goals of the meeting of unmet legal  
22 needs, and pro bono is only one of the many tools that

1 supplement the work of the field program of attorneys.

2 Thank you to LSC, this Committee, and the  
3 Board for not only taking the time to listen with an  
4 extended deliberative process, but thank you for  
5 responding positively to the field with your revisions  
6 and this resulting rule. I am sure you're going to  
7 find that the results are going to be well worth it.

8 CHAIRMAN KECKLER: Thank you, Ms. Murphy, and  
9 thank you, Ms. Wood.

10 As you say, the process for amending the  
11 regulation as we have it is a little bit cumbersome  
12 right now. So I won't ask staff to do that, but I  
13 understand that you have, with regard to incubator  
14 projects, some suggested text that I'd hope that  
15 Management will be able to examine prior to the Board  
16 meeting.

17 MR. FLAGG: Yes. My suggestion would be that  
18 the Committee vote on the preamble and the final rule  
19 as before you, with the amendment on page 18 of the  
20 words "additional service areas" rather than "another  
21 service area," and that we'll work with the ABA to come  
22 up with some language to address what I believe are

1 simply technical issues and don't alter the intent of  
2 the reg or the Committee, and in any event, would have  
3 that for your consideration at the Board meeting so you  
4 could at that time amend the rule further to  
5 incorporate those technical changes.

6 CHAIRMAN KECKLER: That's agreeable, and I  
7 think that it would be suitable for us to discuss it  
8 with that caveat, that we may be carrying our some  
9 technical changes to the definition of incubator  
10 project when it's presented to the Board.

11 With that, I'll open it up for discussion.

12 (No response.)

13 CHAIRMAN KECKLER: Is there a motion to  
14 approve our recommendation of this final rule to the  
15 Board?

16 M O T I O N

17 MR. GREY: So moved.

18 MS. MIKVA: Second.

19 CHAIRMAN KECKLER: All in favor?

20 (A chorus of ayes.)

21 CHAIRMAN KECKLER: Opposed?

22 (No response.)

1           CHAIRMAN KECKLER: The motion is approved, and  
2 this rule, the final rule with the caveats noted and  
3 the amendment, will be recommended for approval by the  
4 Board. Thank you to all.

5           With that, we can now turn to any other public  
6 comment on any other matter that has come before the  
7 Committee.

8           (No response.)

9           CHAIRMAN KECKLER: Hearing none, is there a  
10 motion to consider other business? Robert?

11           MR. GREY: Charles, this is not on the agenda.  
12 This is just a thought of a fellow Board member, that  
13 we don't dive as deep into things like we've done with  
14 this often.

15           And I think it takes real guidance, concern,  
16 commitment, understanding, to arrive at a position, as  
17 others in the community have observed, that brings  
18 consensus to a very important aspect of the work that  
19 we do.

20           You've done a terrific job giving us guidance,  
21 and I don't want that to be overlooked by us. So  
22 that's my new business.



1           CHAIRMAN KECKLER: This business is approved.

2       Thank you very much, Robert.

3           (Laughter.)

4           CHAIRMAN KECKLER: If there is no other  
5 business -- and if this is the sort of other business,  
6 I'm open to any other of that sort -- then I will  
7 consider a motion to adjourn this meeting.

8                           M O T I O N

9           MR. GREY: Moved.

10          MS. MIKVA: Second.

11          CHAIRMAN KECKLER: All in favor?

12          (A chorus of ayes.)

13          CHAIRMAN KECKLER: The Committee is adjourned.

14       Thank you.

15               (Whereupon, at 5:32 p.m., the Committee was  
16 adjourned.)

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