

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE MEETING
AND
PROVISION FOR THE DELIVERY OF LEGAL SERVICES COMMITTEE
JOINT MEETING

Open Session

Friday, September 8, 1995
9:30 a.m.

Legal Services Corporation
750 First Street, N.E., 11th Floor
THE BOARD ROOM
Washington, D.C. 20002

BOARD MEMBERS PRESENT:

LaVeeda Morgan Battle, Chairperson
Hulett "Bucky" Askew
John F. Brooks
F. Wm. McCalpin
Maria Luisa Mercado
Nancy Hardin Rogers
Ernestine P. Watlington
Edna Fairbanks-Williams

STAFF MEMBERS PRESENT:

Alexander D. Forger, President
Martha Bergmark, Vice President
Patricia D. Batie, Secretary
Victor Fortuno, General Counsel
Edouard Quatrevaux, Inspector General

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P R O C E E D I N G S

(9:30 a.m.)

1
2
3 CHAIR BATTLE: I'd like to welcome everyone here to
4 a joint meeting of the Operations and Regulations Committee
5 along with the Provisions Committee this morning.

6 We have the Chair of the Provisions Committee with
7 us, Bucky Askew. Along with him I think Nancy Rogers is
8 here. She's on a teleconference and will be joining us
9 shortly.

10 We also have with us a member of the Chair of the
11 Finance Committee, Maria Luisa Mercado. She just stepped
12 out, and she should be back shortly.

13 And we have all of the members of the Operations
14 and Regulations Committee with us today, Mr. John Brooks,
15 Bill McCalpin, who is also on a teleconference and will be
16 joining us shortly, and Ernestine Watlington.

17 So I'd like to welcome all of the Board members who
18 are here today with us and those who will join us shortly.

19 We have before us an agenda for this joint meeting,
20 and we may move things around a bit depending on how time
21 works. If we could first -- I would entertain a motion to
22 approve the agenda as written.

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1 CHAIR BATTLE: Okay.

2 MR. BROOKS: But is that a motion to approve the
3 agenda?

4 MS. WATLINGTON: I'll move to approve the agenda.

5 MR. BROOKS: I'll second that.

6 CHAIR BATTLE: Okay. It has been properly moved
7 and seconded that we approve the agenda with the caveat that
8 I've provided. All in favor?

9 (A chorus of ayes.)

10 CHAIR BATTLE: All opposed?

11 (No response.)

12 CHAIR BATTLE: Motion carries. Next on the agenda
13 we have approval of the May 11, 1995, Operations and
14 Regulations Committee Meeting Minutes. Are there any
15 objections to the minutes?

16 (No response.)

17 CHAIR BATTLE: We also have approval of the March
18 17, 1995, Joint Operations and Regulations and Provisions
19 Committee Meetings, the minutes, and I think all of the
20 members were provided copies of the minutes before today.
21 You've had a chance to review them. Are there any additions,
22 deletions or changes to the minutes?

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M O T I O N

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MR. ASKEW: I move their approval.

CHAIR BATTLE: Okay.

MR. BROOKS: Second.

CHAIR BATTLE: Seconded. Minutes are approved.

Now, do we need to approve the Provisions Committee --

MR. ASKEW: We'll do that in the Provisions Committee Meeting tomorrow.

CHAIR BATTLE: Okay. That's fine. So we now, then, move on to the timekeeping regulation proposal. As all of the members of the Committee recall, when we met in June, we passed a resolution really directing -- as a board directing this committee to look at four issues, and timekeeping was one of them.

So we've had an opportunity for the staff to put together a draft reg for us to review. I believe there are three people that are going to come to the table for us today to give us some insight as to the proposal that we have before us.

We have Laurie Tarantowicz from the General Counsel's Office. We have Reginald Haley from OPS, and we have Gerry Singsen.

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1 MR. SINGSEN: I'm from the Office of Program
2 Evaluation Analysis and Review.

3 CHAIR BATTLE: Okay.

4 MR. SINGSEN: Good morning. If it suits you, I'd
5 make just a very brief beginning statement.

6 CHAIR BATTLE: Okay.

7 MR. SINGSEN: You have before you the draft
8 regulation, including a draft that's a revision from the
9 draft that was sent to you several days ago.

10 The regulation is pursuant to the resolution that
11 you passed in June. It sets forth a requirement that
12 attorneys and paralegals keep track of all their time on
13 cases, which are anything to do for a client; matters, which
14 are other programmatic activity. Community legal education
15 might be an example of such other programmatic activity, and
16 other activities, "activity" being the third type of thing
17 that you spend time on.

18 There you might include fundraising activities,
19 training, professional activities, administrative and general
20 time.

21 All of the time, both LSC-funded and nonLSC-funded
22 is to be accounted for by the attorneys and paralegals. The

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1 use of the time records is to provide documentation for the
2 allocation of the expense of their salaries, their benefits,
3 their overhead to the LSC fund, to nonLSC fund sources and to
4 allow the Corporation in its monitoring functions, the
5 auditors in their examination of financial transactions, the
6 Inspector General in the review of program activities, if
7 there is investigation or an examination of an audit.

8 In all of those circumstances, the presence of time
9 records should increase our ability to determine how funds
10 were used.

11 The regulation is quite straightforward. It is
12 fully within the terms of the Rogers bill, the House
13 Appropriations Subcommittee bill and the McCollum bill, both
14 of which are pending bills.

15 Both the Gekas bill in the House Judiciary
16 Subcommittee and the Gramm or Hatfield substitute from the
17 Senate Appropriations Subcommittee have a design for a block
18 grant system which goes -- all the money goes to local, to
19 states and then is distributed by contract to private
20 attorneys, essentially, although there is some elements of
21 the plan which are a little hazy to us at the moment.

22 All those private attorneys could be required to

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1 keep time records, but the system is too different that while
2 I think, in fact, what we've designed here covers it. We
3 wouldn't be here to impose a regulation on those attorneys.

4 CHAIR BATTLE: I was about to say, to the extent
5 that the block grant is an issue to be considered by
6 Congress, at this point my understanding is that we would not
7 be an entity in a position to do any regulation --

8 MR. SINGSEN: That's my understanding.

9 CHAIR BATTLE: -- so it's really not relevant to
10 our discussion.

11 MR. SINGSEN: Now, let me explain and then turn
12 over Ms. Tarantowicz the next little piece of the beginning.
13 Mr. Haley, who works in the Office of Program Services, has
14 been in touch with many of our recipients, those who were in
15 our timekeeping demonstration project a couple of years ago
16 and have been imposing and using time records more recently
17 as well as other recipients who have had time records for all
18 their time on their own and from before the demonstration
19 project and is here as a resource should that be a relevant
20 area that we need to explore.

21 And Ms. Tarantowicz from the General Counsel's
22 Office is the person who has actually put this regulation

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1 together, accommodated all of our suggestions about changes,
2 but I do need to say that we've done this quite recently in
3 terms of actually putting the draft together, and the comment
4 internally, for example, we haven't had the benefit of the
5 Inspector General's comment yet, and there may be some
6 comments certainly with this draft.

7 Our intention is, our hope is that we'll be able to
8 adopt the draft today, publish it next week, have comment
9 period for 30 days and during that comment period also take a
10 further look ourselves so that by early November we can have
11 a regulation draft or propose final adoption at the board
12 meeting in November that would be in place by December 31.
13 Laurie, do you want to talk a little bit about the content of
14 the reg or at least how it's structured?

15 MS. TARANTOWIZC: Certainly. Good morning. I'd
16 just like to give you a brief overview of the regulation just
17 by section.

18 The first section, of course, sets out the purpose,
19 as most of our regulations do, which is, basically, to
20 improve accountability, and then it attempts to set out the
21 manner in which that purpose is achieved by the regulation.

22 The second section is a definitions section which

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1 merely defines cases, matters and activities which are the
2 components by which recipients must keep time or their
3 attorneys and paralegals at least.

4 The third section is the timekeeping requirement
5 itself. It's intended to require all recipients to account
6 for the time spent by their attorneys and paralegals on all
7 cases, matters and activities. And that applies whether
8 funded by the Corporation or other sources.

9 Finally, this section has a -- I'm sorry. This
10 section has an administrative provision which merely sets out
11 the access by the Corporation and its representatives and
12 auditors to inform recipients that we will require access and
13 to admonish them to keep their records in a manner consistent
14 with their professional responsibilities.

15 And then finally, the effective date of the
16 regulation, which is January 1, '96.

17 MR. SINGSEN: That's our initial presentation.

18 CHAIR BATTLE: Okay. From Mr. Haley, were we going
19 to get any insight into the demonstration project or some
20 work that has been done in the area before we start?

21 MR. HALEY: Approximately two years ago, the Legal
22 Services Corporation could initiate a demonstration project

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1 in which we received proposals from our Legal Services
2 programs totaling about 30.

3 Of those 30, approximately 18 were awarded.
4 Approximately \$300,000 was used to grant those awards. The
5 purpose of those awards were to give programs the opportunity
6 to design timekeeping systems for themselves as well as
7 establish models from which other Legal Services programs
8 could learn about timekeeping systems for themselves.

9 Basically, what we've learned from the
10 demonstration project is, number one, it has been successful.
11 The objectives that were outlined in the proposals have been
12 met, and by the end of the grant term we anticipate that all
13 the projects will be fully activated.

14 Second, two automated systems that were designed
15 in-house by our Legal Services programs in New York are
16 available free of charge to all the Legal Services programs,
17 if they choose to use them.

18 Third, the systems that have been developed through
19 the demonstration project for the most part respond to the
20 requirements that are being required by Congress, and for
21 those few that don't, they only require minimum
22 modifications.

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1 CHAIR BATTLE: Okay.

2 MR. HALEY: I have something else.

3 CHAIR BATTLE: Okay.

4 MR. HALEY: Second, the Corporation has been in
5 touch with other Legal Services programs that weren't
6 involved with the demonstration project, and the purpose of
7 that was simply to gain insight from those programs that have
8 been involved for a long period of time so that we could,
9 essentially, broaden the pool of information for other Legal
10 Services programs to draw from.

11 What we learned from that, from those programs that
12 have had systems in place for a long period of time is that a
13 lot of them actually use the system as an effective
14 management tool.

15 Other programs simply have timekeeping systems in
16 place so that they can respond to time and activities
17 associated with other funding sources and to also identify
18 the amount of time that has been devoted to user fee cases --
19 I'm sorry, fee-generating cases.

20 A third item that the Corporation is currently
21 involved in is contacting the actual software developers so
22 that we get an idea of the actual timekeeping applications

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1 that are available so that we can help Legal Services
2 programs decide objectively the type of systems that would
3 best suit the needs for their program.

4 Finally, the Legal Services Corporation will
5 generate a comprehensive report which identifies the systems
6 that are available at Legal Services programs, identify the
7 particular needs of the reporting requirements that are
8 necessary from any timekeeping system that is developed and
9 also provide objective information on timekeeping systems so
10 that they can select the best system for their particular
11 program.

12 CHAIR BATTLE: Okay. Mr. Haley, I think you
13 mentioned initially that your assessment was that the
14 demonstration project was a success. What were the measures
15 that you looked at to determine success?

16 MR. HALEY: There are a number of measures. One
17 measure was to have Legal Services programs identify how they
18 would actually use the timekeeping systems as an information
19 tool for increasing the efficiency of operations at the Legal
20 Services program.

21 A second measurement was to assess whether or not
22 the timekeeping model that was proposed could be used as

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1 models, replicated as models at other Legal Services
2 programs, and the third item, of course, was to make sure
3 that we had a diverse group of Legal Services programs so
4 that we could design models that would pretty much represent
5 the diversity of the Legal Services structure.

6 CHAIR BATTLE: Okay. Were there other questions?
7 Ernestine?

8 MS. WATLINGTON: These programs were given
9 additional monies to be in this demonstration program for
10 timekeeping. Are there programs that will now have to come
11 on line to do timekeeping and do not get extra money?

12 Will this provide that they, you know, will need
13 extra money or need additional staff in order to -- the time
14 it would take to do these type keeping records?

15 MR. SINGSEN: Maybe I could respond to that. We've
16 noted in the preamble that there is no question that
17 implementing timekeeping is going to have costs for our
18 recipients.

19 Obviously, at this moment we don't have money to
20 help them with those costs, but the judgment of, I think, the
21 Board when it passed the resolution in June, and the
22 management is that we do need to go ahead on timekeeping in

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1 any event.

2 We won't have any funds available for those who
3 would like to go to an automated system but don't have the
4 current computer capacity. We won't have funds, certainly,
5 to buy the one write systems or the time slip systems or the
6 hand systems. This will be an expense.

7 The largest expense is actually the time that goes
8 into the development of the individual notations by quarter
9 hour, tenth of an hour, whatever the system is that's used,
10 record against -- including information on each case as the
11 work goes forward.

12 And it may very well be that the total costs -- in
13 the past I worked on this question -- suggested that the
14 costs might be 2 or 3 percent of the productive capacity of
15 an organization. Whether it's 5 minutes, 10 minutes, 15
16 minutes a day, that's the kind of percentages that develop
17 when you think about it.

18 So that there will be a real loss in services but a
19 gain in accountability both within our system and to the
20 Congress in our ability to assure the Congress that the time
21 is being spent by case handlers on cases and matters and
22 activities which are appropriate.

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1 CHAIR BATTLE: Bucky and then Maria.

2 MR. ASKEW: The report you talked about, Reggie,
3 will that be available in time for the beginning of the year,
4 assuming this regulation is adopted, so the programs would
5 have the benefit of that before they have to move to adopt a
6 system?

7 MR. HALEY: We estimate that the report will be
8 generated within the next 30 working days.

9 CHAIR BATTLE: Oh, great.

10 MR. ASKEW: Okay.

11 CHAIR BATTLE: So you anticipate that that report
12 will be actually completed before this regulation potentially
13 becomes final so we'll have a chance to review it in
14 relationship to the final regulation?

15 MR. SINGSEN: Like so much else, everything is
16 going to have to be done faster. If this is going to be
17 effective January 1, programs are going to have to make their
18 decisions and implement their decisions by January 1.

19 They're going to have to start keeping track of
20 time, and that's means they're going to have to decide what
21 they're going to use in at least December, which means we'd
22 better give them the advice by November. Otherwise, it's

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1 going to be a little late.

2 CHAIR BATTLE: That makes sense. Maria?

3 MS. MERCADO: Actually, some of my questions have
4 been answered already. So I'll yield my time back to you.

5 CHAIR BATTLE: Okay. All right. Okay. I'm sorry.
6 John?

7 MR. BROOKS: Well, I have a question about whether
8 the demonstration projects or other investigation disclosed
9 any problem about overlap of work in accounting.

10 Very often a staff member can be working on a
11 particular effort which will relate to more than one case,
12 more than one matter, and that is always difficult in
13 timekeeping, how to allocate time spent on more than one
14 project simultaneously.

15 I guess my question is two parts. One is did the
16 investigation disclose any problem in this regard? And
17 secondly, should the regulation give any assistance as to
18 methods of allocation of that kind of work?

19 MR. HALEY: Well, the short answer to whether or
20 not any problems have been disclosed in our investigation is
21 no.

22 When the timekeeping proposals were actually

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1 developed by Legal Services programs, they built into it the
2 need for training and the need for getting staff prepared to
3 actually use timekeeping.

4 So they have systems in place which prevent any
5 overlapping of work in terms of recording time, aggregating
6 time and generating information reports from the timekeeping
7 system.

8 CHAIR BATTLE: If I understood part of what John's
9 question is, for example, if a lawyer is doing research on --
10 let's just take an employment issue -- and a recent case
11 comes out which affects employment issues and it possibly
12 effects five different cases that are pending that this
13 lawyer is working on, when that lawyer reads this case and
14 analyzes it for its application to cases, how does the lawyer
15 account for that time spent reading that case?

16 Does allocate some portion of it to all five files,
17 or does he allocate it to professional development? Is that
18 part of what you're asking?

19 MR. BROOKS: Yes. And if it's an hour's work, is
20 it divided on five different cases which have a common
21 problem? Do you divide the hour by five? Do you charge each
22 one for an hour?

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1 MR. HALEY: I understand.

2 MR. SINGSEN: I would note that that's more of a
3 concern in the billing practice than in the Legal Services
4 practice, the possibility of billing the hour to each of the
5 five clients.

6 MR. ASKEW: Well, the private sector model would be
7 to bill all five --

8 MR. BROOKS: Unless you get different funding
9 sources. That's where it would be material, it seems to me.

10 MR. SINGSEN: Let me speak to that, if I might,
11 because I gather that the demonstration project itself didn't
12 develop material related to that question. Is that right?

13 MR. HALEY: That is right.

14 MR. SINGSEN: There are, in accounting, techniques
15 for dealing with this, and you've actually mentioned a couple
16 of the possibilities.

17 And the way this regulation is designed our
18 grantees would be able to consult with their accountants and
19 allocate the costs among -- the time among cases in one of
20 several ways.

21 We haven't attempted to pin down a specific answer
22 to each question of that kind. Another simple example would

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1 be a case acceptance meeting where six people sat and talked
2 about types of cases and then talked about specific cases.

3 Certainly, it could be allocated to administrative
4 in general, but I would certainly hope that they would
5 develop a timekeeping system in which they allocated that
6 time to cases, because those are cases that are being
7 discussed in the meeting.

8 It might very well be that they'd use a system like
9 an indirect cost pool where they would gather the time and
10 then allocated to all of the cases that were discussed in
11 portions so that the possibility you mentioned would be
12 followed through.

13 Automated systems could do that easily. Manual
14 systems which would have manual entry by a clerk would,
15 obviously, be a more cumbersome -- would have a more
16 cumbersome time dealing with that problem.

17 But they will have to have an answer to that
18 question. They will have to say what their answer is in
19 their system, and their auditors will be able to examine
20 whether they have followed through on the system in the way
21 that they've designed it. We've not attempted to answer that
22 level of question in this regulation.

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1 MR. BROOKS: Well, I just wonder if it would be
2 helpful to have something in the commentary alluding to the
3 problem giving some guidance, probably not in the regulation
4 itself, but we sometimes good the program a little hint as to
5 what the problems are and how they could go about solving it.

6 CHAIR BATTLE: And in that regard, I believe, John,
7 on page 3, when the 1635.2 just, kind of, says these three
8 things are defined, it may be helpful for the commentary to
9 really give examples of what a case is, what a matter is,
10 what activities are, how broad activities are and how one may
11 account for time spent, if there is an overlap, which is the
12 issue that you're raising.

13 MR. SINGSEN: Let me make one suggestion. I think
14 that the kind of information and guidance that Mr. Brooks is
15 describing might better be in the manual on timekeeping
16 systems than in the regulatory commentary where it would take
17 on a much more directive meaning.

18 I think that different systems will have different
19 tools for dealing with this, and it would be better to deal
20 with it in the context where they'll actually be making
21 practical decisions about their systems.

22 Now, if that's consistent with the thought you've

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1 got, I would propose that we deal with it in the manual as
2 opposed to in the commentary here.

3 MR. BROOKS: Well, I think that makes good sense as
4 long as it is available to the programs --

5 MR. SINGSEN: Yes.

6 MR. BROOKS: -- what thinking has gone into it at
7 this level. It would of great help to the programs.

8 CHAIR BATTLE: I agree. I think there are two
9 things. One, the overlap issue is one that probably needs to
10 be dealt with in the manual. An example of what each of
11 these three things are probably would be helpful in the
12 comments. So I think we would divide it up probably that
13 way. Maria?

14 MS. MERCADO: You were talking about either a
15 manual tracking of time or an automated tracking of time. In
16 programs that -- the 18 grants, I guess grantees that you
17 reviewed, the accounting, assuming that it was all done
18 proportionately, you spent about \$17,000 on each program
19 doing the timekeeping. Was that -- on the average.

20 Was that for the software or for the time personnel
21 to input this information?

22 MR. HALEY: Generally, that amount of money would

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1 include a number of things. It would include upgrades to
2 equipment or hardware. It would also include time for
3 contractual services if a system is being custom designed.
4 It would also include the cost of software.

5 CHAIR BATTLE: So is it your view that particularly
6 if programs would like to consider automating their
7 timekeeping that that \$17,000 is a round figure as to what
8 one might expect it would cost depending on -- I guess it
9 really depends on what level their systems are and how
10 amenable a software package might be to their existing
11 system, how well it might work.

12 MR. HALEY: That's a good point, and it depends on
13 a number of factors. It depends on the existing state of
14 technology in the office that just mentioned.

15 It also depends on the type of system, the type of
16 automated system that they would choose to use. Some systems
17 require substantially more powerful equipment than others.

18 So depending on size of the operation, depending on
19 the type of software application that is elected and, of
20 course, depending on the type of equipment required to run
21 the software would all have an impact on the total cost of
22 implement timekeeping for a particular program.

1 CHAIR BATTLE: Okay. And I'm assuming that the
2 manual will then speak to different levels so that programs
3 can look at what their financial situations are and then pare
4 that up with what --

5 MR. HALEY: It certainly will.

6 CHAIR BATTLE: -- what kinds of programs are
7 available.

8 MR. HALEY: It certainly will. And not to cut you
9 off, but sometimes a manual/automated system, if you will,
10 is, perhaps, preferable for Legal Services programs because
11 of the flexibility. It comes with the option of using manual
12 type slips for attorneys and then having those manual type
13 slips aggregated into an automated program and having
14 information reports generated from that.

15 CHAIR BATTLE: Okay. Are we comfortable now moving
16 to the specifics of the actual regulation? Are there any
17 other questions about the philosophy behind timekeeping or
18 what its implementation might entail?

19 (No response.)

20 CHAIR BATTLE: We've been joined by Nancy Rogers
21 and by Bill McCalpin, who seem to have finished their
22 teleconference.

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1 Our discussion has so far just been on the
2 timekeeping requirement regulation, and we've gotten some
3 background about the demonstration project and about this
4 particular regulation, and we're about to go into the
5 substance of it.

6 This is a very short reg. Our usually procedure,
7 bear with us, members of the Provisions Committee, has been
8 to go line by line, because we're real concerned about
9 assuring that the language that we use in our proposed
10 regulations say exactly what we intend them to say. So we'll
11 do that very briefly as we go through timekeeping here.

12 The first section is 1635.1, the Purpose section.
13 And it reads, "This part is intended to improve recipient
14 accountability for the use of funds provided by the
15 Corporation by:

16 "(a) assuring that allocations of expenditures to
17 the Corporation funds pursuant to 45 C.F.R. Part 1630 are
18 supported by accurate and contemporaneous records of the
19 cases, matters and activities for which the funds have been
20 expended;

21 "(b) enhancing the ability of recipients to
22 determine the cost of specific functions; and

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1 "(c) increasing the information available to the
2 Corporation for assuring recipient compliance with federal
3 law and Corporation rules and regulations."

4 Are there any questions about the Purpose?

5 (No response.)

6 CHAIR BATTLE: Hearing none, let's move on to
7 Definitions. You should have two actual -- let me just say
8 there are two copies of 1635.

9 One is a redline copy, and the other is a clean
10 copy. Those two should be right before you provided as
11 result of a discussion that I had yesterday evening with
12 members of the staff about some concerns that I had on the
13 timekeeping reg.

14 So if you'll take the redline copy, we can read
15 through it, and you'll see the difference between that and
16 what you may have received in the mail earlier this week.
17 You will find the actual regulation on page 5 of the redline
18 copy.

19 Section 1635.2, Definitions. "As used in this
20 part, 'Activity' means administrative and general efforts and
21 fundraising efforts which are not cases or matters."

22 There was some concern about whether professional

1 responsibility type activities would be subsumed under
2 "activity," and if they are, whether there should be some
3 mention as to how they ought to be accounted for, whether
4 they should be either in the definition or in the comment
5 when we talk about examples of what an activity might be.

6 Because really, as I understand it, "activity" is
7 almost a catch-all for anything that is not a case or a
8 matter, that is direct services to clients.

9 And we may need to either hear in this definition
10 -- make it clear that "activity" is a catch-all which can
11 have many other subsections to it, or we may need to put
12 something in the commentary that clarifies that point.

13 MR. SINGSEN: I am, as you know, not as familiar
14 with the procedures of this Committee as I, perhaps, should
15 be. Do you want to discuss specific language at this point?

16 CHAIR BATTLE: Yes. Yes.

17 MR. SINGSEN: Or do you want us to -- all right.
18 Well, then, I would certainly have a suggestion for a way to
19 make it clearer in the commentary.

20 CHAIR BATTLE: Okay. Can you tell us your
21 suggestion?

22 MR. SINGSEN: If you look at the commentary on

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1 Section 1635.2, which now has two sentences, the proposal I
2 would make is that we add a third sentence that would read,
3 "'Administration and General' is a catch-all category
4 designed to encompass all other activities which are not
5 cases, matters or fundraising, such as skills training and
6 professional activity" -- I think I misspoke -- "and
7 professional activities."

8 CHAIR BATTLE: Okay.

9 MR. SINGSEN: And we can obviously have this typed
10 up for you later today.

11 CHAIR BATTLE: Okay.

12 MR. SINGSEN: We were just thinking about it this
13 morning.

14 CHAIR BATTLE: Did you need to hear that again?
15 Okay. Could you go back through that again?

16 MR. SINGSEN: In quotes the phrase, "Administration
17 and General," which you'll remember is the phrase in the
18 "Activities" definition that we have in the text of the
19 regulation itself -- "'Administration and General' is a
20 catch-all category designed to encompass all other activities
21 which are not cases, matters or fundraising, such as" --

22 MR. McCALPIN: Wait a minute, which are not --

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1 MR. SINGSEN: "Cases, matters or fundraising, such
2 as skills training and professional activities." We could
3 probably expand that list.

4 The point is these are activities that aren't a
5 case. They aren't a matter, and they are not in the category
6 of fundraising, which, for accounting purposes, is generally
7 accounted for or reported separately from administrative and
8 general activities. So that's the reason for these
9 distinctions.

10 CHAIR BATTLE: Bill.

11 MR. McCALPIN: Well, if you go back to the last
12 sentence as typed, we say, "The definitions are formulated so
13 as to cover all activities." So "case," "matter" and
14 "activity" covers all activities, and then we define
15 "activity" in 1635.2(a) to mean administrative and general.
16 It seems to me --

17 MR. SINGSEN: And fundraising.

18 MR. McCALPIN: It seems to me we're, kind of,
19 circular here when we say, "These definitions, 'case,'
20 'matter' and 'activity,' are designed to cover activities,
21 and then we define "activities."

22 MR. SINGSEN: The word "activity" does appear both

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1 places, and perhaps we should find some other word. I think
2 it's actually linear, not circular; that is, the definition
3 of "activity" has both administrative and general and
4 fundraising.

5 And now what we're trying to do is make it clear
6 that administrative and general is the catch-all category at
7 the end of the line.

8 MR. MCCALPIN: That's right. My problem is that
9 the word "activities" in the last full line is intended --
10 apparently covers case, matter and activity.

11 CHAIR BATTLE: Right. And we just probably need to
12 find another term, it seems to me, rather than using the word
13 "activity," since it has a specific meaning in the context of
14 this regulation.

15 MR. MCCALPIN: I also wonder if we can find another
16 word for "efforts" in sub A. Is "effort" the right word to
17 get what we were looking for? I certainly wouldn't hold up
18 publication over that, but I do think that --

19 CHAIR BATTLE: Look at another term?

20 MR. MCCALPIN: We might think about another word.

21 CHAIR BATTLE: Okay. We have now been joined by
22 our president, Alex Forger, and vice president Martha

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1 Bergmark.

2 MR. FORGER: Good morning.

3 CHAIR BATTLE: Good morning.

4 MR. FORGER: Have you finished your regs?

5 CHAIR BATTLE: We're keeping time on time right
6 now. We're into the actual regulation right now.

7 MR. SINGSEN: As to the word "activity," in the
8 comment in the second sentence, if we don't have an immediate
9 reaction as to an alternate word to place there, because,
10 obviously, it is the problem of the larger and the smaller,
11 if the Committee gives us the discretion, we will certainly
12 find a substitute word before we publish it.

13 MS. MERCADO: That's what I was trying to think,
14 maybe functions or --

15 CHAIR BATTLE: Get out a thesaurus. We'll find
16 something. We'll find something, but I think your point,
17 Bill, is well-taken, that if we're going to define "activity"
18 to be a term of art for purposes of this regulation that we
19 don't need to use it in any other context, or it will be
20 confusing.

21 Okay. We move on, then, to subsection B in 1635.2.
22 "'Case' means the provision of advice or representation to

1 one or more clients.

2 "(c) 'Matter' means the provides of program
3 services that do not involve the advice or representation of
4 one or more clients."

5 My suggestion, I guess, follows here that we need
6 to give examples to distinguish particularly what program
7 service might be -- so that one can distinguish that from
8 advice or representation to a client.

9 MR. McCALPIN: Wouldn't you do that in the
10 comments?

11 CHAIR BATTLE: Yes, in the comment, in the
12 comments. So what we'll do in the comments is give a further
13 example or illumination of all three -- activity, case and
14 matter. And with "case" and "matter" I think we should give
15 some examples which will distinguish "case" from "matter" for
16 people. John?

17 MR. BROOKS: Well, just that "b" I think that we
18 need to polish it a little bit. I think it should say,
19 "'Case' means the provision of advice to or representation of
20 one or more clients."

21 CHAIR BATTLE: Okay. Any other questions? Gerry,
22 did you have something?

1 MR. SINGSEN: No. I think we'll need to -- I mean,
2 the example of a matter which easily comes to mind is
3 community legal education, which is a clear programmatic
4 activity.

5 We can, if you'd like, write -- I mean, the
6 definition of a "case" with examples, we certainly could
7 write something that said, "For example, when a recipient
8 represents a client seeking a divorce, that's a case," but
9 that one strikes me as pretty self-evident in the definition
10 that we have. So "matter" is the one that --

11 CHAIR BATTLE: "Matter" is the one that needs some
12 illumination, probably much more than "case." I think you're
13 right.

14 MR. SINGSEN: And we could certainly put in the
15 commentary a reference to community legal education, and we
16 can think about what other kinds of matters might arise.

17 The phrases "cases" and "matters" appear in the
18 Rogers bill and in the McCollum bill. So we have chosen a
19 definition here which pays attention to those two phrases,
20 those two words, in order to have parallelism with the
21 proposals in that legislation.

22 CHAIR BATTLE: Okay. 1635.3, Timekeeping

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1 Requirement, subsection (a):

2 "All expenditures of funds are, by definition, for
3 case, matters or activities. The allocation of all expenses
4 must be carried out in accordance with 45 C.F.R. Part 1630."

5 Subsection (b), "The direct or indirect time of
6 attorneys and paralegals must be documented by time records
7 which record the amount of time spent on each case, matter or
8 activity."

9 MR. McCALPIN: What is the indirect time of an
10 attorney?

11 MR. SINGSEN: That's the time, in accounting terms,
12 under 1630, which is not spent on a specific identifiable
13 activity but is, nevertheless, time the program pays for. An
14 example would be --

15 MR. McCALPIN: Show me that in 1630. Where is it?

16 MR. SINGSEN: I actually don't have 1630, but --

17 MR. McCALPIN: Here it is.

18 MR. SINGSEN: It will probably take me a moment,
19 Bill.

20 MR. FORGER: Your example while you're looking?

21 MR. SINGSEN: Sure. An example would be a group of
22 members of the staff get together to talk about personnel

1 policies, and depending upon what they were discussing or go
2 to the -- or somebody goes to the bathroom. These are time
3 that you pay for in the program.

4 They are not directly charged to a specific case or
5 matter. In that case, they would probably go into the cost -
6 - you know, the costs are allocated to the time, and they
7 will go into the catch-all of administrative in general. MR.
8 MCCALPIN: Well, that's right. Isn't it administrative time?
9 And if it's administrative time, isn't it direct?

10 MR. SINGSEN: In 1630, where you're concerned about
11 the allocation of expenditures to funds, the indirect time is
12 the time which is not allocated to a fund by the definition
13 of the activity.

14 Now, a case which is being handled under the LSC
15 fund is easy. A community legal education project funded by
16 the bar would be easy. There would be an explicit fund
17 source.

18 But that group of people talking about personnel
19 policies, while it's an administrative or general activity
20 for the record-keeping of expenditure for the allocation
21 under 1630, it's an indirect cost that goes into a
22 generalized category and is allocated among the funds often

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1 by reference to the amount of direct funds that have been
2 allocated.

3 MR. MCCALPIN: Well, it may very well be that
4 program personnel are less obtuse than I am, but it would
5 seem to me that the mere reference to 45 C.F.R. Part 1630 is
6 not a significant explanation of what you mean by "indirect
7 time."

8 CHAIR BATTLE: Is the lunch hour an indirect time
9 example?

10 MS. MERCADO: No, because you don't get paid for
11 lunch.

12 MR. FORGER: No, but you can go to the bathroom on
13 LSC time, but you can't eat. Right?

14 (Laughter)

15 MR. MCCALPIN: I'm sorry I wasn't here when you did
16 the commentary on this. I don't know whether there is
17 something in the commentary --

18 MS. MERCADO: No. We haven't done commentary yet.
19 We didn't go line by line through the commentary. It was
20 explained to us by Laurie. She just, kind of, went by
21 section by section.

22 MR. MCCALPIN: Well, I don't know whether my

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1 confusion about indirect time of an attorney, I don't know
2 that I ever spent indirect time when I was practicing law.

3 It's an unusual phrase to me, and as I say, maybe
4 the people in the programs understand it better than I do.
5 For me, the simple reference in the preceding line to Part
6 1630 was not an explanation.

7 MR. SINGSEN: You did in private practice spend
8 indirect time.

9 MR. McCALPIN: I never charged indirect time.

10 MR. SINGSEN: Who paid for the partners' meetings?

11 MR. McCALPIN: Who paid for what?

12 MR. SINGSEN: The partners' meetings.

13 MR. McCALPIN: Nobody.

14 MR. SINGSEN: No. You built it into the time --
15 the cost of the hours you billed to your clients?

16 MR. McCALPIN: No. Well, I don't know. I doubt
17 it.

18 MR. SINGSEN: You do. You have to.

19 MR. McCALPIN: We weren't that sophisticated.

20 MR. FORGER: How about CLE?

21 MR. SINGSEN: CLE is certainly a cost which, in a
22 private practice, you would end up paying for because it

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1 would be coming out of what would otherwise be profits which
2 have been generated by billing at a rate higher than just the
3 hours that you spent on the client work.

4 CHAIR BATTLE: Let me see if I can help with that
5 discussion. If I understand Bill's concern and I'm an
6 attorney working in a program and I read 1635(3)(b), the
7 question in my mind is how do I discern indirect time, and
8 what is it so that I'll know how to bill or document it?

9 Because this regulation, basically, directs
10 attorneys and paralegals to document both their direct and
11 indirect time, and what I hear you saying is define or give
12 me some guidance as to what indirect time is so that I'll
13 know how to account for it.

14 MR. McCALPIN: Well, I know direct time. That's
15 easy. But indirect time I don't understand.

16 MR. SINGSEN: I think, probably, this is simply a
17 complexity that isn't necessary in the reg, that we can say
18 since we've required the allocation of all time, the
19 reporting of all time and we continue, as we always have, to
20 require the allocation of expenditures in 1630 and the time
21 records here are going to be used as the documentation in
22 support of allocations in 1630 --

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1 CHAIR BATTLE: Can we amend it just to say "the
2 time"?

3 MR. SINGSEN: Yes, I think we could.

4 MS. MERCADO: Then we're also going to have to --
5 aren't you also going to have to -- you had a question about
6 the 45 C.F.R. Part 1630 that if we refer to that, people want
7 to know what you're talking about. Does it mean we're also
8 deleting that?

9 MR. McCALPIN: Well, I just said -- from Gerry's
10 initial response to me, when he said indirect time is
11 explained and governed by 1630, I said the mere reference to
12 1630 didn't explain it to me.

13 MS. MERCADO: As I understand what Gerry is
14 attempting to do is to ensure somehow that time can be
15 allocated based on costs -- you know, that you can somehow
16 have some relationship between the time that is being spent
17 and the amount of money that you have to spend on different
18 activities, and that's the purpose of the quote relating to
19 1630, the allocation process.

20 But the lawyer who is doing the timekeeping is only
21 concerned about sitting there making sure that they know
22 which way to keep their time, and so, in my view, for

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1 purposes of this particular reg, we can eliminate direct or
2 indirect, speak only of time, and if there is an
3 interrelationship between Part 1630 and 1635 as it is now
4 being drafted, that interrelationship exists anyway. Is that
5 right?

6 MR. SINGSEN: I believe that's correct.

7 MR. McCALPIN: If "activity" becomes the umbrella
8 definition of "case" "matter" and whatever, why wouldn't you
9 simply say, "The activities of attorneys and paralegals must
10 be documented by time records"?

11 MR. SINGSEN: Well then, I think if you use the
12 definitions of "case" "matter" and "activity" in point 2 --

13 MR. McCALPIN: Well, I said if "activity" became
14 the umbrella which controlled "case" "matter" and whatever
15 else you're going to have, then you could use the over-
16 arching definition to say, "All activities must be documented
17 by time records."

18 MR. SINGSEN: We could. The flip of -- I thought
19 we were actually doing the flip in the earlier discussion,
20 that we were going to remove "activity" as the general term.
21 We'll only use it as the narrower term.

22 MR. McCALPIN: But then if you're going to use a

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1 general term, you could use it here and just simply say
2 anything a lawyer -- anything a lawyer or paralegal does in
3 and for the program must be documented by a time record.

4 MR. SINGSEN: I think that's actually what we've
5 got in the two sentences if we take out "direct" or
6 "indirect."

7 CHAIR BATTLE: Which really raises a question that
8 John mentioned to me to delineate "case" "matter" and
9 "activity" and to define it separately. It helps some, but
10 it really is activity.

11 It is whatever it is that the lawyer is doing that
12 must be accounted for, and how it's accounted for will really
13 come out of the manual that we send saying these are such
14 suggestions as to how you can account for it.

15 Now that we have -- it seems to me, Bill, now that
16 we have agreed to define "case," "matter" or "activity" that
17 it makes sense in this reg if that definition is here to say
18 the time has to be allocated based on those three.

19 And those are three broad definitions that over
20 time will be distilled and worked through different proposals
21 that we'll make to the programs as to how they can do it.

22 MS. MERCADO: Yes. LaVeeda, I was trying to

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1 recollect in my mind which of the proposed bills, I didn't
2 remember whether it was the McCollum bill or the Gekas bill,
3 that has language in the timekeeping provision that says that
4 no more than 1 percent of the attorneys time can be allocated
5 for so-called administrative or noncase work.

6 Maybe I read that wrong, but I think that that was
7 one of the things that I was real concerned about because
8 there is just no way that you can, you know, in a full day to
9 solely only 1 percent of your time on that.

10 Maybe I misread it, but I didn't know whether that
11 would affect what the time --

12 CHAIR BATTLE: That's a good point. Laurie, are
13 you familiar at least with the provisions of the bills?

14 MS. TARANTOWIZC: If it's the Gekas bill, we don't
15 have to worry about it because that's a block grant, and this
16 regulation will not have any bearing on it.

17 MR. SINGSEN: The Gekas bill has 2 percent
18 mentioned but none that are of that kind that I can remember.
19 One limits to 1 percent the amount of funds the Attorney
20 General uses for transition close-out of cases, and the other
21 limits to 5 percent, I believe, the amount each state can
22 spend on administrative matters of its own.

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1 But I don't remember provision like that in Gekas
2 or, of course, in Gramm, which is, essentially, the same,
3 although the percentage there is 3 percent for state
4 expenses.

5 And I don't remember that in McCollum, but that may
6 be where it is. I don't think it's in the Rogers bill
7 either. So it may have been in something that didn't get to
8 the actual presentation stage in earlier draft.

9 MS. MERCADO: Okay.

10 MR. SINGSEN: I don't recall that one.

11 MS. MERCADO: I just remember looking at that and
12 going my goodness, you know, how can we do anything else?
13 But it seemed to be directed at solely using LSC monies only
14 for case matter, which means that -- I don't know how you
15 were going to pay for the other things that you do, if it
16 wasn't specifically related to a case, and that was one of my
17 concerns.

18 MR. ASKEW: I think you're talking about Gekas and
19 the 1 percent that would be available to close out the
20 existing recipient, which would be a serious problem, but
21 that --

22 MS. MERCADO: Yeah. You're probably --

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1 MR. ASKEW: -- wasn't tied to time as much as
2 just --

3 MS. MERCADO: Just money allocated to that
4 category.

5 MR. ASKEW: Right.

6 MS. MERCADO: Okay.

7 CHAIR BATTLE: Okay. With that being clarified,
8 are there any other questions about subsection (b)? And if
9 not, we can move on to the remaining portion, I believe, of
10 the -- which reads,

11 "Time records must be created contemporaneously and must
12 account for time in relatively short increments, such as one-
13 quarter, one-sixth or one-tenth of an hour which aggregate to
14 all of the efforts of the attorney and paralegal."

15 MR. McCALPIN: "For which compensation is paid."

16 CHAIR BATTLE: Yeah, "for which compensation is
17 paid." We talked a little bit about and I have stricken on
18 my copy the "for which compensation is paid" language,
19 because really there is not a tie between time use and
20 compensation in that sense.

21 So it probably is not necessary for us to mention
22 compensation in the timekeeping regulation. So my

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1 recommendation was going to be that we strike "for which
2 compensation is paid" and somehow there indicate that this
3 has to do with efforts or activities of attorneys and
4 paralegals on behalf of the recipient.

5 MS. NEWSOME: I would be a little confused if I
6 were trying to record -- suppose you put in 10 extra hours
7 beyond the 40 hours of whatever you did and just wanted to
8 spend that time reading a book that might be relevant to a
9 case? Would you need to account for that, the hours that you
10 spend in the evening coming in and just reading?

11 CHAIR BATTLE: I think all time that you spend is
12 to be recorded. So yes. My concern was somehow confusing
13 the issue of the time you spend and your compensation.

14 So that if an attorney is working on a case and
15 he's spending 12 hours a day on that case that at some point
16 he doesn't look at this reg and say, "No. I haven't been
17 compensated for all my time that I spent on this, and this
18 reg seems to give me some leverage to raise that issue."

19 If you come in -- your question being if someone
20 comes in and they decide to read a book on welfare reform
21 because they're working on a case that has to do with welfare
22 reform, I think that they still account for that time.

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1 Now, the question becomes whether that's an
2 efficient or effective use of time, but if it's a program
3 activity, if what they're doing is reading that book in
4 connection with work that they're doing for the program, then
5 I think it should be accounted for.

6 MR. McCALPIN: Why don't you simply say, "during
7 the course of their employment"?

8 MR. FORGER: But you're still employed at night,
9 right?

10 MR. McCALPIN: Sure.

11 CHAIR BATTLE: Yeah.

12 MR. SINGSEN: Madam Chair?

13 CHAIR BATTLE: Yes.

14 MR. SINGSEN: After the discussion that you and I
15 had this morning, we did talk and have a thought about
16 something that might go in the commentary here, there is a
17 sentence in the commentary of 1635.3. It's the third
18 sentence in the first paragraph.

19 "Recipients must account for 100 percent of
20 attorney and paralegal time," and we might add to that
21 sentence, "spent on program business or during program
22 employment" --

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1 MR. McCALPIN: Or during the course of your
2 employment.

3 MR. SINGSEN: During the course of their
4 employment.

5 CHAIR BATTLE: Yeah, during the course of their
6 employment.

7 MR. SINGSEN: We thought an additional phrase might
8 deal with another concern which would, to continue the
9 sentence, "during the course of their employment even if the
10 time is spent outside normal business hours."

11 MS. MERCADO: Especially if you're in trial and
12 you're putting in 14, 15 hour days getting ready for stuff.
13 If you say -- if you limit it only to the category for which
14 you're paid, you're assuming that you're averaging a 40-hour
15 work week, which they're not doing a 40-hour work week, and
16 they're putting in all that time.

17 Somewhere that has to be that balance of time
18 that's put into for the program.

19 CHAIR BATTLE: Yeah. I think that the instructive
20 part about timekeeping is learning how much time it actually
21 takes to get things done, and in many instances what we will
22 learn from this process is that it does take more than 40

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1 hours. John?

2 MR. BROOKS: Two things in (b). I think we talked
3 about the word "efforts" before, and I think there could be a
4 better word in the next to last line of (b), a line or two
5 above, "must account for time in relatively short increments,
6 such as" -- it seems to me it would be more concisely drafted
7 if we said, "must account for time in increments not greater
8 than one-quarter of an hour."

9 MR. SINGSEN: And this is program's choice?

10 CHAIR BATTLE: Yes. Now, John, your suggestion is
11 that we take out in "In relatively short" and put in
12 "increments not greater than one hour --

13 MR. BROOKS: One-quarter of an hour.

14 CHAIR BATTLE: One-quarter of an hour.

15 MS. MERCADO: And take out the one-sixth and one-
16 tenth.

17 CHAIR BATTLE: Okay. All right. As you can see on
18 the redline draft, as discussion yesterday we decided to drop
19 "Other costs," because really the question became what other
20 costs are there?

21 As we go back and look at the intent of the bills
22 which mention timekeeping, there is no provision for

1 timekeeping for secretaries or other administrative staff.

2 So with that being the case, "other costs" is not
3 relevant. The only thing that we really need to accomplish
4 with this regulation is the keeping of time for paralegals
5 and for attorneys. So that we have stricken.

6 The final -- well, there are two other sections.
7 1635.4, Administrative Provisions.

8 "I'm records required by this section shall be
9 available for examination by auditors and representatives of
10 the Corporation and should be maintained in a manner
11 consistent with the attorney-client privilege and all
12 applicable rules of professional responsibility."

13 Any questions about that? Bill?

14 MR. McCALPIN: Well, I guess does this really
15 answer the problem that we've wrestled with on other
16 occasions?

17 If you keep it "in a manner consistent with the
18 attorney-client privilege and the applicable rules of
19 professional responsibility," then say "it shall be available
20 for examination by auditors," are you opening the door to --
21 you know, you keep it in accord with ethical obligations
22 which may involve some description of the services rendered

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1 to the client, certainly the identity of the client.

2 If you keep it, that would be consistent with the
3 privilege and the rules, but then you make it available to
4 auditors and representatives of the Corporation. And I
5 thought we had bigger arguments about this in -- was it 1609?

6 CHAIR BATTLE: Yeah. I think the flip side of what
7 you're saying is what is intended by this, and we may need to
8 explain that, that instead of keeping things like name, that
9 you'd use a number in your records for those that would be
10 made available to the Corporation or to auditors and that the
11 records themselves should not identify or disclose the client
12 but just the time spent and potentially the matter that the
13 time was spent on.

14 MR. SINGSEN: I would just refer you all to the
15 commentary, which does speak a little bit more to this issue,
16 because the concern, obviously, about how to comply is one
17 that has had such prior discussion.

18 And I'd note that the Inspector General, who has
19 previously, in discussions on 1611, urged you to make less
20 reliance on the Rules of Professional Conduct in order to
21 allow more examination of records within a program, has
22 indicated that as to this comment as well they repeat their

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1 thoughts with regard to these references.

2 They also ask specifically in a comment that the
3 phrase "all applicable rules of professional responsibility"
4 be replaced by the phrase "the rules of professional
5 responsibility applicable in the local jurisdiction," which
6 seems to me an appropriate point, as the model rules don't
7 set actual practice.

8 CHAIR BATTLE: When you say "applicable" doesn't
9 that cover it one way or the other?

10 MR. SINGSEN: I'm reporting their comment and --

11 MR. McCALPIN: "All applicable rules" may mean the
12 different rules all around the country; whereas, if you say
13 "the rules applicable in the jurisdiction," then you are
14 referring to the ones that are clearly applicable in this
15 situation. "All applicable rules" --

16 CHAIR BATTLE: Okay.

17 MS. MERCADO: And we have that language in 1611.
18 It's the local jurisdiction. We either have the model rules
19 or the --

20 CHAIR BATTLE: Applicable in the local
21 jurisdiction. Okay. Let me have that language again. I'm
22 sorry.

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1 MR. SINGSEN: It's in 1635.4, the last line. It
2 would be deleted words "all applicable" and add at the end of
3 the sentence "applicable in the local jurisdiction."

4 CHAIR BATTLE: Okay. John?

5 MR. BROOKS: I think it would help to solve one of
6 our problems if we put two commas in the second line so it
7 would read, "Shall be available for examination by auditors
8 and representatives, and should be maintained in a manner,
9 consistent with attorney-client privilege," et cetera.

10 The point being that they should be available for
11 examination by auditors consistent with the attorney-client
12 privilege, and if you want to say "and should be maintained
13 in a manner," I think that's almost superfluous.

14 But I think the attorney-client privilege and rules
15 ought to modify the availability for examination, which is
16 what our prior conversations have been mostly about.

17 CHAIR BATTLE: I would think, too, that the manual
18 that we do should be instructive on this issue in terms of
19 what kind of information is useful in time records and what
20 kind of information probably would create a problem from the
21 attorney-client privilege standpoint.

22 MR. SINGSEN: Yes. And just to expand on that

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1 slightly, that's, of course, true -- in the way the manual is
2 going to be structure, there are, obviously, other things
3 that can be included in time records that may be useful to
4 programs in maintaining time records.

5 The manual is going to exemplify that. A simple
6 example which doesn't pertain to our reporting is that many
7 time records keep track of the specific type of activity that
8 the attorney did on a case, and that sometimes can be useful
9 for local management purposes.

10 It doesn't have any particular consequence for us,
11 but it might be part of a system, and it will be part of many
12 of the exemplars that the programs are shown.

13 CHAIR BATTLE: Are there any other questions about
14 1635.4?

15 (No response.)

16 CHAIR BATTLE: And if not, we have very timely
17 completed our timekeeping --

18 MR. McCALPIN: Wait a minute. Wait a minute. Wait
19 a minute.

20 MR. SINGSEN: Premature, Madam Chair.

21 CHAIR BATTLE: Oh, well. Now it's not going to be
22 timely.

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1 MR. McCALPIN: Do we have a right to say that this
2 shall be effective January 1? We have some process it goes
3 through, including a notification to the Congress and not
4 effective until a certain number of days after notification
5 of the Congress. Can we state a flat date like this?

6 CHAIR BATTLE: Laurie?

7 MS. TARANTOWIZC: I think when we put the date in
8 we were assuming --

9 MR. McCALPIN: Pardon me?

10 MS. TARANTOWIZC: When we put the date in the
11 regulation, we were assuming that we would be working on a
12 timeline publication wise and congressional notification wise
13 that we'd get this all completed in a manner which would
14 allow the effective date to be January 1. It's not required
15 to be in the regulation.

16 MR. McCALPIN: Given the way times slip and that
17 sort of thing, I wonder why we simply don't rely on what we
18 understand to be the process. We publish it 30 days. We
19 consider the comments. We send it to the Board.

20 After it goes to the Board, we send it to the
21 Congress, and then 15 days after that it becomes effective.
22 We may or may not make it by January 1.

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1 CHAIR BATTLE: This being a proposed rule, I think
2 there is some flexibility in whether or not this date remains
3 the effective date as well.

4 MR. FORGER: But under the bill, do we not have to
5 implement time records as of January 1?

6 CHAIR BATTLE: I think Alan had something he wanted
7 to add. Alan, did you want to come to the table?

8 MR. HOUSEMAN: Well, I can just say it from here.

9 CHAIR BATTLE: Okay.

10 MR. HOUSEMAN: Two things. One, the reprogramming
11 requirement is in the current riders, but it's in none of the
12 riders that are being considered that passed the House that
13 was considered in the Senate. So technically, you're not
14 subject -- you're unlikely to be subject to reprogramming.

15 Secondly, of course the bill that passed the House
16 would require you to have this in effect by January 1.

17 CHAIR BATTLE: Yeah. The fact that this is a
18 proposed rule and the fact that the bill does state a
19 specific date that we're suppose to have this effective to me
20 says that if we need some flexibility in this date it will
21 come once we have a final law telling us when it needs to be.

22 But this will at least speak to the pending bill

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1 which directs us to have one in place by January 1. Suzanne?

2 MS. GLASOW: One thing, the effective date doesn't
3 have to be in the rule itself. It can be in the preamble,
4 and it's automatic time-wise when you publish your final
5 rule.

6 Normally, it's effective 30 days after the
7 publication is final. If you want it to be effective later
8 than that time, then you can state that in the publication of
9 the final rule. You can say this rule should not be
10 effective until January 1st.

11 The only problem would come is if we took so long
12 to go through the public comment process, the publication
13 process, the reprogramming process that it would later than
14 January 1, and we'd want to meet that January 1 date.

15 So it's important to go through the process
16 quickly, but you can't have it effective later than 30 days
17 after publication is final if you so state in the
18 publication.

19 CHAIR BATTLE: Can't we put it in the comment, as
20 opposed to the rule? I think that particular suggestion
21 probably makes sense just in terms of format.

22 MR. FORGER: My only concern is that I think

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1 throughout all of this process we want people with whom we
2 deal to understand that we are going forward implementing on
3 their time schedule, which is January 1.

4 I think, since that's a bill, I don't see the harm
5 of putting a January 1 up front in the bill, if everybody
6 agrees that that doesn't create legal problems.

7 CHAIR BATTLE: That in and of itself will not --

8 MR. FORGER: Does that create a problem?

9 MS. PERLE: No, no. I was just going to suggest
10 that at least in the preamble we say we anticipate that this
11 rule will be effective January 1, 1996.

12 CHAIR BATTLE: I think that's fine. If we say that
13 in the preamble, then we're not -- we're not embodying that
14 in the actual rule. We're setting that out as part of our
15 proposed rule, and at the point in time that we publish our
16 final rule, we can make it effective January 1, if we're on
17 time.

18 MS. PERLE: Right. And it shows that we're intend
19 to meet the congressional deadlines, but it also shows that
20 we don't intend to violate any other law.

21 MR. FORGER: But could we not leave it January 1
22 today, and when you get through your public comment and

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1 understand what the timing is and what has happened on the
2 Hill you can change it at that point?

3 CHAIR BATTLE: Yeah. We sure can. We can change
4 the final rule in any way that we see is fit.

5 MR. FORGER: So at least for present purposes, it
6 says January 1 in the rule.

7 MR. BROOKS: Well, I think that's the way to do it.
8 There it is, and we can change it as Suzanne suggested. We
9 don't want, probably, to have it effective prior to January
10 1, and it would help the programs, I would think, to have a
11 specific date known or at least a target date known in
12 advance.

13 CHAIR BATTLE: So if we can just move this to the
14 Comment section and give the anticipated date that we -- to
15 the preamble.

16 MR. BROOKS: Well, I think that was Alex's point,
17 that it ought to be as it is here in the regulation itself at
18 least at this stage rather than in the preamble, which is,
19 sort of, an iffy proposition.

20 MR. FORGER: Because folks are more likely to look
21 at the reg rather than the preamble when they focus on it.

22 CHAIR BATTLE: Is there any legal problem with

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1 that?

2 MS. GLASOW: No.

3 CHAIR BATTLE: Okay.

4 MR. FORGER: I think it's only optics.

5 MR. SINGSEN: I would remind this committee, this
6 joint committee, which comprises more than a majority of the
7 Board that nevertheless there is a Board resolution on this
8 which binds us to January 1 as our goal but not later than.

9 MR. FORGER: Right.

10 CHAIR BATTLE: Okay.

11 MR. BROOKS: So we can postpone it to that point
12 even though we've gone through the necessary hoops earlier.

13 MR. SINGSEN: We should have the problem of being
14 done early.

15 CHAIR BATTLE: Are there any other comments or
16 concerns about this?

17 (No response.)

18 CHAIR BATTLE: If there is no legal problem, then
19 we can leave it as is, and Bill, we have the opportunity
20 after we get comments back and see where things are and see
21 what the final law is to make sure that we conform to the
22 final law with respect to the effective date.

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1 CHAIR BATTLE: Is there a second?

2 MS. WATLINGTON: Second it.

3 CHAIR BATTLE: Okay. It has been properly moved
4 and seconded that we --

5 MR. ASKEW: Is this a vote only by the Operations
6 and Regulations Committee?

7 MR. MCCALPIN: Yes.

8 CHAIR BATTLE: Any discussion? You're free to
9 discuss it.

10 MR. ASKEW: Just a question. Point of order was
11 all I was asking.

12 CHAIR BATTLE: Okay.

13 MR. ASKEW: I can't vote on this one.

14 CHAIR BATTLE: Are there any questions about the
15 motion?

16 (No response.)

17 CHAIR BATTLE: Hearing none, all in favor?

18 (A chorus of ayes.)

19 CHAIR BATTLE: Any opposition?

20 (No response.)

21 CHAIR BATTLE: Motion carries. And I will get with
22 you so that we can finalize this before I leave town.

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1 MR. SINGSEN: Thank you very much.

2 CHAIR BATTLE: All right. Thank you.

3 MR. BROOKS: And maybe even have a draft for the
4 rest of us in final form.

5 CHAIR BATTLE: Yes. Why don't we take five
6 minutes, since we were so timely on time.

7 (A brief recess was taken.)

8 CHAIR BATTLE: I'm going to go ahead and get
9 started -- we've got a quorum -- because I think we are going
10 to have to spend significant time this afternoon on the
11 issues that we have before us.

12 The next item that we had on our agenda is the
13 regulation which has to do with competitive bidding of grants
14 and contracts, and we have before us a panel of four people
15 that will make presentations to us today and give us an
16 overview of the issues that we have to discuss.

17 How are you, Edna?

18 MS. FAIRBANKS-WILLIAMS: Good.

19 CHAIR BATTLE: Good. We have John Tull, who as I
20 understand it, will speak briefly on the interrelationship of
21 this rule with the RFP as well as give us an overview of the
22 relevant policy and program issues which we'll have to

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1 address as we look at this competitive bidding process
2 regulation.

3 We also have joining us today Alan Houseman who
4 will make a brief introductory statement on some policy
5 issues that I think we have to be mindful of.

6 And then we have our usual team of Linda Perle and
7 Suzanne Glasow, who will go with us through the rule and give
8 us an analysis of what the proposal is and some of the
9 history behind the language that we have in the proposals.

10 So with that -- I'm sorry.

11 MS. GLASOW: I would like to always add that
12 Michael Milleman is here on behalf of SCLAID, and he would
13 like to make some general comments early on as possible
14 because he does have an appointment in the early afternoon.

15 CHAIR BATTLE: Well, Michael, do you want to come
16 to the table and join us?

17 MR. MILLEMAN: Thank you.

18 CHAIR BATTLE: Okay. And welcome.

19 MR. MILLEMAN: Thank you.

20 CHAIR BATTLE: We're glad you're here. Now, I have
21 no preference as to the order as to how we do this.

22 MR. FORGER: Are we dealing with a 9/7 draft or 9/6

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1 or 9/5?

2 MS. GLASOW: 9/7 draft.

3 CHAIR BATTLE: 9/7 is the draft that was put before
4 us this morning.

5 CHAIR BATTLE: Still hot off the press, 9/7.

6 MS. GLASOW: I think the order would be I will make
7 general comments, and then John Tull will speak briefly and
8 then Alan Houseman and then Michael Milleman, and then at
9 that point we can go through the rule section by section.

10 CHAIR BATTLE: Okay. All right.

11 MS. GLASOW: Briefly, this rule represents a
12 collaborative effort by an LSC team which includes many
13 members of the LSC staff, and we've taken a lot of comment
14 and were given a lot of help and input from representatives
15 from the field.

16 The rule is intended to implement the Board's
17 resolution on competition and pending legislation. It's
18 intended to implement both the spirit and the letter of the
19 legislation, and we anticipate that the legislation will be
20 adopted.

21 The rule sets out general guidelines, requirements,
22 the purpose, process and criteria for a competitive process.

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1 The RFP, on the other hand, which John Tull will speak about,
2 will spell out in greater detail the requirements of this
3 rule for any particular competitive grant competition.

4 In terms of the publication schedule, in order to
5 meet what appears will be a congressional deadline, we need
6 to publish this as a proposed rule soon after this series of
7 board meetings, hopefully within about a week in order to
8 meet that deadline so that we could get comments in, bring
9 those comments back to this Committee and have the Board vote
10 on this as a final rule.

11 So, if possible, that's a schedule we would like to
12 keep. John?

13 MR. TULL: Thank you. I wanted to just speak
14 briefly to set a context for the regulation in the context of
15 the work that we're doing and engaged in to put together a
16 system for competition wherein the certainly unusual posture
17 of while the regulation is being considered by this Committee
18 and by the Board and going through the required process, at
19 the same time designing and beginning to implement a process
20 for competition that will actually need to begin before the
21 final regulation is adopted, in light of the quite likely
22 possibility that we will be required to implement by making

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1 decisions under our competitive process by December 31st.

2 What that unusual circumstance has done for us is
3 it has given us what I think has actually been an opportunity
4 to test out what we're doing as we think through the
5 principles which are reflected in the regulation and the work
6 that the staff has been doing at 8- 10- 12- 15-hour day
7 chunks of time in order to begin to be prepared to move
8 forward on competition is based on a couple of principles
9 which come from the way the regulation is designed, which I
10 just wanted to mention to you now.

11 And as you get to the specific sections, I think
12 you'll see how they're reflected, but in light of the fact
13 that this is so key to the new responsibility that the
14 Corporation will have as an organization which provides
15 grants under a system of competition, I thought it would be
16 important to highlight them for you now.

17 The first is the regulation is written with a set
18 of time frames in it which is designed to reflect a capacity
19 to make decisions in a competitive process which permit the
20 full intent of competition to have its effect.

21 And that is that the underlying notion of
22 competition is it is a way directly to improve the quality of

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1 services that are provided to clients and to give the
2 Corporation decision-making authority which would allow us to
3 assure that and would also, by virtue of programs being in a
4 competitive environment, would push them to improve the
5 quality of their work.

6 The regulation is designed to permit a serious look
7 at quality, effectiveness and economy, which are the three,
8 sort of, underlying principles that are a part of the act
9 that the Corporation is responsible for assuring.

10 Because we're in the time frame that we're in, the
11 process which is reflected in the reg is not one which we
12 would necessarily be able to follow fully during this first
13 round, if we have to make decisions by December 31st.

14 So when you get to the waiver provisions, you'll
15 see the effort that is made to accommodate that, but you will
16 see as you look at the reg that it is designed to support and
17 permit a process which involves a significant amount of
18 deliberative decision-making on the Corporation's part to
19 assure that we make decisions based on an accurate and
20 complete assessment of the capacity of the various applicants
21 to meet the standards of quality, efficiency and
22 effectiveness which the regulation reflects in the criteria.

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1 The second principle which is reflected in the
2 regulation is an assumption that the regulation should set
3 forth the broad principles under which competition should
4 take place but that the actual -- but that the request
5 proposals should be the process in which the details of how
6 the regulation is carried out, that given certainly in this
7 short time frame where we have -- where we will be forced to
8 make decisions in an extremely compressed period of time and
9 to pursue a process which reflects that, that in the next
10 round of competition, assuming that there is one and that
11 we're given that opportunity, that at that time that the
12 design of how we will carry out the regulation might be
13 different to reflect the longer time frame and the greater
14 capacity for a different approach in terms of deliberations.

15 So that the regulation is designed to set forth the
16 principles but to, in the discretion of the Corporation,
17 then, is to determine through the request-for-proposal
18 process how those principles would be carried out.

19 CHAIR BATTLE: Okay. Alan?

20 MS. GLASOW: Alan?

21 MR. HOUSEMAN: Thanks. I just wanted to, I think,
22 amplify even to a greater degree the context and make a few

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1 points about where the, sort of, framework I think we have to
2 approach this in.

3 I agree with all of what John has said with regard
4 to the regulatory framework. Let me just make a few other
5 broader comments as we start this, in part to make a record,
6 but in part to make sure that you are all aware of what we're
7 aware of with regard to competitive bidding.

8 I think as we start this discussion it's important
9 to understand that competitive bidding is only one form of
10 competition that Legal Services could consider.

11 We're forced to consider it because Congress is
12 clearly moving in this direction, but there are others.
13 We've had a comparative demonstration project that has been
14 working on and sent to funding, kind of, competition, as you
15 know.

16 Obviously, there is a range of other forms of
17 competition that one could think about in the context of
18 Legal Services delivery, for example, competition between two
19 providers in a service area, but these are, essentially,
20 foreclosed in a broader look at the use of competition in
21 Legal Services is foreclosed by the congressional context in
22 which we operate.

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1 Secondly, I think it's important to realize that
2 competitive bidding is not used, contrary to what many of the
3 proponents of it say, in most grants that are given out by
4 the federal government.

5 Most grants that are given out by the federal
6 government are grants that go to state and local government
7 or nonprofit entities through a funding formula, and there is
8 no competition whatsoever. There is no -- at all.

9 So this notion that we are out of sync with the
10 rest of the federal government as a factual matter is just
11 plain wrong.

12 When we've made this point over and over again, the
13 only response that one ever hears is an example where
14 competition is used for this or grant in the Department of
15 Education, the Department of Health and Human Services.

16 But if you look at the range of grants that all of
17 those agencies make, you'll find that competitive bidding is
18 not, in fact, the norm.

19 For example, the closest program that I can
20 analogize to easily, quickly, it's not a pure governmental
21 program but a nonprofit program like Legal Services, is Head
22 Start.

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1 And while Head Start has some one or two lines in
2 the regulations that mention competitive bidding, in fact,
3 there is no serious competitive bidding in the Head Start
4 program.

5 It's very much like our program, in some sense, but
6 ours is even a much more integrated delivery system than Head
7 Start. So that when we think about this, I think it's
8 important just to keep in perspective what we're doing here
9 and not to get trapped just by the moment as we think about
10 it.

11 More to the point, I think it's also critically
12 important to understand the experience that defender programs
13 have faced in competitive bidding and while we are forced to
14 do this by the Congress, and we must move forward.

15 I think we should attempt, if we probably can, to
16 develop a process that does not lead to the kind of results
17 that existed in the defender side.

18 I'm going to summarize those results, but I'm also
19 going to hand you the best example and the best and most
20 thorough discussion of this issue that I know of.

21 It was presented by Bob Spangenberg, who did a very
22 comprehensive study of the defender experience. It was

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1 presented by Bob Spangenberg to the Administrative Law
2 Subcommittee in 1990 during some congressional hearings.

3 What I'm handing you is the excerpts of Bob's study
4 and the congressional hearing, that excerpt from that hearing
5 on the defender experience in competitive bidding. I guess
6 I'll just hand it to you now, or Linda will hand it out.

7 What you will see when you read that is that what
8 happened with contract -- with competitive bidding in
9 criminal defense was this: low ball bidding was the norm;
10 that is, people bid far lower than their actual costs were.

11 Over time, quickly over time, costs rose
12 substantially. In addition, the quality of representation
13 deteriorated significantly. The most experienced and
14 qualified lawyers left the providers, and the most
15 experienced and qualified that were involved in delivery of
16 public defender services left.

17 Effective programs were dismantled, and then later
18 they had to be reinstated at great cost because they improved
19 to be better. And finally, a number of courts in a number of
20 states held the competitive bidding system that was used in
21 contract defense unconstitutional.

22 That's all indicated in the Spangenberg study

1 that's there and in the dialogue that he had with Congressman
2 Barney Frank that I handed you.

3 I think one could fairly look at that record and
4 say that there is very little or maybe no evidence that
5 competitive bidding is appropriate for Legal Services.

6 Even so, we need no go forward, and what I'm urging
7 is that as we go forward we go forward with at least an
8 understanding of what we don't want to have happen in Legal
9 Services as a result of competitive bidding, assuming we have
10 any control over it, of course.

11 We, obviously, don't want to dismantle the existing
12 system of locally based full-service programs staffed by
13 specialized poverty law advocates which are accessible to
14 clients. We want to preserve that.

15 We want to preserve local control by bar-controlled
16 program boards. We want to assure that Legal Services
17 providers can continue to act under ethical requirements
18 imposed upon all lawyers.

19 We want to assure that competition does not
20 discourage and reduce the pro bono efforts of the private
21 bar. We want to make sure that clients do not have to use
22 several different providers to meet their legal needs and

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1 that they have access to an integrated delivery system.

2 And we want, to the degree it's possible, to create
3 a level playing field for the people who are going to compete
4 for bids.

5 In short, it seems to me, the key policy issues
6 that you have to deal with are how do we make sure that we
7 preserve the notion that Legal Services providers should
8 provide a full range of services, not just one or two case
9 types, that we don't fragment services in that way, preserve
10 an integrated delivery system, preserve the ability of Native
11 American and Migrant programs to have their own service
12 areas, if you wish, and that we, in making decisions, to the
13 degree that it's practical and possible, build in some form
14 of peer review into the process.

15 I think if you look at the regulation that's going
16 to come before you that Linda and I have been working on with
17 your staff, you will see that the kinds of principles and
18 concerns that I've outlined are addressed, are addressed in
19 ways that we think meet these concerns and are addressed in
20 ways that will put into place a system that Congress is
21 demanding but a system that will not have the -- that will
22 not result in the problems that we faced in criminal defense,

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1 contracting and other problems that we might face in this
2 system, in this setting.

3 So what I wanted to do was just paint a little bit
4 of this picture to build a bit of a record about the
5 framework that we need to operate in so that as you go
6 forward in dealing with the details of this you keep in mind
7 some of the basic principles John outlined, economy,
8 effectiveness and high quality but the other principles that
9 I've amplified on that, sort of, are the standard by which we
10 should approach this issue.

11 That's the remarks that I wanted to make as, sort
12 of, an opening statement. I'm not going to be participating,
13 at least in any great degree, in this. Linda will do the
14 usual slogging away with all of you over the specifics.

15 But I did want you to at least have a little
16 background and understanding of at least the framework that
17 we've been trying to think about as we've been trying to work
18 with your staff in developing an approach for competitive
19 bidding. Thank you.

20 MS. PERLE: I just want to add to that there has
21 been a variety -- a number of times concern that with all of
22 these new rules that we have an opportunity for the community

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1 to have some input other than just Alan and I.

2 We've, sort of, acted in a representative capacity
3 in all of this. I want to make it clear that an earlier
4 version of this rule, which is in many respects similar but
5 in many other respects quite different from what you see
6 before you was presented by mail to the Regulations Working
7 Group and SCLAID.

8 And Mike's comments I think maybe will reflect his
9 understanding of the earlier version, although he's now seen
10 this one.

11 And we did receive a number of comments. Some of
12 them deal with issues that are no longer addressed in the
13 rule. Some of them were taken account of in redrafting the
14 rule.

15 I'd say that by far the largest number of those
16 comments reflected concerns about the degree of discretion
17 that the Corporation had under the proposed rule that they
18 saw and I think still reflected in this rule.

19 There was a lot of concern particularly around the
20 definition or how the Corporation would define service areas
21 and concern about fragmentation of service areas, concern
22 about not ensuring an integrated system, not ensuring full

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1 range of legal services.

2 Some of those issues we worked hard with the staff
3 to try to address, but we are dealing clearly with balance
4 between protecting the concerns of people who are now
5 delivering legal services and ensuring that this rule meets
6 the congressional concerns.

7 I know it's a very, very difficult balance. We
8 think that, in large measure, this rule does it. There is
9 some places where there are still some concerns that we've
10 had, and I'll try to raise some of those as we go along to
11 the extent that I don't think this rule meets those concerns.

12 It has been a very intense relationship working on
13 these, and I think we've worked really overly well together
14 and tried -- everybody I think has tried very, very hard to
15 accommodate the needs of each of the parties in this
16 discussion to ensure that this rule is workable and does
17 address concerns that both the Corporation staff and the
18 field have.

19 So we've tried, and you'll have to be the judge to
20 the degree to which we succeed in that.

21 MR. HALEY: One footnote. We also had a long
22 discussion at the last Funding Criteria Committee meeting in

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1 Chicago in late August of the draft rule, and those comments
2 as well helped shape what you see before you.

3 MS. PERLE: But just to make it clear, they don't
4 address all of the comments.

5 MR. HALEY: Right.

6 MS. PERLE: Because sometimes it was just clear
7 that those comments were too heavily weighted on one side of
8 the balance. So, you know, not all -- not as much protection
9 is provided in here for current grantees, for example, as
10 people would like.

11 And that was a clear policy decision. That was
12 made not only by the members of the staff, but I think in
13 drafting the original document there was recognition that all
14 of those concerns simply could not be met in this process.

15 I think there may be some people from the field in
16 the audience who might want to weigh in on some of this
17 stuff, but that's, sort of, where we're coming from.

18 CHAIR BATTLE: Michael?

19 MR. MILLEMAN: My name is Michael Milleman, and I'm
20 representing SCLAID today. I appreciate very much the
21 courtesy of allowing me a few minutes of comments. I'll
22 repay it by being brief.

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1 First of all, I want to say that the draft that I
2 saw this morning resolves many of the issues that SCLAID had
3 with this regulation, many of the technical issues with one
4 huge caveat, and I'll come back to that in a second.

5 The committee of SCLAID here that has looked at
6 this includes Judge Howard Dana and Jonathan Ross. The
7 caveat, obviously, is that you are dealing with a problem or
8 an issue that is, in many respects, beyond your control.

9 So what I say today, what SCLAID has to say about
10 this, echoing Mr. Houseman's comments, are directed as much
11 to a process that will cause harm to clients but over which
12 you have little or no control as to the regulation itself.

13 I can say very quickly that SCLAID's two major
14 concerns -- let me back up and digress. I compliment the
15 drafting committee for I think a tremendous job under a tight
16 time frame.

17 The two concerns that Mr. Houseman expressed are
18 SCLAID's two overriding concerns about this regulation, and
19 that has to do with the fragmentation of services and the
20 inevitable low bid process, momentum towards a low bid that
21 is almost inevitable in this process.

22 I want to also endorse what Mr. Houseman had to say

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1 about the experience in other jurisdictions with low -- with
2 competitive bidding of legal services.

3 In Maryland, within the last year, in two major
4 areas the state has competitively bid two civil Legal
5 Services contracts, two major ones, one for the delivery of
6 legal services to children in need of assistance, and these
7 are children who are physically abused and who are among the
8 most vulnerable clients that we have in Maryland.

9 The "we" here is generic. I teach at the
10 University of Maryland Law School, as I said, and I direct a
11 clinical law program there. I do not work with the Legal
12 Services program in Maryland.

13 The CINA cases, the so-called CINA cases, have a
14 life that can be as long as 18 years because the court has
15 supervisory power over the children from the time of the
16 abuse, which unfortunately sometimes is in infancy, through
17 the 18th birthday of the child.

18 These are cases the "normal" case will have 8 or 9
19 or 10 or 11 judicial proceedings. There is an initial CINA
20 order. It is modified, amended. A good advocate will do his
21 or her best to make sure that the child has a shot at
22 adoption if family reunification hasn't worked, will make

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1 every effort to make a family reunification work.

2 This is an extremely labor intensive process. Just
3 interviewing the child, as you might imagine, is a process
4 that takes at least several hours. It's an interview that
5 ought to go on in the child's home for all kinds of reasons.

6 The average cost per case to the successful bidder
7 was between \$400 and \$500 total cost of the case for a case
8 that has a sixth or seven judicial proceeding 18-year,
9 potential 18-year lifetime.

10 At a bill hour rate of \$100 an hour, which, of
11 course, is modest in today's economy, that means that the
12 lawyer might have an opportunity to interview the child at
13 the rate that's being reimbursed.

14 That RFP had all the kinds of language that it
15 ought to have, that requires quality services, that requires
16 an integrated delivery system.

17 It not only was low bid; it was fragmented. Three
18 or four bidders around the state, private attorneys, were
19 able to capture the contracts, and we will now be in the
20 process in Maryland over the next three or four or five years
21 of mopping up the consequences of that bidding process and
22 trying to make sure it doesn't happen again.

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1 It will happen again, unfortunately. So all I can
2 tell you, and this is anecdotal, but we are in touch with a
3 lot of information on this, is what Mr. Houseman has to say
4 is entirely correct.

5 This process will result, unless you take every
6 step that you can, in a low bid, fragmented process, and the
7 people who will be injured by this are clients, and they'll
8 be severely injured.

9 Having said that, and I'm sure many of you might
10 say, well, that's information that we already had available
11 to us, Mr. Milleman. Thank you for stating the obvious, but
12 I would have two tangible suggestions on subparagraph 1624 --
13 section 1636.9, subparagraph (g), which I think is the core
14 paragraph with respect to the concerns that SCLAID has and
15 that, again, Mr. Houseman has so accurately characterized.

16 CHAIR BATTLE: Now, you're speaking -- that page 7
17 of the draft --

18 MR. MILLEMAN: Page 7 of the draft this morning.
19 It's 8 in some drafts I've seen and 7 of mine.

20 MS. MERCADO: On the actual regulations?

21 MR. MILLEMAN: It's of the regulation itself, and
22 it's subparagraph (g). On mine, it's 7. On yours, it's

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1 probably 8.

2 MR. McCALPIN: What's the section?

3 MR. MILLEMAN: 1634.9, subparagraph (g).

4 CHAIR BATTLE: It's page 8.

5 MR. MILLEMAN: Page 8 of your text. The good news,
6 from our perspective, is that the regulation includes words
7 like "an integrated delivery system," "full range of legal
8 assistance," "collaborative efforts."

9 You'll see words that are similar in the preamble,
10 and those -- those are exactly the kinds of themes that ought
11 to be in the regulation, and we applaud the Committee for
12 adding those concepts.

13 I would consider adding in there another phrase
14 that requires that the providers provide legal services
15 consistent with the ethical requirements of the state in
16 which they practice law.

17 I would add that right after the second line,
18 "Delivery of legal services --" (g) begins, "Applicant
19 demonstrates its capacity to provide high quality, effective
20 and economic delivery of legal services."

21 I would stop at that point, put a comma and add the
22 words "consistent with the state's ethical requirements," or

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1 something to that effect, "through an integrated delivery
2 system."

3 What is happening in Maryland is unethical, and I
4 think that lawyers who deliver legal services to the poor
5 ought to be reminded that they have ethical responsibilities
6 to their clients.

7 Although it may be oratory in some ways, I imagine
8 that a creative mind could argue that the federal regulations
9 preempt in some ways local requirements, and this would be a
10 way of making it clear that there is no intent to preempt the
11 local ethical requirements of a jurisdiction.

12 Secondly, unless you're stuck with it as a matter
13 of statutory mandate, I would take the word "economic" out of
14 the regulation. This is on the first line of (g), "Applicant
15 demonstrates its capacity to provide high quality, effective
16 and economic delivery of legal services."

17 I would substitute the word "efficient." If it's
18 statutory and you're stuck with it, you're stuck with it, in
19 which case my comment --

20 MR. ASKEW: "Efficient" is statutory, I think.

21 MR. MILLEMAN: Is it? If it is, then what I have
22 to say is really addressed to the wrong body, but it's that

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1 word that in Maryland invited the problem that I'm describing
2 to you today.

3 The third thing that I would add is I would add a
4 separate subsection that makes it clear that to the extent
5 you can within the framework of the statute the Corporation
6 is going to prefer applications that come from a coordinated
7 entity or group of entities.

8 I don't mean now, currently recipients, but if
9 private attorneys are going to be involved in this bidding
10 process as they are, at least from the point of view of
11 fragmentation they ought to be encouraged to submit bids, in
12 essence, that are integrated and are part of a larger
13 coordinated effort.

14 Now, I think you have language in here that goes a
15 long way towards that, and whether you break it out as a
16 separate subsection or not is up to you, but I think that's a
17 critical point.

18 So having said all that, again I congratulate the
19 drafters of this regulation. I think that from SCLAID's
20 position this is unfortunate. This will do damage to clients
21 and that the two major concerns that I think the drafters are
22 cognizant of are fragmentation and low ball bidding. Thank

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1 you very much.

2 CHAIR BATTLE: Thank you. Any other comments from
3 the panel as a follow-up? Maria?

4 MS. MERCADO: I think in the economic aspect you
5 were talking about can be very critical because one of the
6 big areas that they keep talking about is the financial
7 accountability.

8 I'm not sure how we work into this because part of
9 the audit team, our monitoring of these grantees is whether
10 or not they have competitively bid, you know, whether dollar
11 for dollar those monies are being expended.

12 So it goes back to the economic factor that you're
13 talking about, that the low bid -- because economically, from
14 an accounting or finance standpoint, not in the quality of
15 the legal services or the effectiveness of it but on the
16 money end that they're going to guard that as a higher level
17 that you grade a grantee or not grade a grantee in
18 monitoring, since all that has been refocused over to the IG
19 to do in its monitoring evaluation, that part of that
20 financial is going to be whether or not you're getting the
21 lowest amount of money.

22 MR. MILLEMAN: Our experience in Maryland is that

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1 that word drove the process.

2 CHAIR BATTLE: I've got a question in trying to
3 philosophically understand how this process will work,
4 because the Corporation will retain the ability to define
5 service areas and will establish probably some formula for
6 how a particular service area will be funded.

7 So the question as to whether or not you're going
8 to be looking at economics as the basis for comparing
9 applications really is not as much as I understand it that is
10 at issue as will be the service to be provided to that area.

11 I'm trying to get an understanding looking at what
12 has been said and what it is that we intend to do and what
13 the law directs us to do.

14 If you talk about efficiency, as opposed to
15 economics, then you're really talking about how can you take
16 this number of dollars and do the most efficient or effective
17 way of delivering of service to this population, rather than
18 an argument of I can serve this population for less dollars
19 than some other bidder.

20 Is my view correct as to how we plan to look at
21 this whole process?

22 MR. TULL: I think the key section that is an

1 attempt to respond to the concerns that Mr. Milleman raise is
2 the section that relates to the ABA Standards for Providers
3 of Civil Legal Services to the Poor and the performance
4 criteria and the process that if we -- when we have time for
5 full implementation of the regulation, and we're not likely
6 to have this time in the first round, that the regulation
7 provides for a process during which -- first of all, among
8 the criteria, key criteria that an applicant could need to
9 meet is to demonstrate his capacity to meet the standards and
10 those criteria which have woven within them notions of
11 economy of service but always linked to the principles as
12 well of quality and effectiveness.

13 I think the concerns that have been raised in the
14 past, and certainly I think that the observation that there
15 is a natural tendency always to trend in decision-making
16 toward looking at the bottom line and saying, oh, this is
17 better because it costs less, and that the performance
18 measures and the civil standards that the ABA approved have,
19 I think, taken a long step toward always linking the question
20 of efficiency to the effectiveness and the quality that is
21 derived from that effort.

22 And the specific process for making a determination

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1 about that in reviewing two applications would be, in
2 addition to looking at the application that the entity
3 submits and specifically asking for the applicant to describe
4 how it will meet the performance measures and the standards
5 would be a process of review of an applicant on site using
6 the experience that particularly the comparative
7 demonstration project, which was an effort to look at the
8 impact of competition on quality, to use what -- the
9 learnings we've derived from that effort to view an
10 application -- or applicants, not the application but to
11 review the applicant in terms of his capacity to provide
12 those services.

13 CHAIR BATTLE: Okay. I'm going to take Bill and
14 then Ernestine and Bucky and then Linda.

15 MR. McCALPIN: John, if I understood what LaVeeda
16 asked you, and I think partly based on a conversation she and
17 I had last night I don't think you've got the drift of it.

18 My feeling is that this competition will not be
19 dollar based, that the Corporation will define a service
20 area, and on the equalization formula in the bill there will,
21 be a specific number of dollars available for legal services
22 in that service area and that the competition will be on

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1 hours and service.

2 So that you're not going to have the low ball
3 dollar bids that have come about in the criminal defense area
4 or perhaps in the Maryland experience. What you may have is
5 unrealistically high bid of the number of hours of service
6 that will be provided or the kinds of service that will be
7 provided.

8 Is that an accurate estimate of what is going to be
9 the basis of competition, not dollars but hours and service?

10 MR. TULL: Well, the first half is certainly
11 correct, that there will be a dollar amount which will be
12 allocated to a service area, and that's --

13 MR. McCALPIN: And all of the bidders will be told
14 that --

15 MR. TULL: And all the bidders will be bidding for
16 that amount. There is no a specific request that people
17 indicate the number of hours or the number of cases that they
18 would be able to generate with those monies, which I think
19 would, if that were the way we framed the criteria, would
20 lead us down the road that we've been warned against, which
21 is that becomes an evaluation of the cost-per-case as if that
22 is the prime indicia of whether or not we should fund a

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1 particular applicant or not.

2 So my rather long-winded rendition of what we would
3 look at was an effort to say that it is not just looking at
4 dollars and the number of hours that that would generate and
5 the number of cases.

6 It is looking at the quality, the effectiveness,
7 the capacity of those dollars and cases to respond to client
8 needs in that area.

9 CHAIR BATTLE: Let me just see if I understand.

10 MR. McCALPIN: But everybody starts with the same
11 dollars.

12 CHAIR BATTLE: Well, but that's not what I heard
13 John to say. I heard that we allocate an amount, but someone
14 could come in and say, "But I don't need that much money"; is
15 that correct? "I come do this for less," and that we would
16 take that into account when we began to evaluate an
17 application.

18 MS. TARANTOWIZC: A principle is to avoid the
19 fragmentation of a service area and not to have a number of
20 applicants come in and say, "We'll carve out this piece, and
21 for a very small number of dollars, we'll do all the divorces
22 or all of the landlord-tenant cases or all of the consumer

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1 matters."

2 But because -- both because of the learning of what
3 the standards in fact say a provider should be able to
4 deliver and because of the requirement that we fund entities
5 which are capable of providing full service, which is in the
6 House appropriation, we would not entertain someone doing
7 that.

8 So as a practical matter, given the amount of need
9 in any area, if a provider came to us and said, "We could
10 meet all of the need in the area for half the money that
11 you're saying is available," it would certainly raise a
12 credibility question as to that applicant, because we know
13 from experience that the amount of money which is available
14 isn't remotely close to what is needed to meet the full
15 service.

16 CHAIR BATTLE: I think what you're hearing --
17 you're hearing two things. One, Bill and I did have a
18 conversation about what it is that the bill really provides
19 and what the ground rules will be for competition.

20 And because of a concern about this low ball
21 bidding, which people will do if they think they can put in a
22 bid for less money which will make them more competitive to

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1 be able to acquire the funds, then they're likely to do that
2 and not be able to deliver the services.

3 It seems to me if the ground level determination by
4 the Corporation is that this particular service area we have
5 sufficient history with this service area to know and we have
6 a formula that says this service area gets X dollars, then
7 the question becomes in low balling not how many dollars I
8 get for this but how much service can I give to this
9 particular area? How full service will I be? How many
10 hours? How many attorneys do I have?

11 And that really takes that particular issue, in my
12 view, off the table, and what becomes your level and measure
13 for review is how well are you going to be able to meet the
14 things that you say you can do as you put together your
15 package of what it is you can deliver in that time frame.

16 Now, I have three or four people. Ernestine I
17 think is next, and then John, you're going to be right behind
18 Linda.

19 MS. WATLINGTON: This is a little bit off, but it's
20 something that I didn't hear anyone address. Being one of
21 the clients that really advocated an opposition to
22 competitive bidding years ago to the other Corporation Board,

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1 being a client out there in the service community, I realized
2 how it would hurt us clients, and that is Section 1634.5.

3 I need some clarification on this one. It says
4 groups, applicants that are eligible. I get real upset when
5 I see, "state or local governments and substate regional
6 planning and coordination agencies which are composed of
7 substate areas and governing boards are controlled by locally
8 elected officials."

9 You don't see anything there where it says, you
10 know, we're going to stay within the requirement they must
11 have client involvement and activities.

12 When you see this, as a client out there in that
13 community and knowing that how hard we had to fight to get to
14 anyplace to get some representation, and that this be
15 eliminated and making these people eligible to be -- I'm
16 really concerned.

17 MS. GLASOW: Basically, this type of applicant is
18 required by the pending legislation. We have modified it
19 somewhat, and we'll talk about this more in-depth when we get
20 to the section, but also requiring if a grant goes to that
21 type of entity they would need a policy body consistent with
22 Part 1607.

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1 Now, under 1607, which we just recently published,
2 it would require a policy body that would have client
3 membership and attorney membership of local bars. So
4 hopefully, that would solve that problem.

5 MS. PERLE: And also the policy, but obviously, we
6 can't -- we, the Corporation, can't write a regulation that
7 says that the governing body of a governmental agency be
8 changed to comply with 1607.

9 But what we have done in the past and have provided
10 for in 1670 is for entities that might get a grant that have
11 some other entity -- some other body that governs its overall
12 activities.

13 They, nevertheless, have to have a body, which we
14 call a policy body, which will set policy for the program
15 funded under these -- under this set of provisions.

16 MS. WATLINGTON: It's still saying that, but what
17 I'm saying is that wasn't it -- you know, is it now saying
18 that these people are eligible for --

19 MS. PERLE: It is because that's what the
20 legislation --

21 MS. WATLINGTON: We had fought so hard for that not
22 to be.

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1 MS. PERLE: I know, but that's what the legislative
2 framework which we anticipate will be the law says, that
3 those -- that state and local governments are eligible to
4 compete and that substate regional planning coordination
5 agencies under the control of local and elected officials are
6 eligible to compete.

7 If we leave those categories out of this rule, then
8 we're, sort of, flying in the face of what's said by
9 Congress. Now, they still have to meet all of these
10 criteria.

11 MS. WATLINGTON: Well, wouldn't that eliminate,
12 then, Gekas' concern of trying to block it then as putting it
13 to the state? Isn't that still -- and this is provided in
14 this?

15 MS. PERLE: Well, it's provided. It doesn't
16 require that we give any grants to these agencies.

17 MS. WATLINGTON: But do you understand what I'm
18 saying?

19 CHAIR BATTLE: It opens it up to allow those
20 interested state and local entities to participate in the
21 process of the competitive --

22 MS. PERLE: But they still have to show how they

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1 can meet the ABA standards, and --

2 MS. WATLINGTON: I understand. I just wanted to
3 point out --

4 MS. PERLE: -- how they can avoid conflicts of
5 interest.

6 MS. WATLINGTON: -- and get a clarification to be
7 that it is allowing that, wherein before it was not possible.

8 MS. PERLE: Unhappily, yes.

9 MS. WATLINGTON: And they're still leaning towards
10 that the state block -- they're still putting a lot to the
11 states to be making them eligible where we tried to get away
12 from that years ago.

13 CHAIR BATTLE: Ernestine, does the fact that this
14 provision does require the development of a policy body that
15 would include clients if a state or local governmental entity
16 did make a grant, in part address the concern that you had
17 that clients would be --

18 MS. WATLINGTON: Yes, in part. But I'm just -- I'm
19 very fearful any time you open the door. I just wanted to
20 point it out to make sure that when we do that policy body
21 that we really try to, you know, make sure as much as
22 possible that that door is open, that body must have those

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1 involvement.

2 MS. PERLE: That's the same body, basically, that's
3 required for our current recipients and other nonprofits. It
4 has the same makeup. It is appointed in the same manner.

5 CHAIR BATTLE: And it requires client.

6 MS. PERLE: And it requires one-third client,
7 eligible clients.

8 CHAIR BATTLE: Okay. I think after Ernestine we
9 had, was it Bucky?

10 MR. ASKEW: Yeah.

11 CHAIR BATTLE: Okay.

12 MR. ASKEW: It's hard to get the time. Can I ask
13 two questions? I got one for Mr. Tull and one for
14 Mr. Milleman.

15 This may have been taken care of with your dialogue
16 with Ms. Battle about low ball bidding, but clearly when it
17 comes time to receive these competitive bids, and you'll have
18 not an RFP out there, there will have to be some weighting
19 given to various factors as you review these proposals.

20 And it seems to me you could take care of some of
21 this through how much weight you give to various factors.
22 You always tend to lump high quality, effective and efficient

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1 all in one sentence or in one clause and weight that as one
2 factor.

3 Maybe we should separate that out and have high
4 quality and effective as one factor and efficient as another
5 factor with less weight to the efficiency than would be given
6 to high quality and effective rather than lump it all into
7 one factor that would almost be considered all in the same
8 breath.

9 Secondly, it seems to me throughout this reg we
10 ought to take the opportunity to reference the ABA standards
11 and the performance criteria every chance we get when it's
12 appropriate to make sure that everybody is getting the
13 message that what we're really looking at are bids and
14 programs or bidders that will meet those standards.

15 This really isn't about money or competing for
16 money and submitting the lowest bid. Really, the major
17 factor is about quality effectiveness. So that's not really
18 a question, John. It's a statement. You don't have to say
19 anything.

20 Mike, I wanted to ask you are you aware of any
21 situation where a state disciplinary authority has ever
22 prosecuted an attorney, brought charges, disciplinary charges

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1 against an attorney for failure to provide high quality legal
2 services and the attorney's defense would be, "But I only got
3 paid \$400. I can only do so much for \$400"?

4 You see it all the time in the criminal context
5 with ineffective assistance of counsel being the basis for an
6 appeal, but I'm wondering, in the civil context if we've ever
7 seen a disciplinary authority go after a lawyer who bid for
8 work, only did the minimum of what they're required to do
9 under the bid they got and as a result ended up in trouble on
10 ethical charges with the state disciplinary authority.

11 It seems like that would be the kind of thing that
12 might happen on occasion.

13 MR. MILLEMAN: I've seen it in a somewhat different
14 way. What I've seen the manifestations of not being
15 adequately funded are usually neglect and failure to
16 communicate with the client.

17 Sometimes it's default; you don't show up in the
18 courtroom or file the papers on time but more often neglect
19 and failure to communicate.

20 I've seen a lot -- a lot of the business of
21 attorney grievance commissions has to do with underfunded
22 lawyers who are neglectful and fail to communicate.

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1 I don't know that I've seen anything on point in
2 the sense of a lawyer funded pursuant to an RFP for legal
3 service, because there haven't been many of those.

4 And as you know, the disciplinary panels tend to
5 operate with the most egregious problems, and they tend not
6 to enforce the competency requirement through the discipline
7 process, and they tend also not to enforce the Sixth
8 Amendment right to counsel provision through the disciplinary
9 process.

10 Where it will manifest itself is in neglect and
11 failure to communicate with clients, which are two recurrent
12 tip of the iceberg problems with attorney discipline.

13 MR. ASKEW: In my state, failure to communicate
14 with a client is not even a violation of the standards. One
15 of the biggest complaints that clients or others file against
16 lawyers in my state is failure to communicate.

17 MR. MILLEMAN: Right.

18 MR. ASKEW: And that's really not a prosecutable
19 offense. It's interesting. So most of those get dismissed
20 at the in-take point. Thank you.

21 CHAIR BATTLE: I'm sorry. I just want to make sure
22 I covered everybody. I think Linda was next and then Maria.

1 MS. PERLE: My only point, and it's a point that I
2 raise in all of these -- developing all of these rules is
3 that we want the rule to the extent that we can to say what
4 we mean and what we want.

5 It's one thing to say that we trust John Tull and
6 everybody -- and the other people that are implementing these
7 rules now, today in 1995, and it's another thing to think
8 about what might happen in the future.

9 And to the extent that we can write these rules for
10 posterity -- somebody made a comment the other day in a
11 discussion, "Well, we'll write the rule now, and then we'll
12 change it after the next round to say what we want."

13 And I said, "We cannot control that." First of
14 all, we all know how long it takes to make changes in these
15 rules based on the experience we've had over the last couple
16 of years.

17 And second, we don't really know whether we're
18 going to be in control of that process. So I just want to --
19 my only point, and it's not a specific point, is simply that
20 we might -- if we want to make clear that this process is not
21 driven by cost, we ought to say that.

22 MS. MERCADO: And somewhere in there there has to

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1 be that balance that coming back Congress in the same breath
2 gave a greater control and amount of money to the IG to look
3 at a financially driven monitoring, auditing aspect of how
4 Legal Services, does it work.

5 I mean, part of the criteria that you look at is
6 going to be whether, in fact, financially where low balling
7 or in the competitive process.

8 I mean, is that going to be a negative that you're
9 going to draw against a grantee because they were not
10 actually low balling compared to somebody else? They'll
11 bring up five different entities that bid --

12 MS. PERLE: This didn't go to the lowest -- yeah.
13 I mean, I don't think we have the luxury of ignoring cost or
14 cost per case or, you know, efficiencies.

15 First of all, the statute under which we anticipate
16 we're going to be operating says that you have to base it on
17 cost -- I don't know the three -- it makes it clear that
18 there are other -- at least the McCollum provisions make it
19 clear that cost is not the only criterion but that it is
20 clearly one of the criteria. So we don't have the luxury to
21 ignore it.

22 MS. MERCADO: Let's make sure that we discuss that.

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1 CHAIR BATTLE: We can define -- I think Maria's
2 point is well taken, but I think that we have the
3 opportunity, as Linda is telling us, to clearly define what
4 is meant by cost-effectiveness and what is meant by, you
5 know, when we look at quality feasibility.

6 And once that definition becomes regulatory, it
7 seems to me the idea in anyone else who is doing a review is
8 bound by what we establish as the criteria for the grantee
9 getting the money.

10 And whether they're in compliance with that
11 criteria has to be measured based on how we define what it is
12 that we've asked them to do. I think Alex wanted to make a
13 point and then Nancy.

14 MR. FORGER: Yeah. Going back to the level playing
15 field, my concern throughout is to make certain that a new
16 applicant has the equal opportunity to win the contract.

17 Cost has to be a factor in making a decision
18 between the two. A lower cost doesn't necessarily mean
19 lesser quality.

20 The problem we're going to face is we're not --
21 we're dealing, presumably, with one bidder for whom there is
22 a track record where we can at least seek to make judgments

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1 on quality and effectiveness, although we're just starting
2 that process versus an unknown.

3 And even the fact that it's an unknown the bidding
4 may be on a different bases. They're both going to bid for
5 the same geographic area.

6 One may be emphasizing technology in-take. Another
7 one way be doing the guardianship cases, and so it's going to
8 be extraordinarily difficult to try to get a comparable
9 measure.

10 And I think that assuming you could, that you had
11 the twins that were bidding for the same geographic area, and
12 the new twin says, "I will do 2,000 hours," and the existing
13 provider says, "I'll do 1,500," if you ask the question, I
14 suppose you have to grant it to the 2,000.

15 And you would want to unless you have reason to
16 believe with this new person on the block that the lawyers
17 were not going to provide high quality or ethical work.

18 And I don't know how you're going to make that
19 judgment except look at their past history, and it may be
20 that they're doing this in part through pro bono or for other
21 reasons and every intention of providing high quality
22 service, maybe even better than the original twin, but you're

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1 not going to know that.

2 You can doubt how can they really do these numbers
3 of ours for this money. It's only going to give them \$80 an
4 hour, but they may have good reasons for wanting to do that.

5 MS. PERLE: We tried in the criteria to put in --
6 to put in requirements that they show how it is they're going
7 to accomplish it.

8 CHAIR BATTLE: I would think you would have to
9 have, in addition to someone stating their expectation as to
10 what they believe they'll be able to do, some measure that
11 you use even for a nonexisting grantee or recipient or their
12 ability to demonstrate either through their existing practice
13 and how many clients they've been able to see or some
14 measure.

15 MR. FORGER: When we get to that, one of the words
16 that gives me a problem is "demonstrate." I don't know how
17 five former Supreme Court Justice clerks get together and
18 decide they're going to do this, how they're going to
19 demonstrate that they're going to perform in all the ways
20 that the existing program that has been running for ten years
21 does.

22 But I'm simply underscoring the economic point. I

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1 think it's an important point, and while you don't want folks
2 "low balling" or low bidding unless they're going to do
3 quality service as well as the person who is a higher
4 bidder -- so I don't think because one is bidding on a basis
5 that would, presumably, do more cases than another, then that
6 is unduly suspect.

7 There may be good reasons why they would do that
8 because of either nature of delivery, they're going to use
9 in-take versus the other, they've got more paraprofessionals
10 or they're prepared to do it as a lesser fee.

11 MR. McCALPIN: I would point out that both the
12 Gekas bill and the bill approved in the Senate Appropriations
13 Subcommittee yesterday require in accordance the greatest
14 number of hours of qualified legal services in such area.

15 MR. FORGER: So there are those in Congress who
16 believe that should be the set of criteria.

17 MR. McCALPIN: Yeah. That's in two bills which are
18 pending right now determined on the basis of --

19 MS. PERLE: I think, you know, one thing is quite
20 clear that we were only anticipate what we think is going to
21 be the likely -- when we started this process, we were
22 anticipate what we thought was going to be the likely

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1 legislative framework.

2 And before we adopt this as a final rule we should
3 know what the legislative framework is. We may be dealing
4 with one that's very different from what we started out with.

5 But when we began this process in early August, we
6 were dealing primarily with the McCollum bill, and we used
7 that as the legislative framework.

8 CHAIR BATTLE: We've had some things to change, and
9 we recognize that in the interim. With this particular
10 regulation, before it's all over there may be some
11 significant changes from what it is that we now can
12 anticipate we need to look at.

13 But I think for this flash cut moment in time that
14 it makes sense to take the most recent statements that we
15 have both from the House and the Senate as to their
16 expectation on the issue of competition and to use that as
17 our basis for at least looking at the issue and preparing a
18 proposal.

19 MS. PERLE: Well, the problem is if we do that,
20 then we don't go ahead with this process at all, because
21 under the Gekas bill and the House bill, we don't have -- we,
22 the Corporation, has no role in this.

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1 CHAIR BATTLE: On the issue of competition if we
2 exist. I mean, I should have put that caveat in.

3 MS. PERLE: Well, I think that we need to go
4 forward with whatever proposals there are that anticipate the
5 continuation of the Corporation.

6 CHAIR BATTLE: Right. That was my point, the
7 continuation being part of the presumption for this whole
8 meeting that we at least take the most recent statement from
9 the House and Senate in those bills which do speak to, like,
10 the reauthorization bill that Nancy Kassebaum introduced and
11 what we have in the House.

12 MS. PERLE: I don't think she has introduced
13 anything yet, has she? Unless I've missed something --

14 MR. FORGER: Depends who you listen to.

15 MR. ASKEW: Yeah. We've heard two different
16 stories.

17 MS. PERLE: Okay.

18 MS. ROGERS: I wondered whether you gave some
19 thought to talking a little bit about what cost-effectiveness
20 doesn't mean as well as what it does mean, some language, and
21 maybe there was some discussion and a reason not to put it
22 in, that cost-effectiveness means more than cost per hours

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1 and experience and expertise in the area as a part of what
2 efficiency means or more than cost per case, because case can
3 be defined in so many ways.

4 MS. GLASOW: We have made some mention of this in
5 the preamble on page 2, the top paragraph. It said, "The
6 comparative system envisioned in this regulation is intended
7 to encourage realistic and responsible bids aimed toward the
8 provision of quality legal services.

9 "It is not intended to encourage a system that
10 would promote low ball bidding or result in the fragmentation
11 of services, the reduction of quality legal assistance or
12 disruptions in the delivery of legal services to eligible
13 clients."

14 Beyond that this rule does have the selection
15 criteria which well, basically, be spelled out and quantified
16 in the RFP, and the real, I think, key to this process is
17 when you work the selection criteria out in the RFP that you
18 find a way to basically quantify quality so you can measure
19 an application that comes in in some way and decide among
20 applicants which one is going to be most cost efficient and
21 yet provide good, high quality legal assistance. That's
22 going to be the key I think. Do you agree?

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1 MS. PERLE: I only agree up to a point. I mean, I
2 think that it's the point I made before, which is that, you
3 know, we're looking at how a future corporation will
4 interpret the regulation, and they will have the language of
5 the regulation and one of -- the regulatory history is
6 included in the publications in the Federal Register.

7 So I think -- I agree with you. I agree with
8 Mrs. Rogers that we really should, I think, explain to
9 whatever extent we can, at least a paragraph about what we
10 mean by cost efficiency in the preamble to the rule, not just
11 in the RFP, because the RFP, you know, is a document that's
12 used for whatever competition comes up this year. It's not
13 going to be thrown out next year and be completely redone.

14 CHAIR BATTLE: I think that's a good suggestion,
15 Nancy, that we need to undertake to put in the preamble,
16 something that really defines and clarifies what cost-
17 effectiveness --

18 MS. PERLE: We don't have to have an enormously
19 long discussion with all sorts of history, but I think we
20 need a paragraph.

21 MS. ROGERS: Well, I wonder why it goes in the
22 preamble as opposed to in the rules.

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1 MS. GLASOW: Do you want a definition of the rule?
2 Is that what you're saying?

3 MS. ROGERS: I don't know. I just wonder why --
4 I'm just raising the issue. I don't know enough to know.

5 MS. PERLE: I think the attempt in the rule itself
6 was to include references to cost which are not -- I don't
7 think it says anyplace cost is mentioned per se. It mentions
8 economies or efficiencies, whatever word we decide to use, as
9 one of many criteria.

10 That was an effort to avoid what Mike suggested
11 happened in Maryland, that cost drove the process. I mean --

12 MS. ROGERS: But you do define quality, which is
13 one of the things. I don't know why it would be inconsistent
14 with that to define --

15 MS. PERLE: I certainly have no objection to that.
16 I think that might be kind of difficult.

17 MR. TULL: I think it would have been helpful,
18 given the clear concerns that have been raised about the
19 risks that there are in how that particular criteria might be
20 applied, given what has been seen in the defender world,
21 where there is a rich and chilling history about how a
22 misapplication of that particular criterion can cause serious

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1 and, in that particular case, unconstitutional damage to
2 this -- to the justice system.

3 I think having said that, I think it's also
4 important to note that what the regulation does reflect is a
5 notion that part of the problem of talking about
6 effectiveness, quality and efficiency is, I think, the
7 learning that has come from the work that has been done in
8 this area -- both in the work that was done by SCLAID in the
9 development of the civil standards and the work that has been
10 done first in the comparative demonstration project of the
11 Corporation, then later in the performance evaluation system
12 that was developed during the last year -- is that it is
13 problematic to uncouple any one of those criteria from the
14 other.

15 And to speak just about quality or just about
16 effectiveness or just about efficiency as if they're not a
17 part of a very interrelated set of concerns as you look at an
18 application or at a program or a provider and make a judgment
19 about it, that the actual process for making a decision will,
20 as reflected in the regulation will involve a review based on
21 a set of standards which reflect that -- the interconnection
22 among those three.

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1 But I think that it is helpful to specifically
2 speak to the cost-effectiveness issue in the regulation.

3 CHAIR BATTLE: What about in our Purpose, actually
4 in the language of the regulation speaking to this low ball
5 issue by making it clear that the focus of the evaluation
6 process is not going to be on the dollar amount but on the
7 quality of the services, for the service areas?

8 In doing that, without getting into trying to
9 define "cost-effectiveness," we can communicate clearly in
10 the regulation that the purpose is not to open this process
11 up to bidding in the context of people attempting to low bid
12 but people attempting to put together a proposal that speaks
13 to quality of service.

14 MS. ROGERS: I guess it doesn't merely meet the
15 reason that I would raise it, because I would hope that the
16 grant would go to the one who, in dollar terms, does the best
17 job for the quality provided.

18 My only fear is that as I read the rule I don't see
19 anything -- I see lots of explanation of quality but nothing
20 that talks about how cost is determined other than cost per
21 hour or cost per case.

22 And if those are the likely things that someone is

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1 going to come up with to do it, then it seems to me, just as
2 in the quality area, there ought to be some explanation that
3 experience and expertise counts, other things that we know in
4 the practice of law count, count in this cost-effectiveness
5 analysis.

6 CHAIR BATTLE: I think Alex wanted to also --

7 MR. FORGER: I was going to simply note, at least
8 from my wanderings through the Hill, that I think those who
9 have emphasized the work per hour are those who want to
10 eliminate the Legal Services Corporation.

11 The House bill and McCollum don't emphasize in
12 competition that this is principally an economic issue, and
13 indeed in all of the discussion we have had, I think one has
14 been behind desire for competition by most of those companies
15 is a view that there is a vested interest in the existing
16 programs that we don't defund -- they're always asking how
17 many have been defunded in the last year with a view that
18 there is less accountability in the existing programs because
19 they know that they're automatically refunded, and therefore
20 they can do what they wish to do with the notion that perhaps
21 they're not being as responsive to the restrictions and to
22 the Corporation and that this was simply a way of causing

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1 August of the programs to recognize that they have to win
2 their wings every so often and just don't have a perpetual
3 grant.

4 And all that I've ever heard is that it should be
5 high quality and effective service, but obviously, all other
6 things being equal, if there is an economy factor, you go to
7 that as well.

8 I mean, I think Nancy has a good point, if we can,
9 in some measure indicate that it isn't a Gekas kind of lowest
10 dollar.

11 But to me, the term "quality" "effectiveness" and
12 "efficiency" have to embrace those in any event. I don't
13 know how you can -- as I said before, a low baller isn't
14 necessarily bad if it's high quality and efficient and
15 professional, ethical conduct.

16 I guess the connotation of low ball means somebody
17 is a bait and switch in trying to take the contract and isn't
18 going to perform. And I don't know that we can start with
19 that presumption, but certainly would raise a question if
20 somebody was significantly lower than somebody else.

21 But if the point is made, although it may be
22 redundant, that cost alone is not the factor, but cost is a

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1 factor everything else being equal, I suppose.

2 CHAIR BATTLE: I'd like to just speak to the three
3 items in the McCollum bill, the specific criteria that the
4 law sets out in the context of this discussion so that we can
5 focus on what it is that we have as at least a starting point
6 for what we should be considering in terms of criteria.

7 The first is the demonstration of a full
8 understanding of the basic legal needs of the eligible client
9 to be served and a demonstration of capability of serving
10 those clients.

11 The second is the quality, feasibility and cost-
12 effectiveness of plans submitted by the applicant for the
13 delivery of legal assistance to the eligible client to be
14 served.

15 The third is the experience of the Corporation with
16 the applicant, if the applicant has previously received
17 financial assistance from the Corporation, including the
18 applicant's record of past compliance with Corporation
19 policies, practices and restrictions, which just seems to me
20 is exactly what Alex is saying what the flavor of the
21 McCollum bill is all about, giving the Corporation an
22 opportunity to truly evaluate existing recipients and

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1 grantees to determine whether or not they're doing their job,
2 and if they're not, to look at alternatives but not
3 necessarily to utilize this process to simply open it up to
4 take any bid from anyone that looks like it's less than --
5 because of the numbers in it, a particular proposal by an
6 existing recipient.

7 And the fact that the bill speaks to the experience
8 of the Corporation with the applicant as one of the measures
9 it seems to me gives us the opportunity, when we put our
10 criteria together, to look at those measures and to do what
11 Alex talked about a moment ago, to come up with some way for
12 nonexisting recipients to be able to figure out a way to
13 honestly and in a level playing field look at how they're
14 able to demonstrate whatever it is that they put in their
15 application as well.

16 So, you know, we began the focus, it seems to me,
17 on this cost-effectiveness as one particular issue because of
18 the concern that Mike raised about low balling.

19 But when you step back and look at the full range
20 of criteria that the bill actually sets out, I think -- I
21 think I agree with John that to break out cost-effectiveness
22 and attempt to define it so that we're real careful about it

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1 without putting it in the context of the whole picture may
2 not be what we need to do.

3 But we do need to speak to what cost-effectiveness
4 means, and again, I think this Committee is going to have to
5 make -- this Joint Committee will have to make a policy
6 decision about how basic -- when someone submits an
7 application, whether they're dollar figure is something
8 that's going to be a criteria that we examine or whether the
9 service area will dictate the dollar figure.

10 I mean, I think that's part of what we're going to
11 have to decide, it seems to me. Mike?

12 MR. MILLEMAN: Two quick points relevant to this
13 conversation. First, if our experience is any indication,
14 you'll get a diversity of private bidders.

15 You'll get some break-away attorneys from Legal
16 Services programs who go out and try to set up a private
17 practice, and they're well motivated, and I think that's to
18 the good, not always to the good, but I think there is some
19 good in that.

20 You'll get some existing practitioners who are
21 failing economically and are trying to find some way to hold
22 on. You'll get some recent law school graduates who are

1 going out into a bad market.

2 You'll get, at least to the first bidders
3 conference, some big law firms who will then not come to the
4 second bidders conference, if our experience is any
5 indication, because the dollars aren't there to make this
6 work.

7 So I don't mean to suggest a homogenous notion of
8 who the private bidders are going to be. I think the private
9 bidders will be new nonprofits.

10 They'll be a variety of folks, and my only concern
11 as to the Maryland experience is not with cost as a factor
12 but with cost as the dominant factor.

13 And that leads to a second point that we haven't
14 talked about today and I think is very important, and that's
15 the decision-maker, the person who makes the decision to
16 apply the criteria.

17 In Maryland, which is not the same as your
18 experience, the decision-maker was the state itself, which
19 was the defendant in lawsuits brought by the Legal Services
20 programs that were involved in these areas.

21 One question I have, as you look at trying to
22 insulate -- as you look to try to ensure integrity and

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1 independence of your system, which we don't have in Maryland,
2 in the decision-making, is whether or not you want to
3 consider with the review panels having a seat on review
4 panels for a person by position; i.e., a designee of the
5 local bar or state bar or a designee of a local board of
6 directors that administrators the local IOLTA program.

7 I raise that question only because our collective
8 experience in this country has been the diversification of
9 power sometimes is the best hedge against arbitrariness.

10 Although, if this Board were making decisions
11 forever and ever, I wouldn't raise the issue. I raise the
12 issue, and I wonder whether or not -- and clearly the
13 decision-maker is as important as the criteria.

14 And it may well be that in the process, in the
15 review panel itself, you could put in some hedges against a
16 lack of integrity and lack of independence.

17 MR. McCALPIN: But I don't understand the review
18 panel is the decision-maker.

19 MR. MILLEMAN: It's not the decision-maker. I
20 don't mean to suggest that it is.

21 MR. McCALPIN: There is the decision-maker over
22 there.

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1 MR. MILLEMAN: No. I understand that, but if -- it
2 seems to me that in that process, if you have a review panel
3 that is making recommendations, you've got some hedges
4 against arbitrariness that I think are good.

5 I don't mean, obviously, present company, but
6 building a system for the future, if you have a decision-
7 maker that is consistently disregarded -- I mean, if you have
8 a review panel that's consistently disregarded for arbitrary
9 reasons by the decision-maker, then I think you've created a
10 good process for raising the issue, good process being the
11 more diversified review panel that can raise the question.

12 That's not a SCLAID recommendation. I just thought
13 about it this morning when I was using it in conversation.
14 And I really haven't thought it through carefully, but --

15 MR. ASKEW: Question, do you mean a member of the
16 IOLTA board or member of the state bar from the same state
17 where the --

18 MR. MILLEMAN: I don't know whether you're going to
19 do the review panels regionally or by state. Depending on
20 how you do them, I would stick with the geographic area
21 that's going to be represented by the review panel.

22 If you're going to have regional review panels,

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1 they'd be from the region. If you're going to have state
2 review panels, it would be from the state.

3 MR. ASKEW: I just -- there is potential conflict
4 there because I think some IOLTA programs may be better.
5 Some state bars may be better. I mean, that --

6 MR. MILLEMAN: Clearly, the bidders are
7 disqualified under the current formulation of the conflict
8 rules.

9 CHAIR BATTLE: Or do we envision professional
10 review panels, people that we determine have sufficient
11 knowledge to be able to do this review?

12 I could see a cost factor if for each program you
13 got to have a review panel with some person who is
14 independent coming from that area to participate in the
15 review panel at a point in time when our funds are going to
16 be diminish I should.

17 But we do need to give thought to, and I agree with
18 you, the diversity of that panel so that you have independent
19 thinkers on that panel making a recommendation to the
20 President so that it is not just a rubber stamp process of
21 what now exists but some real critical independent thinking
22 going on about the various applicants before a proposal is

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1 made -- a recommendation is made to the President. Bill?

2 MR. McCALPIN: LaVeeda, as long as Mike as broached
3 the subject of potential bidders, I think the discussions
4 that I've heard so far have had a tendency to overlook what I
5 have been become familiar with in another context as a whole
6 area of potential bidders.

7 And those are the prepaid Legal Services programs
8 which exist all over the country and presently serve an
9 estimated 70 million people in this country. Many of them
10 are nonprofit.

11 They may not be presently structured to meet all of
12 the criteria, but they could become so. I participated in a
13 meeting once where the person who ran the Philadelphia
14 teachers prepaid legal program said without any qualification
15 that he could run a better program than the Philadelphia
16 legal aid program.

17 MS. PERLE: In 1989, when the Corporation proposed
18 its last competitive bidding process, I think a
19 representative of that program came and spoke to the
20 Corporation and made some more representations.

21 MR. McCALPIN: Well, I think there is a whole
22 potential of prospective bidders.

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18 its last competitive bidding process, I think a
19 representative of that program came and spoke to the
20 Corporation and made some more representations.

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22 potential of prospective bidders.

1 CHAIR BATTLE: Which is one of the reasons why we
2 have to carefully construct a regulation that gives potential
3 bidders notice of what it is that they're bidding on so that
4 they have a little appreciation, it seems to me, as to what
5 is going to be entailed.

6 Let me suggest something. It's about, what, 12:20
7 now. I think we've got a two-phase discussion that we need
8 to undertake.

9 One is on the underlying philosophy completely of
10 competition, which is what we've been engaged in so far,
11 which I think we need to continue, and we need to reach some
12 consensus around certain issues.

13 What I'd like to do is to have the panel identify
14 the specific issue areas where we've got to make some policy
15 decisions about which way we're going to go, and then we're
16 going to do our line-by-line go through the regulation, I
17 think, this afternoon.

18 If we could identify what kinds of policy
19 decisions, particularly because we've got Provision's as well
20 as Operations and Regulations here, we, as a joint committee,
21 are going to need to make about how this competition is going
22 to go forward, then we can discuss those policy issues and

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1 come to some resolution as to how we see the policy issues
2 first and then begin to look at the details in the
3 regulation.

4 Does that -- will that work? What we might do is
5 take a lunch break to consider those policy issues now, a
6 lunch break so that we can talk about what those policy
7 issues ought to be and then come back again in about -- what
8 do we need, 45 minutes for lunch?

9 Do we have lunch, Pat, on our own?

10 MS. BATIE: Yes.

11 CHAIR BATTLE: An hour for lunch?

12 MS. BATIE: An hour.

13 CHAIR BATTLE: An hour for lunch, if we can make it
14 over to Union Station. Let's take an hour for lunch, give
15 consideration to those specific issues, those issue areas so
16 that our discussion this afternoon will be focused on those
17 issue areas, and we can resolve those issues up front.

18 Now, Bucky, when does your committee meet?

19 MR. ASKEW: It's scheduled for 1 o'clock tomorrow
20 afternoon.

21 CHAIR BATTLE: Okay. All right.

22 MR. ASKEW: 1:30.

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

(1:46 p.m.)

1
2
3 CHAIR BATTLE: We're going to go back in session of
4 a joint meeting of the Operations and Regulations Committee
5 and the Provision's Committee to continue our consideration
6 of competitive bidding for grants and contracts regulation.

7 During the break right before we ended our morning
8 session this morning I proposed to the panel that we look at
9 and identify some overriding policy concerns that we might
10 want to undertake separate from our review of the specific
11 reg.

12 But after some deliberation, I think the panel has
13 suggested that the way -- the best way to approach this is
14 for us to really begin this afternoon to look specifically at
15 the language in the reg and from that to make policy
16 decisions as we go through, and that might be the most
17 organized way to approach that.

18 So with that being the approach that we're going to
19 undertake this afternoon, why don't we start with the actual
20 proposed rule and the language of the proposed rule and use
21 the same procedure that we have in the past going through
22 line by line and hearing any objections that we might have to

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1 the language in the proposed rule.

2 Are there any questions about that procedure? And
3 this may satisfy our need to get through this process as
4 quickly as possible.

5 The proposed rule is contained in a draft that you
6 should have received, which is dated 9/7/95, and on the first
7 page you start with 1634, Competitive Bidding for Grants and
8 Contracts, Section 1634.1. Purpose.

9 "This part is designed to improve the delivery of
10 legal assistance to eligible clients through the use of a
11 competitive system to award grants and contracts for the
12 delivery of legal services. The purpose of such a system is
13 to:

14 "(a) Encourage the economical and effective
15 delivery of high quality legal services to eligible clients
16 through an integrated system of legal providers;

17 "(b) Provide opportunities for qualified attorneys
18 and entities to compete for grants and contracts to deliver
19 high quality legal services to eligible clients;

20 "(c) Encourage ongoing improvement of performance
21 by recipients in providing high quality legal services to
22 eligible clients;

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1 "(d) Preserve local control over resource
2 allocation and program priorities; and

3 "(e) Minimize disruptions in the delivery of legal
4 services to eligible clients within a service area during a
5 transition to a new provider."

6 John, did you have something?

7 MR. BROOKS: Well, I have a suggestion in (a) to
8 reverse "economical" and "effective" in the light of our
9 discussion this morning, to emphasize the effective rather
10 than the economical.

11 MS. MERCADO: Which number, John? I'm sorry.

12 CHAIR BATTLE: That's (a).

13 MR. BROOKS: The little paragraph (a).

14 MR. ASKEW: By changing the word "economical" to
15 "efficient" as we did earlier.

16 MS. FAIRBANKS-WILLIAMS: He said reversed. Just
17 reverse --

18 MR. ASKEW: Reverse but also change.

19 MR. BROOKS: Well, I wondered about "efficient."
20 Maybe that's a good -- better word here as well.

21 MS. MERCADO: Yeah. I think "efficient" is what we
22 had replaced the "economical" term in the other provision, in

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1 the 1634.9, I think.

2 CHAIR BATTLE: So what are we proposing now, that
3 we take "economical" out and put --

4 MS. MERCADO: "Efficient."

5 MR. ASKEW: Do you want me to read it to you?

6 CHAIR BATTLE: Uh-huh.

7 MR. ASKEW: "Encourage the effective and efficient
8 delivery of high quality legal services to eligible clients."

9 CHAIR BATTLE: I think that's consistent with
10 what's in Section 503.2, which speaks of cost-effectiveness.
11 So you've got "effective" and "efficient."

12 MR. BROOKS: Is 503 -- is that the --

13 CHAIR BATTLE: I think this is McCollum. Suzanne,
14 H.R. 2076, is that McCollum?

15 MS. GLASOW: Is that the language I gave you?

16 CHAIR BATTLE: Yeah.

17 MS. GLASOW: No. That is the appropriations
18 language. McCollum bill is separate.

19 CHAIR BATTLE: So this is in the House
20 Appropriations bill that we now have.

21 MR. BROOKS: What's the bill number on that, do you
22 know? I think it would be helpful to have the bill number in

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1 here.

2 CHAIR BATTLE: H.R. 2076.

3 MS. MERCADO: Is that Rogers, Congressman Rogers?
4 It's not Gekas, is it?

5 CHAIR BATTLE: No. It's not Gekas.

6 MS. GLASOW: It's the one that passed the House.

7 CHAIR BATTLE: That's the Appropriations bill.

8 MR. ASKEW: Did you have something else under this,
9 John?

10 MR. BROOKS: No.

11 MR. ASKEW: Could I make a suggestion?

12 CHAIR BATTLE: Okay.

13 MR. ASKEW: Under "Purpose," I think we ought to
14 find an appropriate place to refer to the ABA standards and
15 to the LSC performance measures consistent with what we
16 talked about this morning, unless you had thought about that
17 and made a decision that it's not appropriate to put it here
18 somewhere.

19 MS. GLASOW: We could do it in (a).

20 MR. ASKEW: In (a)?

21 MS. GLASOW: "Quality legal services," and then
22 refer to the "standards consistent with."

1 MS. PERLE: Just at the end of that, right,
2 "consistent with"?

3 MS. GLASOW: Right.

4 CHAIR BATTLE: So it would be "consistent with the
5 ABA standards"?

6 MR. ASKEW: "And the LSC performance measures."

7 MS. ROGERS: Are those inconsistent with each other
8 in any way?

9 MR. TULL: No. In fact, it's a --

10 MS. ROGERS: Premised on one another?

11 MR. TULL: Premised each on the other. It's a
12 symbiotic relationship.

13 CHAIR BATTLE: Okay. Are there any other concerns
14 about the Purpose? I had mentioned earlier that in our
15 Purpose we want to focus the attention on any prospective
16 grantee or anyone submitting a proposal that the focus is on
17 quality of the legal services rather than attempting to put
18 together a bid that reflects the lowest cost.

19 MS. GLASOW: I think (a) says that pretty much.

20 CHAIR BATTLE: Well, maybe in our comments to (a)
21 we can talk about low bidding not being the measure that
22 we're really looking for.

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1 We're looking for the best quality services that
2 can be provided for a service area based on the budget made
3 available for that service area.

4 MS. GLASOW: Right.

5 CHAIR BATTLE: Something along that line.

6 MS. GLASOW: We said it once on page 2 of the
7 preamble, but we can also pull it down and repeat it in a
8 different way under the section on Purpose in the preamble.
9 We did it in general comments before we got to the --

10 CHAIR BATTLE: Low balling --

11 MS. GLASOW: Okay. That's right.

12 MR. BROOKS: If we're on the comments as well --

13 CHAIR BATTLE: We are.

14 MR. BROOKS: Talking about low balling, it seems to
15 me that rather than phrasing that in the negative "not to
16 encourage" -- "is not intended to encourage a system that
17 would promote low balling," I think it would be more
18 constructive to say, "it is intended to discourage a system
19 that would promote" --

20 CHAIR BATTLE: That's on page 2 of the preamble.

21 MR. BROOKS: First paragraph.

22 MR. ASKEW: I thought you were going to suggest

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1 that it be intended to encourage high balling.

2 CHAIR BATTLE: Okay.

3 MS. MERCADO: The language reads now --

4 CHAIR BATTLE: "It is intended to discourage a
5 system that would promote low ball bidding or result in the
6 fragmentation of services, the reduction of quality, legal
7 assistance or disruptions in the delivery of legal services
8 to eligible clients."

9 MS. MERCADO: Okay.

10 MS. ROGERS: That's sort of a colloquialism, that
11 it is a way to say low ball bidding.

12 MS. MERCADO: Generally, the terminology in a lot
13 of the federal contracts or state contracts is just to the
14 lowest bidder.

15 CHAIR BATTLE: But it's not just the whole pocket
16 of the low bidding. What we're talking about is low balling
17 for purposes of getting a contract, which is a little bit
18 different from someone who effectively submits of lowest bid.

19 MS. PERLE: Well, it's also bidding at a low cost
20 at the expense of quality. It's not simply -- I mean, that's
21 two parts of it. I mean, low balling in the sense of
22 offering less than you know --

1 CHAIR BATTLE: It's going to take to get the
2 contract.

3 MS. PERLE: To get the contract --

4 CHAIR BATTLE: For the first year.

5 MS. PERLE: -- and then jack the prices up later,
6 which is what's happened in the criminal --

7 MS. MERCADO: It does deal with a bait and switch
8 situation, then, and somewhere in there there has to be that
9 discussion of bait and switching.

10 MS. GLASOW: It's offering unrealistic and
11 irresponsible bids to do a job, which is the opposite of the
12 first sentence of that paragraph.

13 CHAIR BATTLE: Yeah.

14 MR. BROOKS: Maybe we should use those words.

15 CHAIR BATTLE: So we can work in some language that
16 explains what that means, it seems to me.

17 MR. BROOKS: I think we should use those words.

18 CHAIR BATTLE: Unrealistically --

19 MR. BROOKS: Irresponsible and unrealistic.

20 CHAIR BATTLE: Suzanne, everybody likes your
21 language, "unrealistic" and "irresponsible."

22 MS. PERLE: But I think that's only part of it.

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1 CHAIR BATTLE: Okay.

2 MS. PERLE: I think that it's also -- it may be
3 that it's not unrealistic to do what they say they're going
4 to do for that price, but it may sacrifice quality.

5 MS. GLASOW: We'll add "do not sacrifice quality"
6 somehow somewhere on this.

7 CHAIR BATTLE: Look for a term that deals with
8 quality issue, realistic issue and the bait and switch and
9 low balling.

10 MS. MERCADO: Will we have a DPTA action for three
11 times --

12 CHAIR BATTLE: Okay. I think John raised a good
13 point. We're going to consider the comments in tandem with
14 our review of the rule, which is generally what we do.

15 So as we go through and people have questions or
16 concerns about the comments, as we go through the sections,
17 you may raise them, and we'll try to make those corrections
18 as we go through.

19 Okay. Anything else on the Purpose?

20 (No response.)

21 CHAIR BATTLE: Hearing nothing else, we'll move on
22 to the definitions. I suggested that we just alphabetize the

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1 definitions. I know there is no rhyme or reason to how
2 they're done, but that might be helpful.

3 MS. PERLE: They were originally alphabetized.
4 There was a change made that, sort of, took it out.

5 CHAIR BATTLE: Okay. The first we have is,

6 "(a) 'Review panel' means a group of individuals
7 who are not Corporation staff but who are engaged by the
8 Corporation to review applications and make recommendations
9 regarding awards or contract for the delivery of legal
10 assistance to eligible clients.

11 "Review panels must include as a minimum lawyers
12 experienced in and knowledgeable about the delivery of legal
13 assistance to low income persons and eligible clients or
14 representatives of low income community groups.

15 "No member of a review panel shall have any direct,
16 current or proposed involvement or relationship with or an
17 actual or potential conflict of interest with any applicant
18 or the applicant staff or governing body that is the subject
19 of the panel's review.

20 "In addition, no member of any review panel shall
21 have had within the last five years a prior involvement or
22 personal relationship with the applicant or the applicant's

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1 staff or governing body."

2 There was a concern raised earlier about the review
3 panel including local people either from the bar association
4 or from the IOLTA group or from some person who would
5 represent a local interest in this, and I think now is the
6 appropriate time to have some discussion about whether
7 "review panel" ought to encompass that.

8 MS. PERLE: I think the current language of the
9 review panel would probably preclude a lot of those people.

10 MR. TULL: I probably shouldn't speak for
11 Mr. Milleman, since he's not here, but since he's not here, I
12 will. He and I had a brief exchange at the end of this
13 morning's session about his comments.

14 And he looked at this section, and I believe his
15 concern as he expressed it was the concern of having the
16 decision be made -- the experience they had had in Maryland
17 where the decision was made by the state, which was -- had an
18 interest in the outcome of the particular litigation that
19 they were bidding for.

20 And his suggestion of local involvement of the bar
21 or someone else he framed in terms of making certain that
22 there was independence of the decision-making.

1 He looked at this and said that he thought that
2 particular concern would be addressed by this language,
3 although since I'm speaking for him and in fairness to him,
4 he didn't sit down in his chair and read it carefully. It
5 was his reaction of a quick read of it.

6 CHAIR BATTLE: Right. There are two issues; one,
7 the conflict of interest issue, which I think this does
8 address, because it identifies that people that have
9 conflicts of interest are not then qualified to sit on the
10 panel.

11 But as I understood this concern, there is a
12 secondary issue, which is local involvement in the decision-
13 making, which this does not address.

14 And I guess we have to, as a committee, take a look
15 at whether we want to give some consideration to whether
16 there ought to be local involvement or whether as long as
17 there is no conflict of interest with regard to the members
18 of the panel and a particular grant that they have to review
19 we could flex that in and out depending on the circumstances.

20 MR. TULL: Perhaps a way to address that would be
21 rather than specifically identifying who should be involved,
22 because I think this morning Mr. Askew pointed out that the

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1 appropriateness may vary from state to state, for instance,
2 an IOLTA foundation or a bar may be an applicant in some
3 states and not in others.

4 Perhaps the way to say -- with the same level of
5 focus which is here now; which is to say, is to add a clause
6 which relates to having knowledge of the delivery needs in
7 the community to be served or in the state to be served.

8 CHAIR BATTLE: This is now stated in general terms.
9 Review panels must have experience and a knowledge about
10 delivery systems, but it doesn't specify that you've got to
11 have knowledge of this particular locality's needs with
12 regard to delivery systems. Bucky? No?

13 I raised this morning a concern about that because
14 I'm just not sure how this whole process is going to work,
15 how many panels we'll have to have, whether four panels for
16 the whole country will do or whether or not we're going to
17 have to, for each locale, try to construct a panel that has
18 some feel for what's going on in that particular location.

19 So as you look at the issues of whether or not a
20 particular applicant can demonstrate, you've got people on
21 the panel who have some history in that region and knowledge
22 of how things work to be able to assess that kind of

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1 information.

2 I wonder whether now we have sufficient insight
3 into how this process is going to work to hamstring us into a
4 local requirement.

5 MR. TULL: I think that's -- my comment at the very
6 beginning that one of the principles was to draw some general
7 principles here in order to provide flexibility to respond to
8 circumstance as we see it and the reality of the resources we
9 have, et cetera.

10 I think that your comments are consistent with that
11 and would be appropriate. So we don't know how much money
12 we'll have for review panels, and if we were to require a
13 local presence, it would mandate this time around, if we have
14 timely review panels, 50 review panels, which will be far
15 more costly than what we're contemplating being able to pay
16 for.

17 MS. PERLE: And there is certainly nothing in here
18 other than the conflict of interest provisions which
19 preclude -- from including local presence. There is nothing
20 here that says you can't have it. I think it certainly could
21 be accommodated within this.

22 CHAIR BATTLE: Yeah.

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1 MS. PERLE: Should the resources be available.

2 CHAIR BATTLE: Nancy?

3 MS. ROGERS: I just had a question about the
4 breadth of the language in the conflict of interest
5 involvement, personal relationship.

6 Usually, you see remunerative or officer position
7 or served as a client or something that's more definite.
8 Anybody who has called them and, you know, offered to take a
9 case would be disqualified?

10 MS. GLASOW: Mike Milleman made that comment this
11 morning. He thought the two words in here that were,
12 perhaps, over broad are "involvement" and "potential
13 conflict." I thought, perhaps, we should say there is a
14 conflict or something that's not quite that vague.

15 CHAIR BATTLE: It's interesting, because some of
16 the comments that question got from people in the field who
17 reviewed the earlier version, which did not have a lot of
18 this language on conflict of interest had some conflict of
19 interest language but wasn't as extensive as this but made
20 the comment that they thought we could not be too pure
21 under -- I mean, there was no way we could be pure enough, in
22 fact, with respect to these things.

1 They thought that they really should do everything
2 they possibly could to make sure that no one could come and
3 say these panelists were biased in favor of a particular --

4 MS. ROGERS: And I don't oppose that. I would much
5 more favor a series of things -- if I were going to be only a
6 panel like this, just putting myself in that position, there
7 would be no way to check whether you had done this because
8 it's so unclear.

9 If you just enlisted every kind of possible
10 relationship that you could have that would be a problem, at
11 least then you could check to see if you'd had it.

12 This one puts somebody in a position of being
13 charged with a conflict of interest because it's so broad
14 without being able to check whether they had it. Would you
15 know whether you'd ever known anyone on the staff when you
16 got a file? You'd have to list the whole staff, think back,
17 "Oh, my gosh. That's somebody I thought years ago and had a
18 relationship with."

19 MR. ASKEW: The irony and the internal conflict in
20 this definition might be that if we decided that local --
21 that local people should be included in this and we'd require
22 that they be experienced in and knowledgeable of, the only

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1 people that you might be able to find is people who never
2 signed up on the pro bono panel in that program.

3 So if you're a lawyer who has never done pro bono
4 work, you've eligible to be on the review panel, but then, by
5 definition, I think you'd be not experienced in and
6 knowledgeable of delivery of legal services.

7 You might not be able to find anybody, or the
8 people you found you wouldn't want on the review panel
9 because they've never done pro bono work.

10 And that, in a way, argues against, sort of, having
11 a local presence on these review panels, because the
12 conflicts -- how are you going to find people in a state who
13 have had no connection with a legal services program but know
14 a lot about it?

15 CHAIR BATTLE: Yeah. And how are you --

16 MS. FAIRBANKS-WILLIAMS: It would be impossible.

17 CHAIR BATTLE: How are you defining or how broadly
18 are you defining "prior involvement" or "personal
19 relationship"?

20 I mean, what if you -- somebody served on an ABA
21 panel and knew the person, gone out to dinner with them a
22 few -- I mean, it really could carry this tremendously far I

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1 think.

2 MR. BROOKS: Well, just as a footnote, we have
3 "relationship" in one line and "personal relationship" in the
4 next sentence. What's the difference? Is there a
5 difference?

6 MR. ASKEW: But this really isn't a problem if --
7 and unless I'm wrong, if there is no local involvement on the
8 review panel. If the review panel from Georgia is all people
9 from Massachusetts, for instance, then you don't have
10 potential conflicts unless there is a real conflict, person
11 used to work in that program or something like that.

12 MR. BROOKS: Or unless I've sat on a board with
13 Mr. Askew.

14 MR. TULL: Did I understand your concern, Nancy, to
15 be with the language "relationship," that that is such a
16 broad term?

17 MS. ROGERS: Well, both "involvement" and
18 "relationship." I wouldn't know whether I had it or not.
19 You have to know so much about the organization to know if
20 you happen to know anyone, and then you'd be frightened
21 because there might be somebody you'd forgotten, who years
22 ago was your research assistant or something else, and you

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1 just don't recognize the name.

2 CHAIR BATTLE: Well, and it seems to me, though,
3 that it's prospective and not -- it doesn't -- later on we
4 talk about no member having had within the last five years,
5 which gives you a time frame certain to look back on, which
6 is probably more realistic than some language that doesn't
7 tell you how far back you've got to go.

8 MS. GLASOW: What if we took out the language and
9 say, "No member of a review panel shall have any direct,
10 current or proposed," and then just skip all the language,
11 "involvement or relationship with an actual or potential,"
12 and just put "conflict of interest with"?

13 MS. PERLE: Well, except it's the flip side. You
14 may have a conflict, but you also may have some relationship
15 that causes you to be biased in favor.

16 MR. TULL: But I think your point the next sentence
17 specifically speaks to that and puts a five-year limit on
18 that to make some -- so the first -- the second -- the five-
19 year limit is really inconsistent to some degree with the --

20 CHAIR BATTLE: First is over broad.

21 MR. TULL: -- preceding sentence, which suggests
22 any relationship at all would --

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1 CHAIR BATTLE: Yeah.

2 MR. BROOKS: Well, somewhere else we have wrestled
3 with this conflict of interest definition. I can't remember
4 which regulation it has been in. Anybody remind me? I'm
5 sure we've had it.

6 MS. PERLE: Was it 1611?

7 CHAIR BATTLE: You know, these two sentences really
8 are going to the same issue, and one is broader than the
9 second. The first one is broader than the second.

10 It appears to cover a broader scope, and then you
11 narrow that scope in the second sentence to specifically
12 "prior involvement" and "personal relationship," which I
13 think a person, if you're looking at five years and you're
14 looking at what it is you've done in the last five years, you
15 could probably identify as it relates to a applicable
16 applicant whether this applicant, with the knowledge you have
17 of that applicant, is someone that you've had a relationship
18 with within the last five years.

19 MS. ROGERS: I don't think so. You mean every
20 employee?

21 CHAIR BATTLE: No, just -- well, it says, "the
22 applicant or the applicant's staff." Will the staff be

1 disclosed in the application?

2 MS. PERLE: Well, the principal staff will be.

3 MS. ROGERS: But not the rest.

4 MS. PERLE: But not the rest. I mean, are you
5 concerned whether you happen to have some personal
6 relationship with the secretary or paralegal, or are you
7 concerned about the director, senior staff of a program?

8 I mean, you're not going to have the names of all
9 those other people. You will have the names and the resumes
10 of the principals, and I think that's really what you're
11 concerned about. Maybe "the applicant's" --

12 MS. FAIRBANKS-WILLIAMS: "Senior staff"?

13 MS. PERLE: "Principal staff" or "principal members
14 of the applicant's staff."

15 MS. MERCADO: But generally, conflicts of interest
16 don't go to that, do they? I mean, they generally go to even
17 having someone within that entity that is remotely -- in this
18 case, talking about, I don't even, relation or what have you.

19 MS. PERLE: Right. But what Nancy is suggesting is
20 that especially you're going to review a whole lot of
21 applications how are you going to know?

22 MS. ROGERS: It would be frightening.

1 CHAIR BATTLE: Now in federal court, if you go up
2 on appeal, you have a certificate which you have to do which
3 discloses everybody that has an interest in that litigation,
4 and somehow in this application process, for the panel's
5 sake, if you want the panel to be able to discern this issue,
6 that information is going to have to be provided so that they
7 can review specifically.

8 MS. PERLE: And you're going to get a list of a
9 current governing body. You're not necessarily going to get
10 a list of all the members of the governing body or their
11 staff for the past five years.

12 CHAIR BATTLE: Because some of these governing
13 bodies haven't been constructed. You know, I'm just
14 wondering for new petitioners.

15 MS. PERLE: Well, they have to give you the name of
16 at least the proposed governing body members in the
17 application.

18 CHAIR BATTLE: Do you have a proposal as to how we
19 might clear up the language problem?

20 MS. ROGERS: No. I just -- I'm hoping that there
21 is some conflict of language elsewhere that is narrower that
22 would suffice.

1 MS. GLASOW: John was just suggesting that, you
2 know, we can work on this language. I'm sure there is good
3 boilerplate type conflict of interest language that we can
4 find and exchange for this.

5 MS. ROGERS: Not necessarily narrow, just clearer
6 so that the reviewer would not get caught by mistake in this
7 situation.

8 MR. BROOKS: I think it's in the bylaws I'm
9 thinking of, the conflict of interest of directors.

10 MR. TULL: Yeah. And there was a form that you all
11 had to design that there was some discussion of the language.
12 When you asked about that, I remembered the discussion, but I
13 couldn't remember where it was, but I think it was also with
14 regard to that.

15 CHAIR BATTLE: I guess one final issue from my
16 advantage point about the review panel is, in my view,
17 whether we're looking for a consistency across the board and
18 how this particular review mechanism is going to work by
19 having either some regional-based reviews where everybody is
20 on the same sheet of music as to how they do the review and
21 what the standards are for it, as opposed to one for every
22 group, every particular applicant service area so that you're

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1 going to have, really, a different mix each time you go
2 through this process.

3 Right now you really can't tell how many review
4 panels one might have, because it's really entirely open, but
5 I would hope that in this process we really try to look for
6 uniformity in our analysis and review so that the standards
7 that people can expect, whether they're program is from
8 Alaska or from Alabama, will virtually -- the review
9 standards will be the same for determining which program --
10 which grant will be accepted or recommended.

11 Okay. Any other --

12 MR. BROOKS: In Section 305 of the bylaws, we're
13 talking about outside interest and directors, which is
14 couched in a little different language. I'm not sure it's
15 exactly comparable to this, but "No board may participate --"
16 well, "may participate in any decision, action or
17 recommendation with respect to any matter which directly
18 benefits such member or pertains specifically to any firm or
19 organization other than the Corporation with which such
20 member is then associated or has been associated within a
21 period of two years."

22 "Association with a firm or organization" is

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1 defined as "serving or within two years has served as a
2 director, officer, trustee, employee, consultant, attorney,
3 agent or partner thereof or in any such other capacities as
4 the Board may from time to time determine is negotiating, has
5 had an arrangement concerning prospective employment."

6 Three is receiving pension and so on, or 4, "has or
7 has had within the period of two years any significant
8 personal financial ownership interest therein."

9 I wonder if we couldn't meld that into the
10 definition we're talking about now.

11 CHAIR BATTLE: We may be able to. There are some
12 specific things about how the bylaws are constructed which
13 point to membership on boards and that kind of thing that may
14 have some relevance, but I think what we're getting at is
15 something broader than that so that we can know up front
16 whether there are any person relationship, kind of, conflicts
17 of interest that go beyond what the bylaws would require.

18 MS. MERCADO: And I think that those are generally
19 in particular in a lot of nonprofit corporation laws that
20 deal with conflict of interest as well.

21 I mean, there is some boilerplate language that I
22 have seen, stuff that we could probably --

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1 CHAIR BATTLE: Yeah. So we need to work on that.
2 And I think what you're asking for is new, clearer language
3 so that people are on notice as to what it is that they need
4 to disclose on the question of conflict.

5 MS. ROGERS: Yes. So that if there is a suit over
6 the award of a particular contract and this is raised as a
7 reason why that award wasn't appropriate that we would be
8 able to tell whether or not it was.

9 CHAIR BATTLE: Yeah. Well, we should have that
10 disclosure up front, it seems to me, from the review panel
11 members so that we can make a judgment as to whether we
12 wanted to participate in that process.

13 MR. BROOKS: And at the same time not to make it
14 too broad.

15 CHAIR BATTLE: Yeah.

16 MR. BROOKS: I think this strikes me, as you say,
17 Nancy, as a little bit too broad a brush involvement and
18 relationship.

19 MR. TULL: He may find some assistance as well.
20 One of the things that we have done in thinking through how
21 to design the competitive bidding process is talk with other
22 federal agencies about how they approach developing RFPs, et

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1 cetera.

2 And it's most likely that some of those agencies
3 have language that they use to finding a conflict of interest
4 that is in this particular kind of decision-making process.

5 CHAIR BATTLE: That would be helpful.

6 MR. ASKEW: Can you tell me is it a common practice
7 of agencies to use review panels like this?

8 MR. TULL: Yes.

9 CHAIR BATTLE: So they'll have some language in
10 their regs.

11 MR. ASKEW: So if anybody were to question or use
12 of a review panel, one answer is that that's fairly common
13 practice in this sort of procedure.

14 MR. TULL: Correct.

15 MR. ASKEW: Good.

16 CHAIR BATTLE: Okay.

17 MR. TULL: And consistent with prior Corporation
18 practice as well. There our other demonstration grants and
19 the like, we have used review panels to make decisions for
20 years.

21 MS. PERLE: What we want to make sure that we don't
22 do is what they tried to do in the 1989 proposed regulations,

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1 which was, basically, to say anybody that knew anything about
2 legal services or who had any connection with legal services
3 in the past was disqualified.

4 MR. ASKEW: That's a danger in this, I think.

5 MS. PERLE: I mean, I think that this may go too
6 far, yes.

7 MR. ASKEW: Yeah.

8 MS. PERLE: So we really have to find the right
9 place. Okay.

10 CHAIR BATTLE: Are there any other questions about
11 subsection (a)? And if not, let's move on to (b).

12 "'Qualified applicants' are those persons, groups
13 or entities described in Section 1635.5(a) of this part who
14 are eligible to submit notices of intent to compete and
15 applications to participate in a competitive bidding process
16 as described in this part."

17 MS. WATLINGTON: That was the same -- that's still
18 referred to what I had said before when I was saying about
19 opening it up for statement of agencies is the qualified--

20 CHAIR BATTLE: Right. And here we're not going
21 into a definition of who is qualified but just to say, when
22 we speak of qualified applicants, what we're referring to

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1 more or less, because later on in here we get into what
2 Ernestine has raised, who actually can qualify. Okay.
3 Subsection (c).

4 "Service area' is the area defined by the
5 Corporation to be served by grants or contracts to be awarded
6 on the basis of a competitive bidding process after
7 solicitation of applications from qualified applicants.

8 A service area is defined geographically and make
9 consist of all or part of the service area served by a
10 current recipient, or it may include an area larger than the
11 area served by a current recipient."

12 MS. MERCADO: With service, is there a word in
13 there? You said all or part of the service grant, top of
14 that --

15 MS. PERLE: Of the area served.

16 CHAIR BATTLE: Of the area served by a current
17 recipient. Ernestine?

18 MS. WATLINGTON: Who is going to make that decision
19 if there is a difference? Is it based on the application or
20 based on where it has been determined that the need is?

21 CHAIR BATTLE: Well, the Corporation will define
22 "service areas," and then people have the opportunity to make

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1 their application for a particular service area, or they may
2 do it for combined service areas. Is my understanding
3 correct? But the Corporation will predefine what a service
4 area is.

5 MS. PERLE: One of the objections that was raised
6 to whatever language was in the last draft was the notion
7 that the Corporation could define a service area to include
8 only part of a current service area.

9 That was an issue related to the whole issue of
10 fragmentation that Mike Milleman mentioned earlier that was
11 brought up several times. We debated this back and forth,
12 and I think there was some degree of disagreement over how
13 this should read.

14 I think that John can explain what the Corporation
15 had in mind. I think the notion was it should be to redefine
16 service areas. It didn't have to be particularly service
17 areas that they currently have.

18 It could be part of one service area. It could be
19 included in two different, you know, larger service areas or
20 something.

21 CHAIR BATTLE: Yeah.

22 MS. PERLE: But I just wanted to note that there

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1 was objection raised about "or part," the two words at the
2 top of page 2.

3 MR. TULL: This is one of those areas where -- I'm
4 sorry.

5 CHAIR BATTLE: Go ahead, Ernestine.

6 MS. WATLINGTON: There is a lot of concern in the
7 field that with the Corporation making these decisions and
8 not with input from the people involved where the services
9 really is.

10 This is where you get back to who is making the
11 decision for the people or what input are they going to have
12 in making a decision, you know is the staff being to say this
13 is where we think it should be, where the people are saying
14 this is where we need it.

15 So that's going to be some -- has already, you
16 know, some concerns in the field about the Corporation coming
17 down and telling you this is where your service area is.
18 That's why it's going to be very important that you work with
19 the states during their planning to make sure that you're not
20 dictating to them where you think the service is compared to
21 where they're saying our needs are.

22 MR. TULL: I was going to -- what I was going to

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1 say relates directly to your question and your observation,
2 which is this is defined somewhat more broadly in terms of
3 what is permissible than what we would anticipate doing in an
4 RFP.

5 This is a complicated area and one we wrestled with
6 a great deal both in thinking about the RFP and how to do it
7 and in thinking how to frame a broader definition of "service
8 area" which will serve not only this year's competition but
9 future competitions.

10 Certainly, the principle that we have been working
11 with in working with states in the plan processes is to
12 encourage state -- broadly based state planning processes
13 which look at delivery needs in an integrated way and make
14 recommendations to us.

15 If we were in a time frame where we have a year or
16 a year and a half to implement the first stage, we well might
17 step back and take a look at, in terms of the RFP itself, the
18 reconfiguring some service areas, because there are
19 statements where it's simply a historical accident how it's
20 divided up, and it's not necessarily the most rationale or
21 the most logical for purposes of benefitting clients.

22 For us to make decisions by December 31st is really

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1 out of the question that we open up that set of questions,
2 because it's so complicated in terms of how to make that
3 judgment.

4 There is a separate issue which is the importance
5 that needs to be attached to not giving preference to any
6 current grantees.

7 So while it's important that we seek input from
8 state planning processes, it's also important that the
9 decision remain with the Corporation, because I think in
10 terms of not -- both the appearance and the reality of not
11 making a decision about a service area which is deliberately
12 chosen to protect the current grantee that that is something
13 that we're directed by Congress not to do.

14 And I think to carry out competition in a way which
15 will best serve clients that we need to -- we need to be in a
16 position to make judgments on the basis of quality and not
17 on -- and have that judgment rest outside of the current
18 providers.

19 So how those decisions get made is going to
20 continue to be, I think, a very complicated and challenging
21 area. The effort in this language is to define that somewhat
22 broadly in order to provide a capacity for making different

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1 sets of decisions this year from what we might do in 1997.

2 CHAIR BATTLE: Okay. Edna?

3 MS. FAIRBANKS-WILLIAMS: Is it your idea to try to
4 get them to be more like state-wide organizations, or did
5 that enter into the way you wrote it?

6 MR. TULL: No. The way this is written -- well,
7 the request for proposals is defined in terms of current
8 service areas, and what we will allow people to do is to bid
9 for, if we stick with the direction that we've been thinking,
10 allow bidding for a combination of current service areas or
11 just the current service areas.

12 We have said as well that we believe in the
13 planning letter we sent out, which I gave a copy of to you
14 this morning -- we believe that size is an important factor
15 that does affect capacity to provide quality services and
16 meet the standards, but it clearly doesn't determine it.

17 It just is a factor that does affect it, but the
18 standard we will look to is effectiveness under the majors.
19 Now, the answer to your question was a little different. Are
20 we trying to have state-wide programs in every state? The
21 answer to that is no.

22 Do we think that it's important for states to look

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1 at and for programs within states to look at consolidation
2 into larger units where that will improve their capacity to
3 provide quality service?

4 The answer to that is a strong yes, but we
5 recognize that that does vary from state to state based on
6 state size and a number of other things, client needs and a
7 variety of things.

8 CHAIR BATTLE: Okay. It seems to me that this
9 definition allows for flexibility in the Corporation's
10 determination of a service area, but John's explanation to us
11 is that given the time frame that we've got under the
12 existing appropriations bill that the Corporation probably
13 will consider existing service areas and allow people to
14 apply for more than one and view that.

15 And there its language which allows that to happen
16 for now until a determination can be made later as to whether
17 any service areas ought to be changed. Okay. Subsection
18 (d).

19 "'Subpopulation of eligible clients' includes
20 Native Americans and migrant farm workers and may include
21 other groups of eligible clients that, because they have a
22 special legal problem or face special difficulties of access

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1 to legal services, require a separate system to deliver legal
2 assistance in order to effectively serve that client group."

3 Are there any questions about that definition?

4 (No response.)

5 CHAIR BATTLE: Hearing none --

6 MS. ROGERS: I just don't understand the "separate
7 system." I understand different method.

8 MR. TULL: There are two things that are attempting
9 to be accomplished in this section. The first is that we
10 have in the past had a separate system, a separate line item
11 and a separate system for Native Americans and for migrants.

12 There is a strong belief and it's one that we
13 communicated with interested staff members on the Hill
14 regarding their view of it, and there is a recognition of the
15 fact, continued recognition of the fact that the special
16 delivery interests of both those groups need to be addressed,
17 and this allows for that.

18 The second section which defines special legal
19 problems and special difficulties of access is in the event
20 that in the future the Corporation may decide that another
21 population that at various times initiatives have been
22 thought about to address their problems, that if such a group

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1 were identified that that would be allowed.

2 The discretion would exist on the Board's part or
3 on the staff's part to say, for instance, an initiative of
4 the Board last year was service to the institutionalized,
5 which historically have not been served well.

6 We don't do that now, and this doesn't bind us to
7 do it, but it would permit it if at some point there was a
8 decision to try to.

9 MS. ROGERS: Consistent with that, which seems like
10 a real good idea, would you want to change the word
11 "require," might be better served by?

12 MR. TULL: That's probably a good idea, yeah.

13 CHAIR BATTLE: Okay. Section 1634.3, Competition
14 for Grants and Contracts.

15 MR. BROOKS: May I speak to paragraph 2? This
16 latest draft has eliminated the definition of "current
17 recipient," and it seemed to me there was something in that
18 "current recipient" definition that was helpful as it was
19 original written.

20 "It includes the recipient which currently serves
21 all or part of the proposed service area as well as a
22 recipient which has merged or been consolidated with other

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1 recipients one or more of which previously served or were
2 part of the proposed service area."

3 CHAIR BATTLE: So is your question why was "current
4 recipient" deleted?

5 MR. BROOKS: Why was it dropped as a definition?
6 Because the term is used quite a bit.

7 MS. GLASOW: At one time this rule had completely
8 separate sections in the competitive process for current
9 recipients and other recipients, and we, over a period of
10 time, continued to change this rule to deal evenly with all
11 applicants, whether they be current or not.

12 At that time we took out the term "current
13 recipient." We've tried to minimize in this rule any undue
14 reference to "current recipient" except where needed, and
15 that included defining it.

16 So we're trying to treat all applicants on an even
17 basis with this rule, and we felt at that point -- we
18 probably had reasons. I don't remember, but at that point we
19 felt we needed to take the definition out. It's no longer
20 needed to deal with some specific sections that dealt only
21 with current recipient.

22 MR. BROOKS: But it's very much in paragraph (c),

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1 "Service area defined may consist of all or part of areas
2 served by a current recipient, or it may include an area
3 larger than the area served by a current recipient."

4 MS. GLASOW: The way we're using "current
5 recipient" now we felt it didn't need a definition because it
6 would be within a competitive process.

7 Any applicant who got one of the grants is now a
8 current recipient and will be until the end of that
9 competitive term, and then the competitive process opens up
10 again. So we felt at that point the term would be
11 understood, just, basically, plain language.

12 MR. BROOKS: So you're assuming your merged
13 recipient would include all the constituents --

14 MS. GLASOW: Whoever got the grant through a
15 competitive process would become the current recipient at
16 that point. And so when we -- for instance, if we took a
17 state and we did all the competitive process in the state in
18 the same year, all the grantees would be the current
19 recipients.

20 They would all be on a level basis with any other
21 new applicants. So those who have the grants and contracts
22 for that competitive period we would give notice to them that

1 six months from now your whole area is opening up to the
2 competitive process again. So that's, basically, what we
3 mean.

4 CHAIR BATTLE: The term -- I'm sorry, John.

5 MR. BROOKS: No. It comes in again.

6 CHAIR BATTLE: Subsection (c) of 1634.3?

7 MR. BROOKS: Yes.

8 CHAIR BATTLE: I guess my sense of the use of
9 "current recipient" was as a transitional term relating to
10 existing jurisdictions before all of this competitive stuff
11 starts and moves on.

12 But as I heard you describe it, "current recipient"
13 will have a continuing definition under the context of how
14 this reg operates after it has been in place over and over
15 again.

16 MS. PERLE: Right. I mean, you know, assuming we
17 do competitive bidding in January 1996, the current
18 recipients in September of 1996 will not necessarily or
19 probably at all be the same current recipients now. They'll
20 change each time there is competition.

21 MS. MERCADO: Yeah, because -- I mean, especially
22 when you look at the transition provisions and other areas

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1 where they talk about the current recipient versus the new
2 recipient who gets the grant and how the transition of cases
3 and property and all those kinds of things, it would work the
4 same whether we're talking about this year or two years from
5 now or three years from now. The language must remain that
6 way.

7 MR. BROOKS: The other question that I had was just
8 in the order. It seems to me "review panel" I would put at
9 the bottom of the list of definition is rather than at the
10 top.

11 MS. PERLE: Originally, they were in alphabetical
12 order, and there was just some change in language that caused
13 them to be no longer in alphabetical order. We were planning
14 to keep them in alphabetical order. We just overlooked the
15 fact -- the name of review panel changed.

16 MR. TULL: Everything changes so much in this
17 world, we're trying -- even the alphabet changes.

18 CHAIR BATTLE: John, I had suggested that we do it
19 in alphabetical order. That's the way we do all of our
20 definition sections, which makes it easier.

21 MR. TULL: I agree.

22 CHAIR BATTLE: Okay. All right. Anything else on

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1 1634.2, the definition section?

2 (No response.)

3 CHAIR BATTLE: Are we prepared now to move on to
4 Contracts for Grants and Contracts? And if we are, 1634.3:

5 "(a) After the effective date of this part, all
6 grants and contracts for legal assistance awarded by the
7 Corporation under 1006(a)(1) of the LSC Act shall be subject
8 to the competitive bidding process described in this part.

9 "The Corporation shall ensure that as of --" and
10 the date will be provided once we know what the date is in
11 our appropriations act, "no grant or contract for the
12 delivery of legal assistance shall be awarded unless the
13 recipient of that grant has been selected on the basis of the
14 competitive bidding process described in this part."

15 MS. GLASOW: I would like to point out that the
16 cite in that paragraph, 1006(a)(1), should be 1006(a)(1)(A).

17 CHAIR BATTLE: Capital A?

18 MS. GLASOW: Yes.

19 CHAIR BATTLE: So it's 1006(a)(1)(A)?

20 MS. GLASOW: Yes..

21 CHAIR BATTLE: Okay.

22 MR. ASKEW: What does that exclude by citing that

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1 section?

2 MS. GLASOW: That excludes grants -- I'll have to
3 look at the LSC Act. (a)(1)(A) are, basically, your direct
4 legal assistance grants, basic field grants, and those are
5 the ones that the competitive process had been directed
6 toward.

7 MR. ASKEW: Okay.

8 MS. PERLE: Depending on, you know, what our
9 legislative framework looks like next year, it may include
10 all of the grants that LSC makes. It, obviously, won't
11 include the contracts because -- it's not going to include
12 the Xerox contract. It includes all contracts for legal
13 assistance.

14 MS. ROGERS: What about emergency, disaster?

15 MS. PERLE: I don't think it really anticipates --
16 it doesn't talk about that, and of course, if we were
17 required to give absolutely all of our money on the basis of
18 census, we may not have the -- "we," the Corporation, may not
19 have the flexibility to do that.

20 MR. TULL: (a)(1)(A) is the section that describes
21 in the Act the recipients -- the type of entity which is
22 eligible to be a recipient, and it's the section which would

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1 be amended by the appropriations language and the proposed
2 McCollum bill, which would include the two that you've
3 expressed concern about, Ernestine, which are the state
4 entities and regional planning districts.

5 They have been added to Section (a)(1)(A). And
6 (a)(1)(B) is other grants and contracts necessary to carry
7 out the purposes of the Act. If Alan were here, he would
8 have on the tip of his tongue the history of that section
9 which relates to the restrictions that had to do with
10 training and research and that sort of thing.

11 At this point, for some of us who are younger than
12 Alan --

13 MS. PERLE: I'm not sure, but I think right now the
14 only one that's funded under B is the clearinghouse, the only
15 one of our current grantees.

16 MS. GLASOW: Actually, that's three. (a)(1)(B) is
17 grant necessary to carry out purposes, and then 1006(a)(3) is
18 research, training, clearinghouse. So it is only (a)(1)(A).
19 It leaves out all those other types of grants.

20 MS. ROGERS: Is there any way consistent with a
21 statute to preserve the flexibility to do disaster relief?

22 MS. PERLE: I think that depends on whether the

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1 Corporation has any flexibility to give out any money on
2 other than a census basis.

3 MS. GLASOW: It would depend on whether disaster
4 relief was available for these types of grantees. In other
5 words, we couldn't do disaster relief for a grantee that was
6 doing just research.

7 If it was a basic field grant, which is what these
8 funds go toward and we had some extra money for disaster
9 relieve to help them, then that might work.

10 MS. PERLE: I mean, it's possible, depending on
11 what our funding situation looks like next year, that the
12 Corporation would be able to set aside from money from its
13 M&A budget for disaster relief, which wouldn't have to be
14 given out on the basis of census.

15 I'm not saying that we're precluding the
16 Corporation from doing that entirely. I'm just saying that I
17 don't think this competition applies to those funds, and we
18 may not have those funds available, but we may.

19 CHAIR BATTLE: John, did you have something else on
20 A?

21 MR. BROOKS: Yeah. I suggest in the beginning of
22 the second paragraph that we eliminate the first five words,

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1 "The Corporation shall ensure that," and just start it, "As
2 of blank date, no grant or contract shall be -- for the
3 delivery shall be awarded." The Corporation shall ensure it.
4 The Corporation is the one that makes the grants. No grant
5 is -- may be made -- first five words are superfluous and
6 unusual.

7 MS. GLASOW: What about when it's -- make it not in
8 the passive voice. We might want to say, "The Corporation
9 shall." As of such and such, "The Corporation shall award no
10 grant or contract unless."

11 MR. BROOKS: Right.

12 MS. GLASOW: We did grammatique on our computers
13 that would tell us we couldn't do that because it's in the
14 passive.

15 CHAIR BATTLE: Wow. So your computer tells you how
16 to --

17 MS. PERLE: This is an aside. Suzanne and I once
18 took one of the rules that we were working on, and we ran it
19 through the grammatique thing. We had spell checked it, and
20 then we said, "Well, maybe we ought to do grammatique just to
21 make sure we catch the words where we put the wrong word in."
22 It took us about an hour and a half to go through this rule

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1 checking each time there was a split infinitive, which was
2 good.

3 But every time there was a passive used in it, it
4 also brought that up, and also when the sentences were too
5 long, it did that. We decided we weren't going to do that
6 anymore.

7 MR. TULL: Well, I think grammatique actually has
8 an option that says you must be a lawyer.

9 MS. PERLE: Well, maybe at the beginning it should
10 say are you a lawyer.

11 MR. TULL: If so, don't use this program.

12 MR. BROOKS: In footnote 1 there, I suggest that we
13 put "appropriation or reauthorization provisions."

14 CHAIR BATTLE: Are these notes going into the --
15 these notes are for our purpose, right?

16 MS. GLASOW: The first note may just to alert the
17 public as to why that date is blank, if indeed it is at the
18 point that we publish.

19 The others, however -- I'm looking at them
20 carefully, but most of them are just for you, and most of
21 them will disappear for the published rule.

22 MS. PERLE: Or maybe they'll be incorporated into

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1 the preamble, if that makes sense.

2 MR. BROOKS: And when you say "preamble," you mean
3 the commentary?

4 MS. PERLE: Commentary, right. Pardon me. We use
5 those terms interchangeably.

6 CHAIR BATTLE: Okay. Anything else on A?

7 (No response.)

8 CHAIR BATTLE: "(b) The Corporation shall
9 determine the service area to be covered by grants or
10 contracts and shall determine whether the population to be
11 served will consist of all eligible clients within the
12 service area or a specific subpopulation of eligible clients
13 within the service area or involving more than one service
14 area."

15 And what this does is to incorporate the definition
16 of "subpopulation of eligible clients" and "service area."

17 MR. ASKEW: This doesn't prevent the Corporation
18 from funding a subpopulation that's in more than one service
19 area, does it?

20 MS. PERLE: That's why it says, "or involved in
21 more than one service area" at the end of the sentence.

22 MR. ASKEW: Okay.

1 MR. ASKEW: But that's limited to subpopulations?

2 MS. PERLE: Yes.

3 MR. TULL: Would it change the meaning to say
4 "within one or more service areas"?

5 CHAIR BATTLE: That's easier.

6 MS. PERLE: So after "within" substitute for "the"
7 "one or more"? Is that what saying?

8 MR. TULL: Uh-huh.

9 CHAIR BATTLE: "Within one or more service areas."

10 "(c) At least six months prior to the end of the
11 term of a current recipient's grant or contract the
12 Corporation shall inform the current recipient that at the
13 conclusion of its current grant or contract term the
14 Corporation will award grants or contracts for legal
15 assistance on the basis of a competitive bidding process for
16 a service area that includes some or all of the area
17 currently served by the current recipient and that the use of
18 the competitive bidding process to award such grants or
19 contracts shall not constitute a termination or denial of
20 refunding of a current recipient pursuant to Parts 1606 and
21 1625 of these regulations."

22 When I -- I think, Suzanne, we talked a little bit

1 about this yesterday, and I guess my view was because we
2 say -- this is getting at the whole question of whether or
3 not a current recipient has any kind of due process rights in
4 they're not going to get the grant for the next year, more or
5 less.

6 And going to a competitive bid process sets out
7 that your property interest ends at the end of the term that
8 you have been awarded and that prospectively, when you make
9 an application again, you stand as do all other applicants
10 for that particular service area, and you have no inherent
11 property right in that application on prospective basis. Is
12 that part of what this section is basically getting at?

13 MS. GLASOW: Basically, what it's saying is during
14 a competitive process everyone is on equal footing, and
15 according to the statutory language, it says during that
16 process Section 1011 of the LSC Act, which are the hearing
17 rights for defundings of different types, does not apply.

18 So we're just, basically, saying that everyone is
19 on equal footing. If you don't win the competition against
20 applicants, other applicants, then you don't get hearing
21 rights.

22 MS. PERLE: And you don't have any right to interim

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1 funding at the end of the term, although the Corporation has
2 the discretion to provide some transition funding under this
3 rule.

4 MS. ROGERS: What would happen if, say, five years
5 was ending and the Corporation discovered that somebody had
6 forgotten to send the six-month notice? They still would
7 have to award it on a competitive basis, wouldn't they?

8 MS. PERLE: They could put the competition off.

9 MS. ROGERS: They would delay the competition?

10 MS. PERLE: They could delay the competition.

11 MS. ROGERS: Because it says that the term can't go
12 more than five years. I'm just wondering why the rule
13 requires -- this is usually something you don't put in the
14 rule, right, that the notice needs to go out in six months?
15 Yet, it seems to invite a lawsuit on that point.

16 MS. GLASOW: We could say approximately six months
17 or within a reasonable time.

18 CHAIR BATTLE: Well, do we have to give notice? If
19 the contract itself is for a term, do we have to give notice
20 six months before the end of that term that your contract is
21 up? I mean, are we required to do that, or are we adding a
22 responsibility --

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1 MS. PERLE: We're adding a responsibility, and we
2 did it -- I mean, we had a lot of discussion when we were
3 drafting this originally, and I think that the Corporation
4 was involved in this discussion as well, about whether we
5 should just say "reasonable period," or whether we should put
6 in a specific period or we should put in a blank indicating
7 there should be a specific period.

8 I think the decision that was made for the purposes
9 of putting together a draft was to say yes, there should be a
10 specific term.

11 Arbitrarily I think six months was chosen because
12 we want to make it clear that, you know, a program that's
13 existing knows, you know, what kinds of contingency plans it
14 has to make in order not to -- to ensure against the
15 possibility that they're not refunded.

16 I think you're right that they have a contract, and
17 it says when the termination of the contract is. This is,
18 sort of, a failsafe.

19 MS. ROGERS: Well, it seems like it actually
20 invites a situation where the Corporation is in the situation
21 it will be sued either way. I can't imagine if you had
22 defined your term that you'd forget. It just doesn't seem

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1 like it's a likelihood.

2 CHAIR BATTLE: And for that reason I think if we're
3 going to give notice, just "reasonable notice" rather than
4 putting a specific time so you don't have a real legal issue
5 arising out of --

6 MS. GLASOW: We seem to feel it's not a real
7 necessary provision. I mean, if it's your favor to take it
8 out --

9 CHAIR BATTLE: I don't have a problem with some
10 notice, but just reasonable notice, I think the specific time
11 of six months invites, if we're a day late, someone to raise
12 the issue, "You were late. So therefore, does that give me
13 another date, or does that give me more time?"

14 MS. GLASOW: And we can't say "may" rather than
15 "shall."

16 MR. BROOKS: If we put it in the manual of whatever
17 the internal governing instrument is that the Corporation
18 intends to give six months' notice.

19 MR. TULL: Yeah. I think as a matter of practice
20 we would do six months, because it really is -- there is a
21 whole notion --

22 CHAIR BATTLE: So maybe we need to just take this

1 whole thing out. I really felt --

2 MS. FAIRBANKS-WILLIAMS: You're looking for new
3 bids anyway. So you're going to tell them that you're --

4 CHAIR BATTLE: Yeah. We can take this whole thing
5 out.

6 MS. PERLE: You don't want to take the whole thing
7 out.

8 MS. MERCADO: No. You want to give some reasonable
9 notice --

10 MS. PERLE: You make to make sure that also that
11 it's quite clear that there is no denial of funding rights.
12 I think you want to leave --

13 CHAIR BATTLE: Reasonable notice?

14 MS. PERLE: -- some of that, yeah.

15 CHAIR BATTLE: Okay.

16 MS. GLASOW: It may just be a matter of good
17 grantsmanship in reminding and letting them know what their
18 obligations are.

19 CHAIR BATTLE: We have a new director come in who
20 wasn't there when the contract was originally entered.

21 MS. PERLE: Right. And they looked at things and
22 they see --

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1 CHAIR BATTLE: If we say "reasonable," does that --

2 MS. ROGERS: Maybe if we just take the time frame -

3 -

4 MR. ASKEW: Just say "prior to." Start it --

5 CHAIR BATTLE: "Prior to the end of the term the
6 Corporation shall inform the current recipient."

7 MS. PERLE: What about prior to the commencement of
8 the competition? I mean, I think that's really the notion
9 that the current grantee has to have a little -- you know,
10 has to have notice that there is going to -- when the
11 competition is going to take place.

12 MS. ROGERS: There you just say that whenever the
13 notice goes out it needs to go to all current recipients.

14 CHAIR BATTLE: At the commencement of the
15 competition.

16 MR. TULL: Well, that's addressed in 1634.4(a).

17 CHAIR BATTLE: They're going to get notice anyway
18 through there, aren't they? So this is double notice?

19 1634.4(a):

20 "The Corporation shall give public notice that it
21 intends to award a grant or contract on the basis of
22 competitive basis for a service area, and it shall notify

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1 current recipients."

2 MR. ASKEW: But Linda's point is -- I think one of
3 the points is we need to make sure that they're told
4 specifically that they don't have -- they don't have 1011
5 rights at the end of the term, and that's what this
6 accomplishes.

7 And maybe we don't need to give them six months'
8 notice or that much notice, but we do need to put them on
9 notice that competition is going to begin. If you do not
10 succeed, you don't have 1011 rights.

11 MS. GLASOW: At least in some way we need to keep
12 that in this rule that they don't have those rights
13 somewhere.

14 MS. MERCADO: Because it's really for -- the
15 fundamental point of that rule is to tell them they don't
16 have those due process rights under the regular regs of 1606
17 and 1625.

18 MR. McCALPIN: There is no time specified in
19 1634.4(a). It just says, "and shall be public notice."

20 MS. GLASOW: We could say prior to the end of a
21 term of a current recipient's grant the grantee shall be
22 informed that it doesn't have these hearing rights, you know.

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1 In other words, just prune this down to letting the
2 grantees know that competition is coming, and you're not
3 going to have hearing rights.

4 CHAIR BATTLE: Does the statute do that? In other
5 words, the statute is some notice. What we're saying is we
6 want to just, in terms of how we're managing the grants, also
7 give actual direct notice.

8 MR. BROOKS: The real question is whether it ought
9 to be on the reg --

10 CHAIR BATTLE: That's my view. I'll tell you what
11 my concern is. Anything we put that becomes part of the reg
12 is going to raise issues down the line that someone can use
13 if, for some reason, there is a slip up administratively and
14 we don't get a notice out to someone as a claim for saying,
15 "Well, you haven't done this, therefore, you can't take my
16 grant away," or "Maybe I do have these rights because you
17 didn't give me notice, timely notice based on your own
18 statute about these rights."

19 I don't want us to actually about in that position.
20 I do think it is good policy for us to give people notice of
21 their rights at the termination of a contract, but I don't
22 want to do it in such a way that it puts us in a position for

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1 someone to challenge the fact that we didn't give them proper
2 notice, and therefore we can't claim that they don't have
3 those rights.

4 MS. GLASOW: In this paragraph, we could delete our
5 reference to giving now, and we could simply state, "The use
6 of a competitive bidding process to award such grants or
7 contracts," and we may have to clarify that, "shall not
8 constitute a termination or denial of refunding of a current
9 recipient pursuant to Part 1606 and 1625 of these
10 regulations."

11 That way we would retain the hearing right issue
12 and not duplicate the notice issue.

13 CHAIR BATTLE: Did you all envision two different
14 notices going to current recipients or one notice?

15 MS. GLASOW: I think we did, but I don't think we
16 quite realized it was duplicative. We merged so many
17 sections of this --

18 MS. PERLE: Part of it is that at one time there
19 were separate sections dealing with a lot of these things
20 which have been merged together. So there may be some
21 duplication as a result of that.

22 CHAIR BATTLE: Okay. But now here clear that

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1 notice will be go to the current recipients by virtue of the
2 other section?

3 MR. TULL: Right.

4 CHAIR BATTLE: Okay. All right.

5 MR. BROOKS: This raised a question in my mind
6 about the possibility of, in effect, eviscerating the
7 termination provisions and the rights of hearings that we are
8 all so familiar with.

9 If the Corporation, instead of making five-year
10 grants, made one-year grants, which is perfectly permissible
11 under the regulation as it's now proposed, it would really
12 defeat the hearing possibilities and the rights if, as a
13 matter of policy or even in specific instances there might be
14 bad blood between the Corporation and a particular recipient.
15 They just do it on a one-year basis and take away all their
16 rights.

17 MS. PERLE: Well, that's clearly true. That's
18 clearly a possibility, and it is clearly one of the things
19 that local grantees -- I mean, you know, field
20 representatives are concerned about and one of the things
21 that was mentioned in some of the comments.

22 It's also clearly the precise thing that the people

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1 in Congress who wrote this really wanted to accomplish.

2 MR. BROOKS: Well, that's what I wanted to be sure
3 that it had been thought about, considered, and this is where
4 your consensus as least came out.

5 MS. PERLE: I think that -- and John can correct me
6 if I'm wrong, although it doesn't say this here, that the
7 presumption is that if you do competition you identify a
8 grantee who you're very happen with, you think is going to do
9 a really good job, that the likelihood is that they'll get a
10 five-year grant or at least, during a phase-in period, there
11 will be three-year grants and four-year grants and five-year
12 grants.

13 I mean, you wouldn't use the one-year grant very
14 often, but it doesn't preclude it. It clearly doesn't. It
15 gives the Corporation discretion.

16 CHAIR BATTLE: The problem is you've got to have
17 the discretion for a new grantee to give a one-year grant to
18 see whether or not they're going to sink or swim without
19 tying yourself up for four or five year in a particular
20 service area, but that discretion opens up the possibility
21 that a current recipient could, likewise, be given a year.

22 MS. PERLE: But of course, there might be this

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1 situation which we'd all agree there is a current recipient
2 that hasn't done a great job, but there is no competition and
3 want to really encourage that new recipient to do better.

4 And that's a situation that we might all agree is
5 an appropriate one to give a one-year grant. I mean, I think
6 just the range of possibilities is so enormous.

7 CHAIR BATTLE: We have not, in this regulation,
8 from what I read, provided any guidance as to how one- two-
9 three- four- or five-year terms ought to be constructed, what
10 kinds of measures are to be used by the Corporation or the
11 president in doing that. We've left that totally
12 discretionary.

13 MR. TULL: And we, in thinking through the issues
14 involved in the RFP process and the decision-making process
15 related to that, have recognized that we need to have a set
16 of standards that we're guided by in making those decisions
17 as to who is one year and who is two, three, four and five.

18 Our feeling was that's not -- we shouldn't make
19 that a part of the regulation, because that's something
20 particularly this year where we're dealing with so many
21 variables, where we first have -- I would go even further
22 than Linda in terms of -- what we're thinking of doing is to

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1 move toward a cycle of everyone being on a five-year grant,
2 as many programs as possible so that we process by
3 competition approximately one-fifth of our grantees and
4 states each year in order to have a capacity to deal with the
5 quality reviews that we, in fact, are going to aspire to
6 accomplish.

7 The first year that means necessarily phasing in of
8 different levels, having some one year, some two, some three,
9 some four, some five on what may be just arbitrary assignment
10 in order to have a reasonable balance through competition
11 case load, if you want to state it that way.

12 We have a separate issue of we have, in the
13 planning process, urged states to seriously address issues
14 and configuration size within their own jurisdictions and
15 have acknowledged that three months or two months between now
16 and January 1st is --

17 CHAIR BATTLE: Not sufficient time to do that.

18 MR. TULL: -- simply too short to address that. So
19 we've said to states, "If this is an issue in your state,
20 spend a year wrestling with it and give us a recommendation,
21 and we'll interact around that. We may well address that
22 issue in 1987."

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1 So in states where that is a concern or where two
2 grantees may come to us and say, "We're seriously thinking of
3 consolidating, but we simply can't figure it out and do it in
4 the time frame we have.

5 "What we'd like for you to do is to give us a grant
6 now, both of us a grant, but with the understanding that
7 during the interim period we're going to wrestle with these
8 issues and look for help from you to accomplish it."

9 In that case, we would give those two programs, for
10 instance, a one-year grant. This is probably the most
11 compelling example one could come up with of how, sort of,
12 broad principles in the regulation really is going so vary a
13 great deal, and based on circumstances, we, sort of, wrestle
14 with different -- with the kinds of issues that we're going
15 to have this year and the following year and the following
16 year after that.

17 CHAIR BATTLE: Yeah. Okay. So we've agreed to
18 strike the first part of (c) and to use the last part to
19 identify the lack of any appeal rights at the termination of
20 the grant. Subsection (d).

21 "The Corporation may award more than one grant or
22 contract to provide legal assistance to eligible clients or a

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1 subpopulation of eligible clients within a service area."

2 We have an alternative language proposal for (d) in 1634.3.

3 MS. PERLE: I think everyone has copies of it, and
4 there are some additional copies if anybody in the --

5 CHAIR BATTLE: That Pat should have provided us
6 during the lunch break. It's a separate sheet that you
7 should have gotten, and the alternative proposal for (d)
8 reads as follows:

9 "The Corporation may award more than one grant or
10 contract to provide legal assistance to eligible clients or a
11 subpopulation of eligible clients within a service area
12 provided that to the maximum extent possible such grants and
13 contracts are awarded in a manner that ensures that all
14 eligible clients within the service area will have access to
15 a full range of legal services."

16 MS. PERLE: I mean, the purpose of the amendment,
17 which I had had time to discuss briefly with Suzanne but I
18 don't know if John had seen it, is to guard against the
19 fragmentation notion.

20 We don't want the Corporation to be encouraged to
21 give grants for little pieces of legal services, but by the
22 same token, we don't want them to be prohibited from

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1 experimenting with different kinds of delivery systems or
2 being able to, in a state that has a very broad array of
3 providers where there is a lot of collaboration with them,
4 that array of providers being prevented from giving grants
5 to, sort of, do only those pieces that need to be funded by
6 the Corporation.

7 It gives the Corporation some flexibility, but it
8 sets a very strong goal for what they hope to accomplish with
9 their grant.

10 CHAIR BATTLE: I think that the amendment is more
11 definitive of the -- of meeting that fragmentation issue that
12 we identified in our purpose. So I think it's good.

13 MR. TULL: I'd just make one small wording change.
14 I don't think it changes the substance, but that would be in
15 the last clause, "such grants and contracts are awarded so
16 that all eligible clients will have access to a full range,"
17 as opposed to "the manner."

18 MR. BROOKS: So that what?

19 MR. TULL: So that -- replace "in a manner that
20 ensures" with "so that."

21 CHAIR BATTLE: Okay. Any other changes or
22 observations or comments about subsection (d)?

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1 (No response.)

2 CHAIR BATTLE: Okay.

3 "(e) In no event may the Corporation award a grant
4 or contract for a period of time exceeding five years, and
5 the amount of funding providing annually under each such
6 grant or contract is subject to changes in congressional
7 appropriations for the Corporation.

8 A reduction in annual funding required as a result
9 of a change in the law requiring allocation of Corporation
10 funding or reduction in funding appropriated for the
11 Corporation shall not be considered a termination or a denial
12 of refunding under Part 1606 or 1625 of these regulations."

13 And I assume that that is to address very recent
14 experiences that we have had with productions in funding.

15 MS. PERLE: Well it's also to make it clear that
16 even though you're going to award for five years and if the
17 Corporation tries to yank your grant or arbitrarily reduce it
18 during that five years, you do have hearing rights.

19 It does recognize the possibility that the
20 Corporation may be faced with a situation where it's possible
21 for them, either because of shrinkage of the total or because
22 the allocations are different, that they can no longer award

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1 that amount of money to each particular grantee.

2 There were some comments that suggested that there
3 should be some proportionality language in here so that if
4 the Corporation next year gets \$300 million and the follow
5 year it's \$200 million that all grantees should -- all grants
6 and contracts should be reduced in proportion to the overall
7 reduction. We didn't put that in, but that was a suggestion.

8 CHAIR BATTLE: Well, I would think that the problem
9 becomes we often get guidance from Congress as to how the
10 reduction ought to be done. So whatever reduction is done
11 probably is going to be in conformity with current
12 circumstances of --

13 MS. MERCADO: You might have population shifts or
14 changes if you happen to be near census time where, even
15 though it may be reduced everywhere else, a particular
16 community has a greater percentage of population in that
17 particular time count.

18 MS. PERLE: Right. I, actually, hadn't thought
19 about that particular thing. We didn't put this in, and I'm
20 not insisting. I'm just relating an issue that was raised in
21 some of the comments.

22 MR. TULL: I think the protection for that is what

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1 is contained in 1626 itself, which is the application,
2 reduction in funds pursuant to a -- I can't remember the
3 language, but it's a decision made to allocate -- which
4 applies equally to classes of recipients.

5 What you want to guard against is, sort of,
6 arbitrary or unfair allocation --

7 MS. PERLE: That the Corporation is not going to
8 give any more grants to Texas, yeah.

9 MR. TULL: Right. But to do that would, under
10 1626, would be a denial of refunding.

11 MS. PERLE: Right. As I said, I'm not insisting on
12 it. I'm just mentioning it was raised.

13 CHAIR BATTLE: Okay. I'm sorry. Nancy and then
14 Bill.

15 MS. ROGERS: I wonder if it wouldn't be a good idea
16 to include language "after appropriations or restrictions"
17 because congressional restrictions may bind the hands of the
18 Corporation to continue a contract.

19 For example, should Congress decide that
20 governmental subunits cannot receive grants and there is a
21 five-year grant to a county, then the Corporation would be in
22 a difficult position in its own regulations.

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1 MS. PERLE: What are you suggesting? What change?

2 MS. ROGERS: To add "after appropriations or
3 restrictions."

4 CHAIR BATTLE: Change "congressional appropriations
5 or restrictions for the Corporation." Generally, those
6 restrictions are in the appropriations bill, but this just
7 clarifies that if there are restrictions as well as monetary
8 as well as potentially service issues that both may affect
9 the --

10 MS. PERLE: Do you need a similar change in the
11 next sentence?

12 MS. ROGERS: After the word "Corporation" before
13 "shall" you wrote in "or congressional restrictions."

14 MS. PERLE: "A change in the law regarding
15 restrictions on the Corporation's allocation"?

16 MS. ROGERS: That would be fine.

17 MR. TULL: Why wouldn't you just take out "result
18 of change in the law," and take out "regarding allocation of
19 Corporation funding"? Because the next sentence says, "A
20 reduction in funding" --

21 MS. PERLE: Right. And it's a change in the law.
22 I think that's right.

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1 CHAIR BATTLE: Read that back so I can be clear as
2 to what the proposal is.

3 MS. PERLE: "A reduction in funding required as a
4 result of a change in the law or a reduction in funding
5 appropriated for the Corporation shall not be considered a
6 termination or denial."

7 MR. BROOKS: Well, I think "allocation of
8 Corporation funding" is a new idea stated there only. The
9 first sentence talks about subject to changes in
10 appropriations or restrictions.

11 This is regarding allocations as the line items
12 could vary radically from one year to another, and that's
13 what this is talking about, it seems to me. So I think we
14 need that language in there.

15 MS. PERLE: But it's still a change in the law.

16 MS. GLASOW: That would be a change in the law, and
17 it would cover any kind of change, right?

18 CHAIR BATTLE: So this just covers any kind of --
19 it doesn't really give a definition to what kind of change in
20 the law, any kind of change in the law.

21 MS. PERLE: I'm just wondering, it's just something
22 that came to mind, what if at some point there is no longer

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1 an absolute requirement that all funds have to be given out
2 on a census basis, and the Corporation would like to set
3 aside some of its funding to do emergencies or to do special
4 demonstration projects or a whole variety of things that the
5 Corporation has done in the past, but it doesn't get any more
6 money, and the Board decides that it wants to do that and
7 wants to allocate those funds and wishes to allocate them out
8 of the funds currently available for basic field?

9 Could it do that under this?

10 CHAIR BATTLE: You talk about a reduction in annual
11 funding required as a result of the change in the law not
12 permitted.

13 MS. PERLE: That wouldn't be required.

14 CHAIR BATTLE: Yeah. That's a permission. That's
15 something that's discretionary.

16 MS. PERLE: Now, it may be that Part 1606 -- 1625
17 deals with the issue because it talks about funding policies.
18 I still think there might be some question, and maybe the
19 answer is that we shouldn't -- that we should just not
20 address that question.

21 CHAIR BATTLE: You can't just alter a contract
22 because you have the discretion to do so.

1 MS. PERLE: I mean, that's certainly fine with me.
2 I mean, I would suggest that the Corporation not try to do
3 those things unless it gets additional money to do them.

4 MR. BROOKS: Don't we need to clarify the annual
5 funding? As I read it, that was annual funding of the
6 Corporation. What it would mean there I think is annual
7 funding of the recipient, of a recipient.

8 MS. GLASOW: So it should be after "in," "in a
9 recipient's annual funding" right?

10 MR. BROOKS: "A reduction in the annual funding of
11 a recipient required," et cetera.

12 CHAIR BATTLE: Okay. Let's read this completely
13 through.

14 MS. MERCADO: No. "A reduction in annual funding
15 required as a result of change in the law or a reduction in
16 the funding appropriated by the Corporation shall not be
17 considered a termination or denial of refunding under Part
18 1606 or 1625 of these regulations." Is that the way it now
19 should read?

20 MR. BROOKS: I'm sorry. That's the beginning. "A
21 reduction in annual funding of a recipient" --

22 CHAIR BATTLE: " -- of a recipient," yes, "of a

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1 recipient required as a result of a change in the law or
2 reduction of funding appropriated for the Corporation shall
3 not be considered a termination or denial," those two things.

4 MS. MERCADO: But isn't the annual funding, though,
5 going to the funding that congressional indicates to the
6 Corporation and not to the annual funding that is allocated
7 to the recipient?

8 CHAIR BATTLE: But it could be a change in the law.
9 That's the distinction. In other words, a reduction in
10 annual funding -- or it may be the elimination of -- for
11 example, the law could change and say states can no longer
12 get these grants.

13 Well, then, that doesn't necessarily mean that
14 Legal Services has gotten less money. It means that we
15 cannot give the money to a state entity anymore.

16 MS. GLASOW: But I think what Maria is saying is
17 the law -- we could only reduce the funding in the law said
18 you reduce that recipient's funding, because what happened in
19 the past recision, they just took a whole bunch of money
20 away, and we had to decide how to handle that and how to
21 apply it to the whole range of recipients.

22 This now sounds like --

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1 MS. PERLE: But that's right. Those recisions -- I
2 don't think anybody claimed those recisions -- that
3 recipients whose money rescinded under that was subject to --

4 MR. TULL: I don't read this as requiring the
5 Corporation to give a certain amount of funding. I think
6 it's a much more limited statement that only says that in the
7 event that as a result of change in the law funding is
8 reduced, that that does not give rise to hearing rights under
9 the regulation.

10 And the regulation itself still would provide for a
11 reallocation of funds among recipients, which is --

12 CHAIR BATTLE: Yeah. This only speaks to the
13 question of when you don't have a hearing.

14 MR. TULL: Right. I think this is fairly limited
15 statement. I don't think it creates any rights.

16 CHAIR BATTLE: Does that meet your concern, Maria?

17 MS. MERCADO: Well, it's just that when you put in
18 "the recipient" after the annual funding, that changed the
19 meaning of the sentence.

20 MS. PERLE: It says "reduction in funding" twice in
21 that sentence, and one clearly applies to the Corporation,
22 and the other didn't clearly apply to the recipient, and now

1 it does.

2 MR. TULL: It is intended to the recipient's
3 funding get reduced less the entity that has the hearing
4 right or would otherwise have hearing right.

5 CHAIR BATTLE: Section 1634 -- okay. You're back
6 on board, Bill. Do you got something you want to say?

7 MR. McCALPIN: Well, I have two things. One, take
8 a look at this amendment --

9 CHAIR BATTLE: We just -- I'm sorry. We did.

10 MR. McCALPIN: 1634.3(d), which was passed out.
11 Does the last clause of that imply a right to legal services
12 which may not be within the priorities access to a full range
13 of legal services?

14 MS. GLASOW: Yes, it does.

15 MS. FAIRBANKS-WILLIAMS: Yes. Definitely.

16 MS. MERCADO: I looked at that because what that
17 means -- of course, they're talking about a particular type
18 of subpopulations.

19 MR. McCALPIN: It says, "More than one grant or
20 contract to provide legal assistance to eligible clients or a
21 subpopulation provided such contracts are awarded so that all
22 eligible clients within the service area will have access to

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1 a full range --"

2 CHAIR BATTLE: But the one clause you left out is
3 the qualifier, "maximum extent possible." So I think what
4 this does is to say to the extent that you have two different
5 grantees making an implication one says, "For this
6 population, I will do divorces."

7 Someone else says, "For this population, I'll do
8 everything that the law will allow me to do," that to the
9 maximum extent possible we want to provide those eligible
10 clients with as much access to legal services as we can.

11 MR. McCALPIN: But don't we still have priority?

12 CHAIR BATTLE: Yes.

13 MS. GLASOW: We could take care of that, I think,
14 by adding a clause that said, "pursuant to that envisioned in
15 the LSC Act," or something to that extent, because the LSC
16 Act talks about priorities and all of the other factors that
17 go into the provision of legal assistance. So we could put
18 some kind of qualifier in there.

19 MR. McCALPIN: Well, it just seemed to me that
20 somebody could take a look at this and say, "I'm entitled to
21 this service even though it may not be within what you" --

22 MS. PERLE: Well, it also does say "to the maximum

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1 extent possible," recognizing that there is allocations of
2 priorities, and there may not be -- it may not be possible,
3 given your range of applicant and whatever, but I think
4 Suzanne is right --

5 CHAIR BATTLE: "In accordance with the LSC Act" at
6 the end?

7 MS. PERLE: Yeah. I think, "In accordance with ---"
8 and that, sort of, embraces within it the whole priorities
9 notion. Do you think that meets your --

10 MR. McCALPIN: Yeah. The other -- and I just
11 leaned over to John and asked him if there had been any
12 discussion of footnote 3 on page 2.

13 While I'll confess there is not much legislative
14 history to look at, it seems to me that to grant a whole
15 panoply of due process rights within the period of a contract
16 is not in accord with the spirit of what the Congress is
17 trying to do.

18 Now, when I had the earlier draft of this in front
19 of me, I said maybe what we have to do is have a short
20 period, grant a hearing and limit the funding to 90 days
21 within which a decision would be made or something of that
22 sort, but I think that the Congress clearly does not want

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1 vested right to continuation.

2 CHAIR BATTLE: We talked about that some. We
3 talked about the fact that the Corporation has the discretion
4 to grant a one-year, two-year, three-year or four-year or
5 five-year contract and that these 1011 rights within a year
6 are less meaningful.

7 MR. McCALPIN: Yeah. But let me say suppose the
8 contract grants a five-year contract and at the end of three
9 years decides that the contractee is not performing very
10 well --

11 MS. PERLE: Then they have a hearing, and they
12 defund them.

13 MR. McCALPIN: What?

14 MS. PERLE: Then they defund them with a hearing.

15 MR. McCALPIN: But do we go through the whole
16 process that's presently available to vacate the remaining
17 two years of the contract?

18 MS. PERLE: This Board has the authority to revisit
19 those regulations. I think it's anticipated that it will,
20 and it may want to streamline those procedures.

21 MS. GLASOW: This footnote is an interpretation of
22 what we see the pending legislation talking about. We don't

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1 know what final legislation we're going to be faced with.

2 The interpretation could change. It will not go
3 into the published rule. So it's not like this is something
4 that's going to go into the rule; it's going to bind us.
5 It's just our current interpretation where we see the law
6 right now.

7 MS. PERLE: And also, we said earlier before you
8 did come in that when this was drafted we were basing it on
9 what we understood the McCollum bill to require.

10 And there has been a lot of water under the bridge
11 since then, but this is still based on what we felt would be
12 required in McCollum, which clearly says that they don't
13 expect to have a competition more often than every five
14 years, or it's not necessary.

15 MR. McCALPIN: I understand that, and I think good
16 discretion would not.

17 MS. PERLE: Right.

18 MR. McCALPIN: Not universally give five-year
19 contracts.

20 MS. PERLE: We talked about that as well, that we
21 wouldn't be giving -- universally be giving five-year
22 contracts.

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1 First of all, if terms of the Corporation's ability
2 to actually go in and look at what's happening and what the
3 competing applicants are saying -- I mean, the Corporation is
4 just not going to have the capacity to do that every year for
5 every grant unless -- unless we're faced with some amalgam of
6 McCollum and the Gekas bill which does say you have to do
7 it -- they're only one-year contracts. If we're faced with
8 that, we'll deal with it, but --

9 MR. TULL: I think, if I understand your point,
10 Bill, in terms of what Congress intends, the language in the
11 House appropriation, and I believe this is also true of the
12 McCollum bill, doesn't eliminate 1011 rights or refunding.

13 It specifically refers to them but says that
14 decision is made in the competition, that in those
15 circumstances those sections don't apply.

16 So I actually read this as affirming the import of
17 both those sections. I think Linda is correct that the
18 degree to which we may have a concern, the Corporation may
19 have a concern with performance of a grantee or its failure
20 to comply with the Act and the regs during that five-year
21 period, if they have five years, then we may well want to
22 take a look at -- the Board may well want to take a look at

1 the hearing procedures which have been subject to criticism
2 that it is too long, that there are so many protections that
3 you can't act efficiently.

4 I don't read this language as evidencing a desire
5 to do away with the hearing rights, and, in fact, during the
6 five-year period or whatever period we make the grant --

7 MS. PERLE: For one-year or two-year or three-year
8 or four-year period.

9 MR. McCALPIN: One year is not much of a problem,
10 because by the time you got around to doing --

11 MS. PERLE: And I think, you know, the Corporation,
12 while I think the expectation, as John said -- I don't know
13 if you were here for that -- would be that once the
14 Corporation got through several years of transition everybody
15 would be on -- everybody, maybe, in a particular state, would
16 be on, basically, the same schedule.

17 So people would be looked at every five years in
18 terms of the competition, but they'd be still looked at and
19 monitored and viewed and evaluated during that --

20 MR. McCALPIN: There may be a flood of complaints
21 about a particular --

22 CHAIR BATTLE: The bottom line is that this Board

1 does have the option to review the hearing procedure in light
2 of competition, because the hearing procedure that we now
3 have is one that existed prior to having a totally different
4 structure for how we're doing the award or grant.

5 MS. PERLE: But I would argue strenuously that the
6 Corporation doesn't have the authority to -- in between
7 competitions to say there are no hearing rights, because I
8 think that -- as John said, that part of the Act remains
9 impact. You have the authority to define what constitutes an
10 appropriate hearing within the constitutional protection.

11 MR. McCALPIN: I think I was mollified by the fact
12 that it's in a footnote and it really isn't part of the
13 regulation anyway.

14 MS. GLASOW: It's really for your information.

15 CHAIR BATTLE: All footnotes are going to come out
16 when we publish this. So the footnotes will not be in what
17 goes into the Federal Register.

18 MS. MERCADO: Unless you want some part in the
19 comment that might address it very briefly that would allay
20 some of your concerns.

21 MR. FORGER: Can I ask a question I should know?
22 What happens if there is no competition with an existing

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1 program and you give a five-year grant?

2 CHAIR BATTLE: Well, you have the discretion not
3 necessarily to give a five-year grant if your view of the
4 existing or current recipient is that they're not doing the
5 job that you would desire for that particular service area.

6 You might choose to give one- or two-year grant and
7 then look during that two-year time frame to see if there is
8 anyone else out there who might be able to provide better
9 quality --

10 MS. PERLE: And there actually is a provision here
11 where the current grantee is the only competitor or there is
12 only one applicant.

13 CHAIR BATTLE: You don't have to have a review
14 panel and all that.

15 MS. PERLE: Well, you can -- and that you can
16 extend the deadlines in order to solicit additional bids.

17 MR. FORGER: Or you can do it on a year-to-year
18 basis, if you want?

19 CHAIR BATTLE: Yeah. You have the discretion to do
20 it in less than five years.

21 MR. McCALPIN: Certainly, there shouldn't be
22 anything automatic about five-year contracts.

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1 MS. PERLE: No.

2 CHAIR BATTLE: Part of the discussion that we had
3 was just the whole area -- we talked about this earlier on,
4 Alex -- that right now there is nothing in this regulation
5 that really gives specific guidance to how to determine
6 whether to give a five-year, one-year, two-year, three-year
7 or four-year contract.

8 MR. FORGER: One of my concerns has been if we are
9 forced to keep this time schedule there is likely not to be
10 as many competitors as folks would think.

11 For me, a rule of thumb could be, in that
12 circumstances, to go with shorter periods than longer
13 periods.

14 MS. PERLE: The Corporation clearly has the
15 discretion --

16 MR. FORGER: Right. I just don't want the world-
17 at-large looking at this says, "Well, only ten people
18 competed," and they can give everybody else a five-year grant
19 and frustrate our ability to have a competitive system.

20 And rather than tinker with a loss of due process
21 rights, which earlier on I said I thought was probably one of
22 the principal motives in getting a competitive system, I

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1 don't know whether it is useful to have any expression here
2 as to the exercise of that discretion in this first year.

3 I mean, once we get on a regular basis and there is
4 time for competition, you know, I would have no qualms about
5 three- four- five-year contracts, I suppose, if it's a
6 quality program. It's just a notion in the first year we
7 might, in fact, frustrate the whole process by doing five-
8 year contracts.

9 MR. TULL: I think that the regulation provides
10 discretion, deliberately provides discretion to make a
11 decision about that, that it's written in such a way that
12 each year, and particularly this first year where we have a
13 whole number of considerations which the be very different in
14 subsequent years, that we can choose the terms of the grant
15 that we'll give, the basis for doing that, the --

16 MR. FORGER: I just wonder whether any signal can
17 be put into commentary or regulation.

18 CHAIRBATTLE: The last section is an Emergency
19 Procedures and Waiver section, and let's hope and pray that
20 by tomorrow we'll get to page 9 and be able to really address
21 it.

22 It really, in part, I think is there to allow for

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1 an emergency procedure where the time frames and everything
2 else really, because of what Congress may ultimately act
3 upon, did not give the Corporation adequate time to do the
4 kind of appropriate review.

5 So you waive the time frames that we've got
6 established for how competition ought to be done, but then
7 you do have in place provisions to allow within a year to do
8 it in a way that is --

9 MS. PERLE: I think that maybe --

10 CHAIR BATTLE: -- honors the spirit of the original
11 Act.

12 MS. PERLE: Excuse me. I didn't mean to interrupt.
13 I was just going to say that certainly it's possible -- I
14 don't think we've done it in the preamble. We certainly can
15 put in a paragraph near the provision that says, "The
16 Corporation may give grants up to five years, ""we can
17 certainly put in a paragraph that says the Corporation has
18 the discretion to grant awards for a shorter term, and we
19 anticipate there will be circumstances under which the
20 Corporation will do that, and then maybe list some of those
21 circumstances.

22 MR. McCALPIN: Or such as in this first year, if

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1 we're on the short time frame.

2 MS. PERLE: Well, I don't know that we want to
3 promise that, because then I worry that somebody would come
4 back, Congressman Rogers or something, if he sees that we've
5 given a five-year grant to somebody and say, "But you
6 promised that you weren't going to give more than" --

7 MR. FORGER: I would be prepared to put in the
8 regulation that there will be no more than one year for any
9 program that has not been in competition, because it's just
10 continuing the grant that they've been working under, right?

11 MR. TULL: I would counsel against that which has
12 to do with a whole separate set of considerations we don't
13 know the answer to yet, which is I think we may well want to
14 do that for reasons of making certain there is real
15 competition and being able to answer to congressional intent.

16 But if we only have a \$5 million budget, to lock
17 ourselves in the regulation to having to recompute everyone
18 next year when we may have scarcely the staff to do a smaller
19 number with any credible way I think would be -- might turn
20 out to be a mistake, and we just don't know the answer yet.

21 MR. FORGER: I'm just citing the extreme in order
22 that folks might believe there is something in the middle we

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1 could do rather than say, well, there's discretion.

2 MS. PERLE: What if there is no competition because
3 the application that's received for, say, a state wide
4 program comes in with letters from every conceivable group
5 within the state that says we support this application?

6 MR. FORGER: I can understand that case.

7 MS. PERLE: Yeah. I mean, the judiciary and the
8 bar and all kinds of private attorneys.

9 MR. FORGER: But I think what is more likely to
10 happen is that there is no opportunity for folks to get their
11 act together --

12 CHAIR BATTLE: In the short period of time that we
13 have in the first year. We may need to address --

14 MS. PERLE: -- to the Corporation to make a
15 determination in each particular service area whether that's
16 the case or not.

17 CHAIR BATTLE: We may be able to, with broad brush,
18 speak to the issue of the immediacy of meeting what the
19 congressional intent is and at the same time putting in place
20 a system that over time will be able to complement the whole
21 concept of competition in all of our service areas and make a
22 statement to that effect without really binding us to a

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1 particular procedure for how that ought to be done.

2 MS. PERLE: Or binding the Corporation to any
3 particular decisions about the length of the grant award
4 right now at the outset before you really have some sense of
5 what's going to happen.

6 MS. MERCADO: Earlier, you talked about the
7 competitive process in trying to provide high quality legal
8 services.

9 There are probably, in looking at what range of
10 discretion you have, given the number of personnel you may or
11 may not have to review this, there are programs that merit
12 the high quality legal services already, and that is their
13 reputation, and they have the support, you know, of all the
14 different entities that deal with poor people, that maybe
15 that is one that should have a three-year or a five-year or a
16 four-year because they more than likely have that.

17 And then, in other programs where you know that
18 there has to be a higher level of legal services, that those
19 are shorter, one year, so that you could have the competitive
20 process.

21 MR. FORGER: On the other side of that, then, could
22 be looking at the process rights where there was no

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1 competition in the first review.

2 One could suspend the due process rights in that
3 circumstance so you could do a five-year grant and not worry
4 about it unless there was competition that came along and you
5 wanted to open it up. I suppose that would be less
6 palatable.

7 CHAIR BATTLE: Well, once you give a grant, then I
8 think to the extent that the term of the grant is a term
9 where due process rights become an issue, my view is that if
10 you give a five-year grant, then within that five years that
11 grantee has the expectation that they have the contract.

12 If for some reason we view their -- the quality of
13 legal services that they're providing to be substandard and
14 therefore do not want them to continue, I think their due
15 process rights will attach within that five years.

16 MS. PERLE: That's right. And there are provisions
17 which have never been used in the current regulations which
18 say that one of the rationales for defunding the program is
19 that another -- there is another provider that can do a
20 better job.

21 Now, of course, it has never been used, so it has
22 never been tested, but my assumption is that you have to give

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1 some proof of that in a hearing, but it's probably a somewhat
2 different standard of proof.

3 MR. FORGER: That's a good point, because you
4 wouldn't, even if you eliminated due process or you made it
5 on a one-year basis, you wouldn't award it, I wouldn't
6 suppose, away from a satisfactory program unless there was a
7 clear advantage with the other.

8 So that is the answer. I guess there is a
9 provision now that says if there is somebody who can do it
10 better --

11 MS. PERLE: That's right. The difference is that
12 you have to do it in the context of a hearing. You have to
13 establish that, and it has never been tried. So I don't know
14 how -- I don't know how difficult it would be to do it, but I
15 think that we do have an obligation once, sort of, things
16 settle down to look at that regulation and see how it can be
17 improved and streamlined.

18 MR. FORGER: The only reason I raise that, as you
19 know, is because of my earlier comments about defunding
20 aspects of a vested interest, particularly in the short time
21 frame the amount of competition that is going to be less than
22 many folks think.

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1 MS. PERLE: We understand. I think everybody
2 understands that.

3 MR. FORGER: It goes to the credibility of the
4 process, and I suppose the fruit will be how it's
5 administered.

6 MS. PERLE: And how it turns out.

7 CHAIR BATTLE: We may be surprised once we get all
8 these notices out, which is the section we're about to come
9 upon in a minute, that there may be some real response to our
10 bids.

11 MR. FORGER: Thank you for indulging me.

12 CHAIR BATTLE: That's okay. 1634.4, Announcement
13 of Competition:

14 (a) The Corporation shall give public notice that
15 it intends to award a grant or contract on the basis of a
16 competitive bidding process for a service area and shall take
17 appropriate steps to announce the availability of such a
18 grant or contract in the periodicals of state and local bar
19 associations and shall publish a notice of the request for
20 proposals in at least one daily newspaper of general
21 circulation in the area to be served under a grant or
22 contract.

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1 "In addition, the Corporation shall notify current
2 recipients, other bar associations and other interested
3 groups within the service area of the availability of the
4 grant or contract and shall conduct such other outreach as
5 the Corporation determines to be necessary to ensure that
6 interested parties are given an opportunity to participate in
7 the competitive bidding process."

8* MR. McCALPIN: I would suggest that in the second
9 line we take the phrase "for a service area" and move it up
10 to follow the word "contract" in the first line.

11 CHAIR BATTLE: Okay.

12 MS. WATLINGTON: That is there been any
13 consideration given to the amount of cost it takes for
14 announcement?

15 MS. PERLE: Again, this is something we were going
16 to be required to do under the law. So we don't really have
17 a lot of choice.

18 One thing I will note on that it says in the
19 statute, in the McCollum-Stenholm bill, that we shall
20 announce it in the periodicals of state and local bar
21 associations.

22 What we found, I think the Corporation got the same

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1 comments that we got, which was that you can't always
2 guarantee that it will happen because of publication
3 schedules.

4 They may just not want to publish it. So what this
5 obligates the Corporation to do is to do what it can to make
6 sure it happens.

7 CHAIR BATTLE: Yeah. And the law actually says --
8 it says that "such regulations shall ensure that timely
9 notice for submission of applications is published in
10 periodicals of local and state bar associations and at least
11 one daily newspaper."

12 So the regulation has to ensure that we're required
13 to do this, but the publication schedules are something
14 that --

15 MS. PERLE: I think that you have to read that to
16 say the Corporation will take all steps within its control to
17 ensure that it happens. We don't have the authority to force
18 a bar general to publish or notice.

19 CHAIR BATTLE: Okay. Anything else on (a)? John?

20 MR. BROOKS: Well, I suggest in the next to the
21 last line, "outreach as the Corporation determines to be
22 necessary or appropriate," and the same I suggest in the last

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1 line of subparagraph (b) just so we don't get into a hassle
2 as to what's necessary and what isn't.

3 CHAIR BATTLE: Do we have to have "necessary"? Can
4 it just be "appropriate"?

5 MS. PERLE: Well, I mean, then, of course, you have
6 somebody saying, "Well, this wasn't appropriate for you to
7 ask me for this information," and the Corporation then can
8 say, "Well, yes, but we think maybe you're right, but we
9 think it's necessary." I think it's an advantage to have
10 both.

11 MR. BROOKS: Sort of boilerplate language.

12 CHAIR BATTLE: Okay.

13 MR. McCALPIN: You haven't done (b) yet, have you?

14 CHAIR BATTLE: No. I was about to read (b).

15 MR. BROOKS: I'm sorry I jumped ahead.

16 CHAIR BATTLE: That's okay. I was about to read
17 (b) earlier.

18 "The Corporation shall issue a request for proposal
19 which have include, (1) information regarding eligible
20 application; application procedures and deadlines; the
21 selection process and deadlines; selection criteria; the
22 service areas that will be the subject of the competitive

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1 bidding process; the amount of funds available, if known, for
2 the service area; and the LSC Act, regulations and guidelines
3 that will apply to the recipients; and (2) any other
4 information that the Corporation determines to be necessary
5 or appropriate." John?

6 MR. BROOKS: What does it mean when we say
7 "information regarding eligible applicants"?

8 MR. McCALPIN: I think that's badly phrased.

9 MR. BROOKS: "Information regarding eligibility"?
10 Isn't that what we mean?

11 MR. McCALPIN: Information regarding applicant
12 eligibility.

13 MS. PERLE: Who can apply. I mean, that's --

14 MR. McCALPIN: We don't want to have to identify
15 applicants and give information --

16 MS. PERLE: Right.

17 MR. McCALPIN: I agree with you. Thank you.

18 MS. PERLE: And isn't it "qualified applicants"
19 anyway? Isn't that what we've defined the word?

20 CHAIR BATTLE: "Qualification."

21 MS. PERLE: Who could be considered qualified
22 applicant or something. I mean, look at 1634.2(b), which is

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1 the --

2 CHAIR BATTLE: "Qualification to apply."

3 MS. PERLE: Yeah.

4 MR. BROOKS: You got two things. You got "eligible
5 applicants," and you've got "qualified applicants," which are
6 different stages. What do we need here?

7 CHAIR BATTLE: Just "qualification to apply,"
8 because you don't have a qualified applicant until that
9 person has made application and you've determined that
10 they're qualified. So you're only talking about
11 qualification to apply.

12 MS. PERLE: "Qualifications for applicants," or
13 something like that.

14 CHAIR BATTLE: I'm going to take a chairman's
15 prerogative on this, "Qualification to apply."

16 MR. FORGER: Suzanne and I were chuckling at the
17 number where we have 1 followed by a long list and then 2,
18 any other information.

19 MS. PERLE: Well, except that I think that we did
20 it purposely because what we said is we want the Corporation
21 to include these things, and then anything else you want to
22 include in the RFP is up to you.

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1 MR. FORGER: Correct. So what's the magic
2 phrasing?

3 MS. PERLE: We didn't originally have the 1 and 2.
4 We added that.

5 CHAIR BATTLE: "Qualifications to apply,"
6 "regarding qualifications to apply."

7 MS. PERLE: Well, how about "qualifications for
8 applicants," or something. We can figure it out. Can we
9 leave that up to Suzanne to figure out?

10 CHAIR BATTLE: Submit it to the computer and tell
11 us what it kicks back.

12 MS. PERLE: It's going to say, "This sentence is
13 too long."

14 CHAIR BATTLE: Do you want to go through each of
15 these things that we've got that we want included in the RFP?
16 No. 1 has to do with the qualifications; No. 2, the
17 application procedures and deadlines; No. 3, the selection
18 process and deadlines for the selection process. We're using
19 "deadlines" twice. I'm assuming we mean selection process --

20 MS. PERLE: Well, I think that means the date by
21 which the Corporation anticipate it's going to award the
22 grants.

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1 MS. GLASOW: It's application deadlines and then
2 selection deadlines.

3 MS. PERLE: Maybe it should be "timetable" instead
4 of "deadlines," the second one.

5 MR. FORGER: Why do you have to identify
6 "deadline"?

7 MR. TULL: Yeah. Isn't a deadline --

8 MS. MERCADO: No, but I mean, it is required in an
9 RFP for you to give a window of time in which somebody has to
10 submit. If somebody doesn't submit their bid by February 1,
11 you're out of the picture.

12 MS. PERLE: That's in the first one. That's
13 applications and deadlines. We're talking about the
14 selection process. What if we say "timetable"? Because
15 there are other things besides a deadline for that.

16 MR. FORGER: Isn't that part of the selection
17 process?

18 MS. PERLE: That's what John said.

19 CHAIR BATTLE: Selection process, take out
20 "deadline." Selection criteria --

21 MS. GLASOW: We could put "deadlines" separately,
22 actually.

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1 MS. PERLE: Why don't we just put "timetables" and
2 "deadlines" as a separate thing and take it out of both of
3 those places?

4 CHAIR BATTLE: So we'll have the application
5 procedure, the selection process, timetable and deadlines?

6 MS. PERLE: Right.

7 CHAIR BATTLE: "Selection criteria; the service
8 areas that will be the subject of the competitive bidding
9 process; the amount of funding available, if known for the
10 service area; and the LSC Act, regulations and guidelines
11 that will apply to the recipient."

12 MS. PERLE: I think maybe we might want to put
13 something about other laws, because it won't necessarily --
14 there may be riders that --

15 MS. MERCADO: And you'll have stuff like subject to
16 the Wagner --

17 MS. PERLE: We don't put that in.

18 MS. MERCADO: In the federal funding grants, you
19 don't put any --

20 MS. PERLE: We don't put any of that in, do we? I
21 don't believe so.

22 MS. GLASOW: I don't think so.

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1 MS. MERCADO: No federal in which they must comply
2 with on an RFP?

3 MS. PERLE: Well, don't forget up to this point --
4 LSC funds are not federal funds for all purposes. Now, that
5 may change next year.

6 MS. MERCADO: Well, but if you're doing it in a
7 competitive process, it seems like there are some, sort of,
8 standards that look at for RFPs and federal monies. I mean,
9 whether or not --

10 MS. PERLE: But LSC funds are not considered
11 federal funds for the purposes of those various and sundry
12 things. They may be in the future depending on what the
13 legislation says, but right now they're not.

14 The proposals -- you know, we would hope that it
15 just says for purposes of federal criminal prosecution so
16 that --

17 CHAIR BATTLE: What about a section that says "and
18 other federal law"? You got the Act, regulations and
19 guidelines, but you don't have, for example, appropriations
20 law.

21 MS. PERLE: Why don't we say, "other appropriate
22 federal laws"?

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1 CHAIR BATTLE: Yeah.

2 MS. PERLE: Or applicable.

3 CHAIR BATTLE: Applicable.

4 MR. McCALPIN: Does this language suggest that
5 we'll tell them the whole LSC Act applies, or are we going to
6 isolate sections of the Act that apply?

7 Are we going to tell them all the regulations
8 apply, or are we going to say this, this, this and this
9 regulation applies, implying that the others don't? Are we
10 going to pick and choose within the Act and regulations as to
11 what's going to apply and what not?

12 CHAIR BATTLE: But in my view, every single reg
13 applies to a recipient.

14 MR. McCALPIN: That's what I would have thought.

15 MS. PERLE: Yeah. The purpose of this, really, was
16 to make sure that all applicants who aren't current grantees
17 know what they're getting in for.

18 MS. GLASOW: We had a discussion on whether we had
19 to send out the Act and regs to every applicant, whether we
20 should do a summary, whether we should do an index.

21 We haven't decided, so we said information about in
22 the rule, and then we can decide as we go through the RFP

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1 process what we have the funding to do, what's appropriate.
2 That's why we have that worded that way.

3 MR. MCCALPIN: The way this is phrased it implies
4 that some but not all guidelines and regulations may apply.

5 MR. TULL: Does taking out the word "will" address
6 that?

7 CHAIR BATTLE: What about putting in, "The LSC Act,
8 regulations and guidelines and other federal law that will
9 apply to the recipients" so that that qualifier really goes
10 to the other federal law that will apply to the recipients?

11 MR. BROOKS: Well, that should go in before
12 "regulations and guidelines," which are not federal law. So
13 "LSC Act and other federal law," "LSC regulations and
14 guidelines."

15 CHAIR BATTLE: Why don't we do it this way,
16 "Regulations and guidelines, LSC Act and other federal law
17 that will apply to the recipients" so that you've got up
18 front the regulations and the guidelines, the things
19 promulgated by the Board and then move from that to federal
20 law, which is the LSC Act and other federal law.

21 And the other federal law really has to do with
22 appropriations, potential language that may specifically

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1 address the competitive grant situation or something that we
2 think grantees need to be aware of in putting their
3 applications together.

4 MR. BROOKS: We're not going to send them copies of
5 our regulations and the LSC Act. We're just going to
6 enumerate what acts apply?

7 MS. PERLE: We may.

8 MS. GLASOW: We haven't decided.

9 MR. BROOKS: I think we ought not to bind ourselves
10 to send enormous wads --

11 MS. PERLE: No, but the Corporation -- we thought
12 we talked about that, and we said that we may, in fact, want
13 to do that even though it will be costly.

14 It depends on how many we really anticipate on
15 getting, because we really want people to know what they're
16 going to be subject to, and if we just --

17 MS. FAIRBANKS-WILLIAMS: If there is new bidders,
18 they don't know.

19 MS. PERLE: Right. And if we just give them an
20 index, that was one suggestion that was made, if we just send
21 them --

22 CHAIR BATTLE: The law is thin -- you know, we're

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1 not talking about a lot of paper.

2 MR. ASKEW: The RFP -- the application they submit
3 is going to have to explain how they're going to comply with
4 the Act and regulations, right? So they ought to have a copy
5 of those before they do the application so they can explain
6 to us how they're going to come into compliance with all of
7 those regulations.

8 MR. TULL: This is another one where what we do in
9 practice may be driven by a number of things, including
10 money. It will be very expensive this first round to send
11 the entire Act and the regs to every current recipient and
12 anyone else that -- so then our judgment, in thinking about
13 the RFP, would be to try -- because we have a serious cost
14 problem and a serious budget problem would be to opt not to
15 send the entire Act and regulations for cost purposes,
16 therefore --

17 MS. PERLE: What about on the notice of intent to
18 apply they could check off if they want copies of all of the
19 stuff?

20 CHAIR BATTLE: Well, and --

21 MR. TULL: Yeah.

22 MR. BROOKS: Including the ABA --

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1 MR. ASKEW: Standards?

2 MS. PERLE: But, I mean, that's not funny, because
3 we really don't want people to understand --

4 MR. ASKEW: But I would think the way to deal with
5 it is in the notice of intent, and you check if you would
6 like them, and current recipients will not check that they
7 want the Act and regulations, presumably. So you'd really be
8 sending them to new applicants who are going to have to
9 address in there.

10 MS. PERLE: Right. And those are only those people
11 who have already expressed a serious intent to apply, but we
12 don't have to put down the regulation.

13 MS. ROGERS: Or any of this, really.

14 CHAIR BATTLE: What about the RFP just identifying
15 the acts and regulations that will apply to the recipients
16 and then the actual -- when you send out your package to
17 people, you can at that point, if they request copies,
18 provide them?

19 MS. PERLE: Well, the way it is purposely, to give
20 the Corporation discretion to figure out how to do it best,
21 because it's, basically, information regarding all of these
22 things.

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1 Maybe what we need to do is put a colon after
2 "regarding" so it's clear that "information regarding"
3 applies to each and every one of these.

4 CHAIR BATTLE: Yeah. That was not clear to me
5 because you have so many semicolons in there I thought that
6 this meant provide the actual copies.

7 MS. ROGERS: In thinking about the possibility of a
8 lot of disgruntled people who don't get the grants, looking
9 to see whether we followed procedures correctly and so forth,
10 I don't like the idea very much that we're going to pick
11 which laws are applicable, because they could say, "You left
12 out this one which you're now claiming to be applicable."

13 I wonder -- I'm in favor of doing it just as you
14 three have proposed, but if we could just leave that out
15 completely from "service area" on, just omit the rest of that
16 clause, I'd be more comfortable.

17 MR. BROOKS: Do it in the RFP as far as we want to
18 but not --

19 MR. FORGER: Isn't there a way for people to access
20 this with technology?

21 MR. TULL: Internet.

22 MS. PERLE: Well, there clearly is.

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1 MR. FORGER: Make it available in a variety of
2 forms. It doesn't all have to be like this put in the mail.

3 MS. PERLE: No, no. It doesn't have to be.

4 CHAIR BATTLE: Linda, are you saying in (b) we're
5 going to do -- the Corporation shall issue an RFP which shall
6 include information regarding," and then 1 is going to be
7 qualifications, 2 --

8 MR. FORGER: And you can tell them how they could
9 get this information --

10 CHAIR BATTLE: And then you might be able to say,
11 you know, check the Internet for da-da-da-da-da.

12 MS. PERLE: Right. We could do that.

13 MR. TULL: That's Nancy's suggestion to be not here
14 as a part of the regulation and make a requirement of
15 notifying them about the law which will apply, I think your
16 point being, and I think it's right, that there may be some
17 laws that turn out to apply to a program, but don't have --
18 the appropriation, not the ones that are obvious to us, but
19 it's the -- fraud has the Federal Fraudulent Claims Act --

20 MR. MCCALPIN: Fair Labor Standards.

21 MR. TULL: Fair Labor Standard Act, all of those,
22 and I think the point is well taken that --

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1 MS. PERLE: But we may want to put in -- maybe what
2 we want to put in is some qualifying language that we're
3 going to give them information about the specific things that
4 are LSC things, the LSC Act, riders, regulations, whatever.

5 I just think -- I think the point that we made in
6 developing this and that we've discussed a number of times is
7 that we want to make sure that we're not flooded -- the
8 Corporation is not flooded with applications from people that
9 don't have a clue.

10 MS. ROGERS: But you heard John say he's going to
11 do it.

12 MR. TULL: But I think that is a matter of --
13 you're absolutely right that has absolutely been practiced,
14 but I think we don't -- this is one where every good practice
15 doesn't need to become a regular priority requirement, and it
16 strikes me that this is one where -- we clearly will do that,
17 but I think there are -- I think Nancy's correct that as soon
18 as we make a regulatory requirement of notice of the
19 existence of a law we bind ourselves to being very clear that
20 we know what every law that exists, and that's probably not
21 something --

22 CHAIR BATTLE: Or somebody gets a packet that

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1 doesn't, to some reason, have the Act in it, and they say,
2 "Well, you know, you can't bind me to the rest of your time
3 frames because the Act wasn't in there."

4 MR. TULL: I think Alex was correct, too, that we
5 probably will end up with this on our Home Page in the
6 Internet where people can get it off of that.

7 MR. FORGER: So why shouldn't it be, "Information:"
8 and then "the Act, guidelines and regulations"?

9 MS. MERCADO: I think that you have to have the Act
10 and guidelines and regulations on it because you want to put
11 them --

12 MR. FORGER: Information for the Act itself.

13 MS. MERCADO: Yeah. Well, I mean -- just
14 information regarding -- you can tell them where they can get
15 it. I mean, they can go to their law library, you know, 45
16 C.F.R and go get it.

17 MR. FORGER: But if it's information relating to
18 these things, you can either send the whole thing out, go
19 tell them where to find it or whatever.

20 MS. MERCADO: I mean, in most RFPs, people who are
21 bidding for this stuff do the research and the work. I mean,
22 there are people that do this full time, grant writers and so

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1 forth that do all the background research to find out what
2 laws and regulations it is that applies to them.

3 I mean, it's not up to the funding source, you
4 know, to provide them all the stuff that they need to have,
5 but you need to put them on notice that you have to follow
6 XYZ, and they have to find out what XYZ is and whether or not
7 they can meet it. If they can't meet it, then they have no
8 business bidding for it.

9 CHAIR BATTLE: Okay. So really, we've changed the
10 first part of this to say "information regarding," and since
11 we've said that, I think that alleviates the concern that we
12 initially had about having to actually provide copies of the
13 Act, but at least we'll put all of the grantees on notice of
14 what is they need to be aware of.

15 MS. PERLE: I'm confused. Have you said that you
16 want to take out reference to the Act, regulations and
17 guidelines or no?

18 MS. ROGERS: I'd prefer it.

19 MS. PERLE: That's what Nancy proposed. Is that
20 what the rest of the Board --

21 CHAIR BATTLE: Well, what I'm hearing Maria say is
22 since we're not talking about actually providing copies of

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1 the Act, all we're doing is putting the grantees on notice,
2 "These are the laws which will govern your application." And
3 I think that's fair.

4 I think that to send an application out without any
5 clue as to the LSC Act, appropriations language, regulations
6 and guidelines puts in the dark those people that are not
7 already existing recipients.

8 And I think we're talking about a level playing
9 field issue. If we take it out, then those people that don't
10 have that knowledge already are going to be left without it,
11 and their applications are going to be inherently --

12 MS. PERLE: I would suggest that we take out --
13 take out "that will apply to the recipients," because that I
14 think helps with Nancy's concern that -- you know, that says,
15 "This is what we have. You can decide whether it's going to
16 apply to you or not."

17 CHAIR BATTLE: Yeah. We can then provide them at
18 least a listing or a way to get access to the information. I
19 think the information is what is --

20 MS. MERCADO: Yeah. Probably if it just reads,
21 "and the LSC Act, regulations and guidelines," and then just
22 cross out of rest of the stuff that's in there, that will

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1 take care of it.

2 MS. ROGERS: I guess a, sort of, related thing that
3 permeates the comments for the next page, have you done an
4 analysis of the likelihood of lawsuits, increase in lawsuits
5 against the Corporation as a result of this new process,
6 where they're likely to come from, what the basis of them is
7 likely to be and the cost to the Corporation?

8 MS. GLASOW: I don't know if we've gone to that in-
9 depth. We've looked at the law in terms of a bidding
10 competitive process, grant-making process, and applicants
11 have no property rights, in essence.

12 So unless they can show a discriminatory process,
13 constitution or we didn't follow our own procedures to a
14 substantial extent, you know, that reasonable man test -- and
15 that's a very heavy burden to show, then they really don't
16 have any right to sue. They have no property right and
17 interest because they haven't gotten a --

18 MR. MCCALPIN: -- bucks they can file a lawsuit.

19 MS. PERLE: And there were lawsuits --

20 MS. GLASOW: They can file it. That's always true.

21 MS. PERLE: In the early of the Corporation, there
22 were lawsuits from disgruntled applicants who didn't get

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1 grants, and none of them won, and I guarantee you're going to
2 get lawsuits now.

3 I think you'll get lawsuits from disgruntled
4 applicants, and you'll get lawsuits from recipients that
5 weren't refunded. You'll get them. I don't know that there
6 is any way to predict.

7 MS. ROGERS: Are there any likely handles for those
8 lawsuits that we should look out for?

9 MS. PERLE: Well, I think that Suzanne is saying is
10 that the law suggests that the Corporation really does have
11 discretion to pick who it wants to fund.

12 CHAIR BATTLE: Well, what I hear Nancy saying is
13 that as we set out our requirements are there any things that
14 we need to look at through the eyes of -- are we putting in
15 requirements that are going to provide hooks for purposes of
16 lawsuits that aren't necessary and that we use that as a
17 screen through this process so that we do -- on the one hand,
18 it's a balancing act.

19 I think we have to give full disclosure. We have
20 to put new grantees on a level playing field, and we have to
21 give them information, but we have to term it in such a way
22 that we don't give someone who is disgruntled with the

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1 process an opportunity to use it as a hook to challenge the
2 whole process.

3 MS. PERLE: I agree with that, but then you have to
4 balance --

5 CHAIR BATTLE: Yeah. That's my point. It has to
6 be a balance, and I would error on the side of giving
7 information but not tying us -- even the next provision,
8 "shall send a copy to --" you know, that "the Corporation
9 shall send a copy of the RFP to any person, group or entity
10 that requests a copy."

11 MS. PERLE: In writing.

12 CHAIR BATTLE: Is that a requirement in an RFP
13 process that anybody who requests, no matter what time they
14 request it, we send them a copy of the RFP?

15 MR. BROOKS: Well, should it be a regulation -- in
16 the regulation or just another policy?

17 CHAIR BATTLE: That's my question.

18 MR. McCALPIN: Well, as Linda said a moment ago,
19 we're not necessarily writing this for the people sitting
20 around this room or who will be here in the next year or so.

21 We're writing something which we expect will reach
22 on into the future, and as a result, I think that ought to

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1 stay.

2 MS. PERLE: The other thing that I've said also on
3 other occasions when we've been discussing proposed rules
4 which are going out for comment that the product that we
5 develop today should meet whatever we thought about today,
6 but it's not the final rule, and we'll have another
7 opportunity, and we'll have lots of -- you'll all have lots
8 of time to review this again and, sort of, think about it
9 from those perspectives.

10 We have 30 days of public comment when you get
11 comment back. You'll have an opportunity to revisit all of
12 these I after you've had a chance to think about them a
13 little bit.

14 You can take this rule to people who you know who
15 have applied for grants and say, "Is there anything in here
16 that's going to cause us a problem?" I think it's impossible
17 for us to, kind of, anticipate all those things right here
18 right now.

19 MS. GLASOW: Maybe we could take a break?

20 CHAIR BATTLE: Yeah. I was just about to say it's
21 close to 4 o'clock, and we have done a wonderful job on about
22 two pages.

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1 MS. PERLE: Oh, but the rest of the stuff is
2 easier.

3 CHAIR BATTLE: Three pages of this regulation. So
4 we are one-third through. I think it's an appropriate time
5 for us to take a five-minute break.

6 (A brief recess was taken.)

7 CHAIR BATTLE: We've had our five-minute break. It
8 has stretched into a ten-minute break, so we're going to go
9 back on the record and get started so that we can meet our 6
10 o'clock deadline so people can get home before dark.

11 John just brought to my attention in subsection (c)
12 to 1634.4 that he would amend, and I agree, subsection (c) to
13 read, "The Corporation shall make available a copy of the RFP
14 to any person, group or entity that requests a copy," which
15 gives us the opportunity to make it available through the
16 Internet or other electronic or other services.

17 MS. GLASOW: I would also amend it to say "request
18 a copy in writing."

19 MS. PERLE: Well, I'm not sure I would say in
20 writing, because if they request it on the Internet it might
21 not be in writing. But I would say, "in accordance with the
22 procedures established by the Corporation."

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1 MS. WATLINGTON: I agree with that, too.

2 CHAIR BATTLE: Okay. All right. Let's move on to
3 1634.5, Identification of Qualified Applicants for Grants and
4 Contracts.

5 As I understand it, this section really comes
6 straight out of the appropriations bill, which sets out in
7 Section 502 the specific entities that are qualified to make
8 application for the funding. This section reads:

9 "(a) The following persons, groups and entities
10 are eligible to submit a notice of intent to compete and an
11 application to participate in the competitive bidding
12 process:

13 (1) Current recipients;

14 (2) Other nonprofit organizations that have as a
15 purpose the furnishing of legal assistance to eligible
16 clients and that will have before any award is made under
17 this part a board of directors or other governing body that
18 is consistent with the requirements of Part 1607 of these
19 regulations;

20 (3) Private attorneys, groups of attorneys or law
21 firms that will have before any award is made under this part
22 a policy body consistent with the requirements of Part 1607

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1 of these regulations except that no private law firm that
2 expends 50 percent or more of its resources and time
3 litigating issues in the broad interests of a majority of the
4 public may be awarded a grant or contract under the LSC Act;

5 (4) State or local governments that will have
6 before any award is made under this part a policy body
7 consistent with the requirement of Part 1607 of these
8 regulations; and

9 (5) Substate regional planning and coordinating
10 agencies which are composed of substate areas and whose
11 governing boards are controlled by locally affected officials
12 and that will have, before any award is made under this part,
13 a policy body consistent with the requirements of Part 16076
14 these regulations."

15 Now, that's subsection (a). What we have tried to
16 do, it seems to me, with subsection (a) is to distill the
17 present regulatory requirements for LSC now recipients, which
18 require either a policy, board or a governing board which is
19 comprised of what the statutory language now requires in
20 terms of attorneys, client members and others, into any of
21 the entities.

22 So worry meshing the existing law and this new law

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1 in the appropriations bill so that our regulation will assure
2 us that both are met. Is that correct?

3 MS. GLASOW: What we did is for those entities
4 where the Appropriations Act didn't have a requirement for
5 some sort of governing body, we added that requirement.

6 We felt that any recipient that got a grant should
7 have some body that makes policy, somebody to which they are
8 accountable so that some tiny little group of people that get
9 together to form, you know, a two- or three-person group that
10 apply, that they're not making all the policy decisions, and
11 how are they going to comply with a lot of the regs that
12 require some sort of governing body that includes client
13 involvement and that type of thing.

14 So we added that requirement to at least have a
15 policy body as envisioned in Part 1607.

16 CHAIR BATTLE: Okay.

17 MS. WATLINGTON: LaVeeda, the same concern I had
18 goes even whether that -- because the same thing is in
19 housing. We nonprofits advocated very strongly and have been
20 for set-aside money, and the requirement was similar to the
21 requirement for a board.

22 State agencies and region agencies that had funding

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1 made it very difficult for nonprofits to compete with them
2 because all they did was just form this board on the side.

3 But they had monies to form these type of boards,
4 whereas these other programs don't have these kinds of fund
5 to do that, to get around that, still be able to make the
6 decisions for -- you know, providing the type of service, and
7 we still don't feel that we get the type of -- sensitive to
8 the needs of Legal Services clients and in the community that
9 we feel that we worked so hard to get that now let's open it
10 up and have these state agencies and these funded agencies be
11 able to put up these bogus boards and still dictate to the
12 committee. They're not getting the input from the committee
13 that shall be.

14 So that was why I voiced my concern the first time,
15 and this is why -- all I can do is voice it, because as you
16 say, this came from there, but just that you be aware of some
17 of the things that have been happening in communities when
18 this is opened.

19 CHAIR BATTLE: One of the things about this
20 particular requirement, it seems to me, is that it does make
21 it a requirement before a particular applicant receives the
22 funds that this policy body be in place.

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1 MS. FAIRBANKS-WILLIAMS: If it's more than one,
2 does there have to be just one qualified body in place, and
3 the other two groups that joint don't have to have one, or do
4 all three groups have to have one or all two groups or
5 whoever?

6 CHAIR BATTLE: Whoever is making the application is
7 deemed the applicant. Now, if the applicant is a group of
8 three people, the governing body will have the responsibility
9 for that entire service area is my understanding. I envision
10 it being an entity making the application.

11 MS. PERLE: I think Edna was talking about (b), the
12 joint applications.

13 CHAIR BATTLE: Okay.

14 MS. PERLE: I think it may depend on whether you're
15 talking about the situation that John was where you have
16 separate entities that want to merge and just can't get it
17 together before the application is submitted, then the
18 proposal will be ultimately we're going to have one governing
19 body.

20 If you're talking about, sort of, a joint effort of
21 three or four different organizations, I think each of
22 those -- that doesn't plan to merge into one organization, I

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1 think each of those should have -- I think should have a
2 governing body or a policy board depending on what's
3 appropriate.

4 MS. FAIRBANKS-WILLIAMS: Well, the way we're funded
5 in Vermont we get money, say, from the elderly, and they have
6 their governing body. We have our governing body, and we may
7 get money from something else, and we have to -- all three of
8 the governing bodies have to have togetherness.

9 CHAIR BATTLE: I'm not sure, from a practical
10 standpoint, how that would work. Because if you have three
11 programs, unless those governing bodies are specifically
12 given jurisdiction over a particular service area so that you
13 don't have three different governing bodies attempting to set
14 priorities across a state that might not be the same
15 priorities, that further delineation of what this means needs
16 to come with how the policies are implemented.

17 MS. PERLE: I think that's right.

18 MR. TULL: I think Edna's question really does go
19 to an issue and a challenge that we're going to have, but it
20 is -- this is another area where it is not as explicit in the
21 regulation as it could be because there is a -- one of the
22 questions that we're wrestling with now in the context of

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1 developing the RFP is what is the practical range of joint
2 applications that we would envision?

3 We have -- Linda correctly noted one that we would
4 contemplate, and that is we have pushed programs to look to
5 possible merger and consolidation. So we're encouraging as a
6 way to make that possible in such a circumstance people to
7 submit -- two entities to submit a joint application.

8 We're in the midst just two days ago of a
9 conversation about whether we would contemplate a submission
10 of a joint proposal from four separate recipients, I mean,
11 folks who would want to stay separate, but what they want to
12 do is also be able to demonstrate coordination of work and,
13 perhaps, share training or shared administrative capacity as
14 a way to demonstrate both a capacity to provide full service
15 and to demonstrate that they are moving toward accomplishing
16 some of the things that we'd indicated that we would like to
17 see happen.

18 But frankly, whether that really is going to make
19 sense to do or not given the time frame we've got between now
20 and December 31st, we didn't come to a conclusion about it.

21 I guess it illustrates again we're in a position
22 where there is an enormous complexity to what we need to

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1 accomplish, and it is affected by the time frame that we end
2 up in.

3 If we end up in a June time frame, if Congress
4 gives us that opportunity, then we may be able to do much
5 more in this area, but the language is designed to provide --
6 to provide an opportunity for exercise and discretion in
7 designing the RFP to respond to a range of things, including
8 time and a number of other factors.

9 CHAIR BATTLE: Okay. Any other comments on 1645.5?
10 Bill?

11 MR. McCALPIN: I guess I have two comments. It
12 seems to me that we're going to get some flack along the line
13 from a requirement that a priority attorney have a governing
14 or a policy body.

15 It just seems to me that we're going to get
16 complaints that this is unduly restrictive, that the
17 legislation clearly says an award may be made to a private
18 attorney, and it's saying that a private attorney has to have
19 a governing body --

20 MS. PERLE: It's a policy body. It's not the same
21 as a governing body.

22 MR. McCALPIN: Or a policy body.

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1 MR. TULL: The problem we found ourselves wrestling
2 with was so many of the regulations require a decision around
3 policies such as appeals, practice outside of the --

4 MS. GLASOW: Priorities, yeah.

5 MR. TULL: -- priorities that we couldn't fashion a
6 notion of how an individual lawyer without some --

7 MR. McCALPIN: I'm just trying to think of the
8 reaction of Mr. Rogers and Mr. McCollum or Mr. Gekas to a
9 proposal like this when they clearly want awards to be made,
10 possibly to be made to a private attorney to engraft the
11 governing and policy body onto that.

12 CHAIR BATTLE: Well, I think as an interim measure
13 for now that all of the proposals did envision some
14 accountability at some level, be it state and local
15 government is what Gekas is looking at, making the awards,
16 that a private attorney, absent some policy body as the body
17 to whom that attorney would be accountable, would make it a
18 variation from all other entities under this.

19 MR. McCALPIN: Under the Gekas proposal only a
20 private attorney can be a recipient.

21 CHAIR BATTLE: However, that private attorney is a
22 recipient, and the state making that grant has some oversight

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1 locally, and the policy body is our substitute, it seems --

2 MR. TULL: I think Bill's point is well taken.

3 Some of this way be -- I think we have a responsibility to
4 explain back the dilemmas that we have, because another
5 concern we had was if there is a distinction between a law
6 firm, private law firm, not having to have an accountability
7 structure, a current recipient could declare himself a law
8 firm, cease to be a nonprofit organization and free itself of
9 the obligation to have a board and have a board appointed by
10 local bar associations.

11 Obviously, there is a number of, sort of, practical
12 considerations in making it apply fairly to all. Clearly,
13 there is political considerations in terms of the appearance
14 issues that we're addressing.

15 And the problem we're stuck with, of course, is
16 that reality doesn't always comport with appearance, and the
17 degree with which we're stuck with just not being able to
18 mesh we, obviously, have an educational responsibility to
19 oversight --

20 MR. McCALPIN: My other point, and I might just as
21 well raise it here, but it is probably more relevant in the
22 next section, I don't understand fully, really, the

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1 requirement of the additional bureaucratic hurdle of a notice
2 of intent to compete.

3 In areas of competitive bidding that I'm been
4 familiar with, the contractor, the issuing body, the
5 authority, whatever, issues plans and specs in an RFP, and
6 people drop by and pick it up or obtain it or whatever, and
7 they either file a bid, or they don't.

8 Now, this injects an intermediate process. If
9 somebody files -- has to file a notice of intent to compete,
10 then they still have to file the application for the award.
11 Now, I'm not sure, really, why we have this intermediate
12 step.

13 CHAIR BATTLE: Okay. Before we get to that --

14 MS. WATLINGTON: We've been having to do this as a
15 nonprofit in all the places now that we have to go for
16 monies.

17 MS. FAIRBANKS-WILLIAMS: And then they tell you
18 what they want.

19 MS. WATLINGTON: And then you can file.

20 CHAIR BATTLE: Before we get too far into that,
21 Nancy had one other concern about the way that we've drafted
22 1634.5 that I want to handle. So put a pin in your

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1 discussion just now until we deal with this.

2 I think what Nancy is suggested that we use the
3 language that comes straight out of the appropriations bill
4 and that we add a provision that deals with the issue of
5 governing body in one section separate from 2, 3, 4 and 5.

6 That makes it applicable to 2, 3, 4 and 5?

7 MS. ROGERS: Uh-huh.

8 MR. TULL: Also, say "all recipient" or "any
9 recipient" --

10 CHAIR BATTLE: Yeah. "Any recipient must have a
11 governing body --" yeah. And that way we clearly have what
12 the law now requires, and then we add to that just folding in
13 what our existing law requires.

14 MR. BROOKS: Where does this parentheses come from,
15 the "(except that no private law firm that expends more than
16 50 percent or more of resources)" et cetera?

17 MR. McCALPIN: It's in the statute.

18 MR. BROOKS: Oh, in our --

19 MR. McCALPIN: LSC Act.

20 MR. BROOKS: LSC Act?

21 MS. GLASOW: It says, "We can make no grants to a
22 private law firm that expends 50 percent or more of its

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1 resources" --

2 MR. BROOKS: Okay. So litigation language which
3 doesn't make any sense to me, you know, litigating or devoted
4 to, but if it says "litigating," I guess we have to leave --

5 MS. GLASOW: I researched this one time, and it
6 really was difficult to figure out what that means, but it is
7 in the Act.

8 MS. PERLE: Well, they thought it defined a public
9 interest law firm, and they didn't want grants to go to
10 Center for Law and Social Policy.

11 MR. FORGER: On Bill's point, does this mean if
12 there is a six-lawyer firm that is interested in making a bid
13 that it then has to go to the local bar association and have
14 an award of some type or description appointed, and it has to
15 get client --

16 CHAIR BATTLE: Participation? Yes.

17 MR. FORGER: -- members on this board and the whole
18 four meetings a year and all of that?

19 CHAIR BATTLE: Right. It sure does.

20 MR. FORGER: Well, I certainly -- if the only
21 reason we're doing that is because other parts of regulations
22 contemplate a board, I would find it difficult to justify

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1 having a law firm overseen by another group of lawyers for
2 the sake of having some element of accountability.

3 I understand the rationale where you've got a
4 corporation, a not-for-profit and, sort of, an artificial
5 entity, but where you have a law firm composed of members of
6 the local bar association, although not client members, I
7 suppose, strikes me as being --

8 CHAIR BATTLE: They're not overseeing, obviously,
9 the whole -- the law firm's entire work.

10 MR. FORGER: No, but that's all they're doing.
11 These six people got together to do a bid and not --

12 MS. WATLINGTON: But aren't they supposed to have
13 clients on that --

14 CHAIR BATTLE: Yeah. Clients would be on the
15 governing board.

16 MR. FORGER: Well, if you had a corporation, yes.

17 MS. FAIRBANKS-WILLIAMS: Well, if you don't have a
18 corporation, they can decide to do just one thing. They
19 don't have to set any policy that does anything for the
20 clients or whatever. They can decide to do all divorces or
21 all consumer law or all -- most anything.

22 MR. FORGER: Well, we tell them they have to do,

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1 you know, the all purpose -- they will have to submit to us,
2 I take it, their plan and their priorities and how they reach
3 those priorities in cases and the like. It's quite apart
4 from having a policy board.

5 I mean, I think a six-person law firm would be
6 capable of doing that just like a six-person policy board
7 would be.

8 MR. TULL: I think we were pushed to the notion of
9 this by, sort of, a recognition of reality, which is given
10 the fact that a private firm cannot operate in any way which
11 is inconsistent with the restrictions in the appropriation
12 right or which includes getting attorneys fees that the
13 reality is that any firm which applies is going to have to
14 dedicate itself to do just a Legal Services grant,
15 essentially, because that's the way it's framed in the
16 appropriations.

17 MR. FORGER: All right.

18 MR. TULL: So the concern -- the concern we had
19 really was an accountability one, that what we wanted to
20 guard against, among other things, was a group of Legal
21 Services lawyers simply forming with a Legal Services program
22 but not having a board and not having the requirement of --

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1 because a Legal Services program is a firm of a different
2 type, but it acts as a firm and operates as a firm, and the
3 ABA opinions that have -- that have -- 334 and others which
4 have answered ethical questions have treated it as a firm.

5 You've clearly identified, as does Bill, a problem
6 that given the reality of how the private firms operate is a
7 significant one, but the suggestion that 1607 policy board be
8 attached was really aimed at to assuring that there is
9 accountability and in recognition of the fact that the truth
10 is that a private firm which applies is going to have to be a
11 dedicated -- a group of lawyers who, essentially, are
12 dedicate to doing this work.

13 MR. FORGER: What makes that six-member law firm
14 with an advisory board more accountable than the six-member
15 law firm without --

16 CHAIR BATTLE: The fact -- in my view, that the
17 policy board would set priorities, local priorities, with
18 input from clients as to what kinds of cases broadly ought to
19 be considered, would in a regulation that we're going to
20 consider tomorrow establish on a limited basis whether class
21 actions may be undertaken in a way that if you did not have
22 input from clients and from members of that board who don't

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1 have a vested interest because they're not part of that
2 practice, there may not be input in a broader sense as to how
3 those priorities are set.

4 MS. PERLE: The only thing missing, LaVeeda, in my
5 structure, is I don't have client members, but I can take my
6 six-person partnership and have them be the board of your
7 program or have these six partners running their own program.

8 They're capable of getting client priorities.
9 Whether you call them a board of your program or whether you
10 call them a law firm of my program, the only thing missing is
11 the client participation in the board.

12 MS. PERLE: But I think that's a very significant
13 piece. I mean, I think certainly Ernestine and Edna would
14 agree that client input is perhaps one of the hallmarks of
15 the --

16 MR. FORGER: I'm just pressing it from a point of
17 view of the outside folks who want to involve private
18 attorneys. I don't know, is the City of New York going to
19 get an advisory board? I suppose it could get an advisory
20 board, but I think it's more difficult when you're talking
21 about an individual lawyer who now wants to do Canna Jahare,
22 and that's what -- he's going to do the whole thing.

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1 Now he has to go out, and it's sort of a huge
2 impediment, I guess, to go out and try to create a board and
3 get the local bar to appoint people and go have to get
4 clients and do a lot of things.

5 It clearly is designed to put you in proper form
6 is, basically, what it is.

7 MS. WATLINGTON: But this is what we've fought so
8 hard for. It actually happens in reality now. The board is
9 made up of 60 percent of attorneys, and then that McCollum --
10 was it McCollum-Stenholm -- that had to be so many bar
11 associations appointed.

12 So you're still getting around what we fought so
13 hard for, and even now we're losing even more so because
14 they're going to still have the majority vote, and they'll
15 pick the clients that's going to say what they say anyway.

16 But it's meeting that accountability that clients
17 can at least fight for to try to get true clients in order to
18 have some even put from the community of what the community
19 really needs instead of you put all the money on just what
20 that one attorney wanted to do and not going to be able to do
21 what the community needs are.

22 And how will they know if they don't have even put

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1 from the community what the needs are in that community?
2 They could be better served with those dollars.

3 MR. ASKEW: Alex, for those people who would like
4 to see private attorneys, law firms, other groups apply for
5 these funds, when they don't apply, I think rather than there
6 being an impediment because of this requirement, the real
7 impediment is going to be because those private attorneys
8 can't do fee-generating cases. They can't get private funds.

9 All the other restrictions that they put in this
10 legislation are going to impede the effort to diversify the
11 funding here.

12 I think John is absolutely right. A law firm, all
13 they'd be able to do is this work with this money, and that's
14 going to impede them from applying in the first place. I
15 think the requirement they have a policy board wouldn't be
16 the real impediment. It would those other things.

17 MR. FORGER: I don't want to belabor the point. I
18 mean, my druther is everybody would be a not-for-profit
19 corporation, but that's not the environment in which we're
20 functioning today, and I was just posing that maybe on the
21 listing that a group get together for the purpose of bidding
22 in New York to do 33,000 cases, for example.

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1 CHAIR BATTLE: I don't know that we now have an
2 option, given that the McCollum bill is law establishing that
3 governing bodies --

4 MR. MCCALPIN: Oh, you mean the old one.

5 CHAIR BATTLE: The old McCollum bill now says
6 recipients must have governing bodies, that we have an option
7 right now to have a recipient not have a governing body of
8 some sort.

9 So I think right now here at a hybrid point where
10 in order to us to be true to our existing law and meet what
11 it is that we've been asked to do with regard to constructing
12 something that meets the bill that we've got before us we
13 have to merge the two until we get further guidance as to
14 what's appropriate.

15 MS. ROGERS: I think it would be a good thing, in
16 addition to just tracking the language in 1634.5 from the
17 bill, it would also be a good thing in the section that
18 requires the governing board, and I agree completely with you
19 on the substance, to indicate "as required by" and then put
20 in the provision of law each -- one criteria for receipt of
21 the is --

22 CHAIR BATTLE: That you have this governing body

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1 that the law requires. So that's really where we are. Now,
2 with can debate whether or not in the future that's what the
3 law ought to require, but right now what we're trying to do
4 is draft a regulation that does honor existing law as well as
5 what we anticipate may become law.

6 MS. PERLE: I think it's accurate to say, though,
7 that the law that requires it is Part 1607. I don't think
8 the McCollum bill requires private attorneys to have a
9 governing body.

10 CHAIR BATTLE: What does the --

11 MS. PERLE: The McCollum bill says that, "None of
12 the funds appropriated in this act for LSC shall be used by
13 the Corporation in making grants or entering into contracts
14 for legal assistance unless the Corporation ensures that the
15 recipient is, (1), a private attorney or attorneys for the
16 sole purpose of furnishing legal assistance to eligible
17 clients." So there is no governing body requirement there.

18 And then they go, "or (2), a qualified nonprofit
19 organization chartered," and then it goes into the McCollum
20 requirement.

21 So if you are nonprofit, you must have the McCollum
22 board. If you're a private or private attorney, you can get

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1 a grant, but it has to be for the sole purpose of furnishing
2 legal assistance, which again really limits what they can do.

3

4 MR. ASKEW: But it does refer to them as a
5 recipient right?

6 MS. PERLE: Yes.

7 MR. ASKEW: Is "recipient" defined as something
8 with a governing board, a McCollum board, ironically?

9 MS. GLASOW: A "recipient" is defined as a grantee
10 who gets a 1006(a)(1)(A) grant for the provision of legal
11 assistance.

12 MS. PERLE: And then our regulation 1607 permits
13 the Corporation to waive the governing board requirement for
14 certain situations, but as a condition of that you have to
15 have a policy board.

16 MS. GLASOW: The policy body is less stringent than
17 the governing body requirement.

18 MR. TULL: I think the problem is we have an
19 irrational situation that a legal service program with six
20 lawyers is indistinguishable in how it functions from a law
21 firm with six lawyers in it except that one calls itself
22 nonprofit and has a board, and the other would be profit-

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1 making and wouldn't have a board.

2 And the problem is that that becomes -- and I think
3 what we need to guard against is that becoming a guise for an
4 organization getting out from under a very key accountability
5 provision which is in the Act and, you know, which McCollum
6 has indicated certainly a strong interest in making certain
7 that you don't have a group of lawyers who just follow their
8 own whim in how they pursue cases and that they be responsive
9 to the community through bar association and through client
10 representatives.

11 I think you're absolutely correct, Alex, that that
12 completely --

13 MR. FORGER: Are you proposing an additional
14 burden, then?

15 CHAIR BATTLE: The governing body which is less
16 strict than the -- or the policy body, which is less strict
17 than the governing body, is something that we do impose by
18 regulation on those entities particularly when 100 percent of
19 their funds are not LSC funds.

20 So that the policy set for how those LSC funds are
21 spent mirrors what our requirements are in other places, and
22 I think in the interim -- this is all that we're doing here

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1 with the formation of this regulation -- is to adopt that
2 starred for now.

3 Now, if we get further guidance that it ought not
4 to be adopted, I think we have the opportunity to delete it,
5 and particularly if we set out in a separate section, as
6 Nancy has proposed, if there is further guidance that we get
7 that this is not appropriate, I think right now our view at
8 least is that it is appropriate, that the policy body concept
9 was one which we embodied for purposes of accountability on
10 issues that we thought were critical so that there could be
11 client input from input from local bar associations on those
12 things which McCollum set out for governing bodies.

13 MR. FORGER: But is this going beyond the law,
14 then? Did I understand that McCollum did not impose the
15 governing body on the lawyers? Is that what you read in the
16 Act?

17 MS. GLASOW: That's McCollum amendment, which is in
18 our appropriations act. The LSC Act would require a 60
19 percent governing body, right.

20 MS. PERLE: For anybody who is a recipient.

21 MS. GLASOW: Yes.

22 MR. McCALPIN: Not all of it you organize solely

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1 for --

2 MS. ROGERS: So just refer to both laws.

3 CHAIR BATTLE: Yeah. Refer to both in this
4 section, and I think we can move on. 1634.6, Notice of
5 Intent to Compete. We have three different points on the
6 floor. Let me read first this section, and then we can take
7 them up.

8 "(a) In order to be eligible to participate in the
9 competitive bidding process, an applicant must submit a
10 notice of intent to compete on or before the date designated
11 by the Corporation in the RFP.

12 "The Corporation may extend the date, if necessary,
13 to take account of special circumstances or to permit the
14 Corporation to solicit additional notices of intent to
15 compete."

16 Okay. Any on that section?

17 MR. McCALPIN: Why do we have a notice of intent to
18 compete?

19 MR. TULL: I can speak to the practical reason,
20 although whether it would required to be in the regulation I
21 think is maybe a separate question.

22 The purpose for having a notice of intent to

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1 compete is to make certain that the competition can work
2 effectively in the following way, that if a new applicant who
3 is not a current recipient intends to apply, it gives us an
4 opportunity to identify who they are and to establish contact
5 with them to help them through what they need to do in order
6 to compete.

7 If the first point at which we receive from them
8 information about who they are and what they're going to do
9 is the date of the application being due, that new applicants
10 may not be fully apprised of what they're required to do
11 under the Act.

12 They may not have a real appreciation of what they
13 need to do in terms of getting a board and a variety of
14 things. So it's really an effort to give us the opportunity
15 to work with potential new competitors to help them get up
16 speed in order to be able to compete and not to be eliminated
17 because of just technically not being prepared when they
18 actually submit their application.

19 MR. McCALPIN: Well, I think that opens you up to
20 the accusation that you have helped a competitor.

21 MR. TULL: Which is a hard issue. We've been
22 wrestling with the position of having with any potential

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1 applicant, which would include current recipients as well as
2 a new recipient, do we take a position that neutrality means
3 we can do nothing to assist them or that we have to assist
4 everyone -- "equally" is not the right word here but assist
5 everyone in order to try to make them as capable as possible
6 of competing.

7 MR. McCALPIN: I think you let applicants stand on
8 their own feet, stand or fail based on their compliance with
9 the RFP.

10 MR. TULL: The policy problem that that creates is
11 if "neutrality" means not helping anyone, then, when we do
12 have a current recipient, if we provide them technical
13 assistance during the period of time that they are a
14 recipient, then a new applicant which comes in, and we've
15 been working with a program for five years and as a part of
16 the Corporation's carrying out its responsibility under the
17 Act to assure high quality we're assisting a current
18 recipient, at the point that their five-year or two-year or
19 whenever their grant ends, they are then needing to compete
20 with everyone else without preference and on a equal playing
21 field.

22 And if we have helped them and provided some

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1 assistance, if we say to a new applicant, "We're sorry we
2 can't help you," then we're actually benefitting the
3 recipient's board.

4 MR. McCALPIN: Are you going to tell the new
5 applicant everything you have told the existing applicant?

6 MR. TULL: Well, that's precisely the question that
7 we've been wrestling with, how much we can realistically and
8 practically --

9 MR. McCALPIN: I think you're making a mistake.

10 MR. TULL: Well, the choice, then, is that the
11 Corporation does not carry out any role in providing
12 assistance either to a recipient or an applicant, I think.

13 MR. McCALPIN: I think it's really a different
14 thing to provide technical assistance, as you call it, to a
15 contractee during the period of the contract, as opposed to
16 in the competitive process offering advice and assistance in
17 differing ways to differing competitors.

18 This is one of those handles that Nancy is talking
19 about what you're going to get. You award the contract to
20 one competitor, and the other one is going to say, "You have
21 unfairly helped that competitor as a result of which he got
22 the contract I should have gotten."

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1 MS. PERLE: There has been discussion about
2 bidders' conferences which as I understand it are pretty
3 standard practice --

4 MR. TULL: It's standard practice throughout the
5 industry to --

6 MS. PERLE: -- throughout the government.

7 CHAIR BATTLE: And does this notice -- okay. Tell
8 me how this notice to compete will be utilized. Is it simply
9 to give notice to the Corporation of people that may intend
10 to participate in the process so that if you're going to have
11 a bidders' conference --

12 MR. TULL: So we can wholly advise them of what
13 they're required to do in order to compete so that they -- so
14 that if it is someone who is brand new coming around the
15 block that we can, in advance of the time they would file
16 their application, make certain that they're aware of what
17 they need to do.

18 MR. McCALPIN: Would you advise them even if they
19 didn't ask for it?

20 MS. PERLE: You might invite them to a bidders'
21 conference, and it would be up to them as to whether they
22 came or not.

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1 MR. McCALPIN: Are you going to have a bidders'
2 conference in every instance?

3 MS. PERLE: No, not necessarily.

4 MS. GLASOW: We have the discretion to --

5 CHAIR BATTLE: What I have seen -- and then I'm
6 going to let Bucky -- what I have seen in government
7 contracts is a person who is a point person to contact. If
8 you've got an RFP out there and if people have questions,
9 that is the person that they call, and they get --

10 MR. McCALPIN: After they get the RFP.

11 CHAIR BATTLE: After they get the RFP, yeah.

12 MR. McCALPIN: That's right.

13 CHAIR BATTLE: Bucky?

14 MR. ASKEW: I was thinking of the issue of bidders'
15 conferences, either you hold 323 bidders' conferences without
16 knowing if anyone is interested in applying, right, or you
17 hold regional bidders' conferences which may be totally
18 irrelevant to a lot of people to come to Atlanta, if you're
19 interested in applying in the South, for instance, which is
20 an expense, a problem, might not reach the people you want.

21 If you don't have a notice of intention to apply,
22 you don't know where you need to hold bidders' conferences.

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1 There may only need to be ten bidders' conferences in the
2 United States. There may need to be 100, but there certainly
3 don't need to be 323.

4 CHAIR BATTLE: Why not make this discretionary? If
5 interested in participating, an applicant may submit a notice
6 to compete? And that way we have the list of people who may
7 submit it. They're not required to submit it, and if they
8 don't choose to submit it, then they don't access whatever
9 information we plan to make available to them.

10 MR. MCCALPIN: It seems to me you send out the RFP,
11 and if somebody has questions, then that point person or
12 whatever, they direct their questions at somebody in the
13 Corporation, and you answer them.

14 They evidence their intent to compete by asking for
15 an RFP. They get the RFP. They raise questions if they have
16 them. They respond to the RFP by the time bids have to be
17 in, and they stand or fall on the content of their bid.

18 CHAIR BATTLE: And they have to request that RFP in
19 conformity with some procedure that we set out probably in
20 our notices.

21 MR. MCCALPIN: In the published notice.

22 MS. WATLINGTON: You're talking about saving money.

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1 I mean, all that's going to be -- I'm almost inclined to
2 agree with Bill.

3 MR. TULL: Almost inclined?

4 MR. ASKEW: It makes her nervous to agree with Bill
5 on tape.

6 (Laughter)

7 MR. ASKEW: John, also in the comment to 1634.7,
8 you refer to -- it's not in the regulation, but you do refer
9 to providing technical assistance to bidders, including
10 convening of bidders' conferences. That would make me
11 nervous.

12 If you're in the position of providing assistance
13 to people who want to submit an application, I think that
14 both leaves you open to criticism in a lot of ways, but also,
15 if something is wrong with that application when it's
16 submitted, then you're open to criticism from that very
17 applicant that this is what you told me to do.

18 I think holding a bidders' conference may be the
19 most that you would do in answering questions of people who
20 call, but the term "technical assistance" to people who are
21 applying implies you go down there and help them fill out the
22 application or help them develop a board or help them set up

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1 a budget, which you clearly do not -- cannot get into the
2 business of doing.

3 MR. TULL: Yeah. The term is probably not the
4 right term. Really, the focus is to make certain that there
5 is a clarity of what's required and that people know what
6 they need to do.

7 MR. ASKEW: Right. Well, staff is available to
8 answer questions and provide appropriate information to
9 people to assist them in the completion of the RFP or the
10 application, period.

11 MS. WATLINGTON: Added to that, Bucky, you have to
12 make sure that you're telling everybody the same thing.

13 CHAIR BATTLE: What about that last sentence
14 reading, "The Corporation is also authorized, if resources
15 and staffing permits, to answer questions and may convene a
16 bidders' conference"? I'm reading on page 4, really.

17 MR. ASKEW: In the commentary.

18 MR. BROOKS: Let's say "respond to" instead of
19 "answer."

20 MS. GLASOW: In section 1634.7. It has only one
21 paragraph, last sentence.

22 CHAIR BATTLE: "The Corporation is also authorized,

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1 if resources and staffing permits, to respond to questions
2 and make convene a bidders' conference."

3 MR. BROOKS: Actually, we're, sort of, mixing up
4 two issues here. One is the notice of intention, and the
5 other is --

6 CHAIR BATTLE: We've gotten ahead of ourselves,
7 really. Let's go back to notice of intent to compete. You
8 know, John, one thing I think -- and this is the point that
9 Ernestine is making.

10 Since people are going to have to request an RFP,
11 is that sufficient notice to the Corporation of who is
12 intending to be involved in the process, or is there
13 something more that you're saying that the Corporation is
14 going to need in order to fashion, for example, its bidders'
15 conference or any other --

16 MR. TULL: Kathleen Welsh, who is one of the staff
17 members working with Karen Sarjent and others, is on the task
18 force trying to work this through, and the two of them and
19 Charlie Moses did a survey of other agencies' practice round
20 on competitive bidding.

21 She has pointed out to me that one of the standard
22 reasons for having a notice of intent is that so we -- and

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1 the reason in the -- whoever is making the grant, in our
2 case, it's the Corporation, obviously, can know if we're
3 going to have applicants for an area.

4 We have gotten some indications, for instance, that
5 current recipients may opt not to compete. I mean, once --
6 where now our current recipients may opt not to compete in
7 the forthcoming competition because of the restrictions that
8 will be applied to them and where the LSC funding is a small
9 portion of they're grant. They're just going to say we're
10 going to go with our other funds.

11 MS. FAIRBANKS-WILLIAMS: We discussed that last
12 night in Vermont.

13 MR. TULL: So it's a real issue in some areas. We
14 need to know if we're not going to have any applicants,
15 because we need to be prepared for transition and addressing
16 issues of --

17 MR. ASKEW: Who is going to serve that --

18 MS. PERLE: Well, that's right. The Corporation
19 has an obligation to provide service in those areas. So they
20 need to know whether they needed, sort of, scare up some
21 applicants.

22 MR. McCALPIN: If the program is not going to

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1 compete, it still has to complete whatever service it's
2 providing.

3 CHAIR BATTLE: Only for that year, though. I
4 understand the point now that John is raising because really
5 only for the rest of this fiscal year, if a program only gets
6 30 percent of its funding from LSC now and, you know, they're
7 going to get a 30 percent cut in funding anyway, and the
8 restrictions would then mean that they cannot keep their
9 other nonLSC funds, they may choose not to compete, not to
10 participate in this process, not to go after LSC funds.

11 And then LSC, unless someone else decides to
12 participate in the competition for that jurisdiction, will be
13 left with no service in that area.

14 And what you're saying is that you need to have
15 notice of that, not just somebody who requests an RFP but
16 somebody who has made a determination that they want to
17 participate in this process so that we can do some planning
18 around that issue.

19 MR. FORGER: Notice of intent not to compete.

20 CHAIR BATTLE: So I do now have an appreciation for
21 the distinction between this and a person who simply requests
22 an RFP, because people who do grant writing, every time they

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1 look in the Federal Register and see an opportunity they
2 request the RFP, but they may not have a real interest in
3 submitting an application.

4 MS. PERLE: Right. And if this is going to be
5 posted on the Internet, the Corporation is not going to know
6 when everybody downloaded something from the Internet. So we
7 won't know. Not every request for an RFP is going to come in
8 through the mail where we have a record.

9 CHAIR BATTLE: Yeah. So I now have an appreciation
10 for this notice in this first instance.

11 MR. MCCALPIN: Wait a minute. What are we going to
12 do if it turns out that an existing program is not going to
13 bid? Are we going out and ask somebody else to bid?

14 MR. BROOKS: We need to cover that territory.

15 MR. ASKEW: We're going to talk to the surrounding
16 programs and ask them if they would be willing to serve that
17 service area.

18 MS. PERLE: I mean, the Corporation is entitled to
19 do outreach under this to ensure that they get --

20 CHAIR BATTLE: At least one. I mean, you know --

21 MS. GLASOW: Currently, if we've had a recipient
22 either defunded or just decide they don't want to do it

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1 anymore, we're still faced with that situation, and the
2 Corporation has an obligation to cover that area.

3 So we start looking for we do a new competition.
4 We advertise further. We have a whole variety of things we
5 can do, or as Bucky said, you know, get a neighboring
6 recipient to, perhaps, cover that area for a while.

7 MS. PERLE: Or to submit an application.

8 MS. GLASOW: Right.

9 CHAIR BATTLE: I can see the reason for having to
10 have specific notice for all the service areas and to have
11 some preknowledge before the competition is imminent as to
12 who intends to compete in certain areas.

13 So with that being the case, I can also understand
14 why you would say "shall submit," because then, if someone is
15 interested, they have to know that there is not an option.
16 They need to submit their notice of intent to compete.

17 MR. McCALPIN: So we conclude this is perfect as
18 drafted.

19 MR. ASKEW: Well, with that, let me ask this. What
20 we're requiring them to submit in the notice to compete --

21 CHAIR BATTLE: Let me read all of that.

22 MR. ASKEW: Oh, you hadn't read it yet?

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1 CHAIR BATTLE: No.

2 MR. ASKEW: Okay.

3 CHAIR BATTLE: "(b) Either at the time or prior to
4 the filing of the notice of intent to compete, all applicants
5 must provide the Corporation with the following information
6 as well as any additional information that the Corporation
7 determines is necessary:

8 "(1) Names and resumes of principal partners and
9 key staff;

10 "(2) Names and resumes of governing board or
11 policy body members and their appointing organizations; and

12 "(3) Initial description of area to be served by
13 the applicant, the services to be provided and a proposed
14 budget." Now, Bucky?

15 MR. ASKEW: When I first looked at this, I started
16 adding things to this that what we'd want to know, but now,
17 after this discussion, I think we ought to make it as simple
18 and as plain as possible. And I would say take out the
19 proposed budget --

20 MS. MERCADO: No.

21 MR. ASKEW: Well, that's all going to come in an
22 RFP in very specific form in an application. We don't need -

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1 - what we need to know through this process is who is going
2 to compete.

3 And it's useful to know who the principal people
4 are and the service area and that sort of thing, but we don't
5 need to get into specifics. That comes in the actual
6 application.

7 So I would say make this as simple and as vanilla
8 as possible just so we'll get the names and addresses and
9 intentions of the people there.

10 MS. PERLE: The original version had more things.

11 MR. ASKEW: Yeah.

12 MS. PERLE: Then, the next version we took out
13 things, and now some of them are back in.

14 MR. McCALPIN: At this stage you certainly don't
15 need names and resumes of a governing board.

16 MS. PERLE: I think that's right.

17 MR. ASKEW: Well, the governing board probably
18 won't exist for --

19 MS. PERLE: Well, if it exists, then you should ask
20 for it, and if it doesn't exist, then --

21 MR. TULL: Okay. What we need is who they are and
22 the area they propose to serve?

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1 CHAIR BATTLE: Those are the two main things. So
2 we're down to 1 and 3 without a proposed budget. Okay. John
3 and then Maria. John?

4 MR. BROOKS: I have two suggestions, one that
5 instead of saying at the end of the first line "all
6 applicants," I think it should be "each applicant shall
7 submit."

8 And then, in 1, the "names and resume --" instead
9 of "principal partners," it seems to me "principals" because
10 they may not --

11 MS. PERLE: Excuse me for laughing. It said -- the
12 legislation says -- I think it says "principals," and we
13 said, "Well, what does that mean?" So we said "principal
14 partners and/or key staff." We just put it in because we
15 wanted to explain --

16 MS. GLASOW: Principles and key staff.

17 MS. PERLE: I'm not sure -- we weren't sure --
18 maybe we can explain what that means in the preamble.

19 MR. BROOKS: Well, "principals" is a common use in
20 architectural firms and accountants.

21 MS. PERLE: But not necessarily for nonprofits.

22 MR. MCCALPIN: The nonprofit corporation won't have

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1 partners either.

2 MS. PERLE: So this really should have by "or."

3 MR. McCALPIN: It says "and" --

4 MS. PERLE: I know. It should have been "or." But
5 if you want to put in "principals" that's fine, and we can
6 explain what it means --

7 MR. BROOKS: I would say "principals and" --

8 MS. GLASOW: "And key staff."

9 MS. PERLE: Oh, "principals and key staff"? Okay.

10 CHAIR BATTLE: So what we're going to do -- John,
11 did you have something else?

12 MR. BROOKS: No, just "each applicant."

13 CHAIR BATTLE: Okay. Maria?

14 MS. MERCADO: On the proposed budget part of it, I
15 think part of what you would want to look at is a very quick
16 review of people who are applying as to whether or not
17 someone has given any thought or is anywhere realistically
18 close to where you think they ought to be.

19 I mean, when they do an RFP, they've already done a
20 significant amount of work in what they think they're going
21 to be able to provide, because they have a limited amount of
22 time that they have to submit this.

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1 So you would want a summary of what kind of
2 services they're going to provide, what the proposed budget
3 is going to be. It wouldn't necessarily have to be a
4 detailed budget, but you should have a general overall
5 feeling of what that budget is going to be.

6 MR. McCALPIN: Suppose you think it's inadequate.
7 Are you going to tell them so at this stage?

8 MS. MERCADO: No, but I think it gives you a better
9 picture of where it is that people are coming from and what
10 you expect that they're going to be able to provide as far as
11 legal services are concerned.

12 MR. McCALPIN: Why don't you do this when you get
13 the RFP?

14 CHAIR BATTLE: My thinking is this: My thinking as
15 to the reason for having a notice of intent to compete is
16 really to give us notice of who the people are that are even
17 interested in this process, and that's basically it.

18 The RFP should provide all of the detailed
19 information that we're going to need from these people once
20 they get into the process.

21 I think the concern I would have, if I were a
22 grantee at this early juncture, when I've gotten the RFP and

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1 I say, "You know, I think I'm real serious about this. I've
2 done legal services work," if I'm asked to put a budget
3 together that is grossly different in my RFP, the question
4 becomes credibility.

5 I'm not sure that I've had a chance to do the kind
6 of research into it. I might find out that the variables are
7 wholly different than those that I would put in a proposed
8 budget, and that would put me, you know, in a different light
9 with LSC.

10 LSC may look at that proposed budget and say, "Oh,
11 my goodness, this is totally unrealistic," and then my RFP
12 comes through and I've had a chance to distill a budget into
13 something that's more reasonable.

14 I'm not sure that people are going to want to that
15 early tie down their figures before the bidders' conference,
16 before they get more information, before they understand the
17 Act and before they understand the entire RFP.

18 So all we really want is to know the names,
19 addresses and some sense of who these people are, and once we
20 get that information they can fulfill the budgetary
21 requirement when they submit the RFP.

22 MS. MERCADO: And you want the resume on those

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1 boards.

2 CHAIR BATTLE: Yeah, and the resume.

3 MR. BROOKS: Well, and we also need the area that
4 they propose to cover and the services which they propose to
5 give.

6 CHAIR BATTLE: Yes, initial description of the area
7 to be served by the applicant and the services to be
8 provided. Okay.

9 "(c) As soon as possible after the due date for
10 the notice of intent to compete, the Corporation shall notify
11 all persons or entities who have submitted applications of
12 other notices to compete that have been filed by any other
13 applicant for the area that includes some or all the area for
14 which the applicant is competing, or, of the Corporation's
15 decision to extend the due date in order to permit the
16 Corporation to solicit additional notices of intent to
17 compete."

18 MS. GLASOW: On the second line where it says, "who
19 have submitted applications," that should be "who have
20 submitted notices."

21 MR. McCALPIN: You're going to tell everybody who
22 the bidders are?

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1 CHAIR BATTLE: Well me the rationale for this,
2 John. Why are we going to tell everybody who everybody is
3 that they're competing with.

4 MR. TULL: Actually, I didn't draft this section.
5 (Laughter)

6 CHAIR BATTLE: Okay. Linda, tell us. Inform us.

7 MS. PERLE: Well, I will -- originally said it was
8 just going to -- was notify current recipients, and then we
9 said we can't do that. It's to give bidders an opportunity
10 to know what the landscape is and to know whether there is a
11 lot of competition or a little competition.

12 MR. McCALPIN: Why should they know that?

13 MS. PERLE: Because they want to get a sense of,
14 you know, whether others are bidding for a larger area or,
15 you know -- joint applications with others.

16 I just thought -- I think we had a sense that it
17 was fair to people to have some sense of what the
18 competition --

19 MR. McCALPIN: I think you're inviting collusion.

20 MS. PERLE: Well, I think there was also a notion
21 that we might want to encourage certain applicants to hook up
22 together or to let them do it themselves. I don't think

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1 that's collusion.

2 MR. TULL: But I think there is -- the notion is
3 that there is a choice between making as much information as
4 possible about who is complying or just leaving it blind.

5 When I responded saying I hadn't drawn it, that was
6 accurate, and I truthfully don't have a strong feeling
7 personally that this is a good idea, because I think it
8 does -- there are antitrust issues involved in this whole
9 process.

10 And one of the things that we're going to notify
11 folks about is that they need to be aware of that. We don't
12 want to encourage people getting together and deciding on
13 areas in a way which inhibit competition, because that does
14 have antitrust implications.

15 So my instinct would be I don't think there is a
16 compelling reason for it.

17 MR. ASKEW: We don't put it in the regulation that
18 we're required to do this, but we will supply it if people
19 request it, right?

20 CHAIR BATTLE: Well, let's let Maria --

21 MR. TULL: Are we going to keep it secret? I mean,
22 are we going to tell programs we won't tell you who is

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1 bidding?

2 MR. McCALPIN: Who your competitors are?

3 MS. GLASOW: They can get some of the information
4 through FOIA. Some proprietary information may be protected
5 under FOIA. We'd have to look into that, but I think -- I
6 know we did the veterans grant, and there was a competition
7 on that. There was some FOIA information about other
8 applicants.

9 CHAIR BATTLE: Wait just a minute. Let me just --
10 let me get the floor back. And Maria, I think you've had
11 your hand up for the last five minutes.

12 MS. MERCADO: My, at least, experience with RFPs,
13 and again I'm sorry that I do use state or federal monies,
14 but that's -- municipalities that there are.

15 I have yet to see where there has been a situation
16 where the bidders -- you know who all the bidders are. You
17 don't know who the bidders are. They're sealed. So are the
18 particular budgets and proposals on how that particular RFP
19 is going to be -- it is sealed.

20 I mean, obviously, the people who are granting the
21 contracts or granting the grants know, but the general public
22 or the bidders themselves don't know what you bid or what I

1 bid or what services are because they are trying to keep it a
2 competitive process that doesn't have that collusion, that
3 doesn't have the antitrust overtures of violation.

4 So I don't know that I agree with --

5 CHAIR BATTLE: Let me suggest something as an
6 alternative and see if this works. What I hear, in part, is
7 that especially for this new process in going through it to
8 be able to determine whether all the services areas have been
9 covered sufficiently we're going to need to know who is
10 involved in the process, and we're going to have to hold --
11 we're anticipate, if we have the resources to do so, holding
12 potentially a bidders' conference and inviting people who
13 have given us notice that they're going to participate in
14 this process the opportunity to come.

15 Now, what I also -- the concern I'm hearing from
16 Linda about if I'm going to be in competition for the first
17 time, it helps, at least in what I'm going to do in being
18 involved in this process, to know whether or not I'm the only
19 one that has submitted an application or whether there are
20 others who have submitted an application to go through the
21 process for my particular service area.

22 And we're trying to assure that some level of

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1 knowledge about that is communicated so that people can
2 expend resources appropriately. Does that get at what we're
3 talking about?

4 MR. McCALPIN: Well, I think you're wrong. I think
5 that it is adverse to the process to know you're the only
6 bidder. It let's you go to sleep. If you know you're the
7 only bidder, then you don't have to compete.

8 Maybe it helps to know if there are other bidders,
9 but it sure as hell doesn't help the competitive process if
10 you know you're the only bidder.

11 CHAIR BATTLE: I was just looking at the fact that
12 a lot of our programs have limited resources. And if we're
13 talking about some of them being in a situation where for the
14 first time they're going to have to go through a competitive
15 process, and if they have other applicants who have going
16 through this process, they're going to have to gear up to
17 fully compete.

18 If they're not competing against anybody, then how
19 are you at a competitive disadvantage?

20 MR. McCALPIN: Well, then you don't -- presumably,
21 what you want is people to become more qualified, provide
22 more service, provide better service, and if you know there

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1 is in competition, you don't have to have any incentive to do
2 that.

3 MS. PERLE: But you're basing -- you know, you have
4 so much knowledge about current recipients, about what kind
5 of a job they've done that they're not going to gear up and
6 do anything different.

7 MR. MCCALPIN: Well, if they don't, then we ought
8 to do something about them.

9 MS. PERLE: They should be gearing up -- I'd say
10 that in the period of the couple of months between when the
11 RFP goes out and when the application is due they're not
12 going to change what -- they may make some different plans
13 regardless on how they're going to do it. I mean, you have a
14 whole history to look at how they've done and to make a
15 determination.

16 MR. TULL: Can I recommend something? I think the
17 reality is that we can't keep information about who has
18 applied secret, that that's FOIA information, but I think
19 that to require us in the regulation to make that information
20 available to everybody I think --

21 CHAIR BATTLE: Just take (c) out?

22 MR. TULL: I would just take it out.

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1 CHAIR BATTLE: Okay. Good.

2 MR. TULL: I think what we end up with is a reality
3 in which if somebody is an applicant and they want to find
4 out if there is a competitor, we can't hide that from them,
5 but they've got to go through a FOIA process to get the
6 information, and that will have the impact that it does, but
7 I think it doesn't make sense for us to be obligated to --

8 CHAIR BATTLE: Good. Any objection to that? In
9 none, let's go on to 1634.7, Application Process.

10 MR. BROOKS: Do we need to put them through the
11 FOIA hoops or just we know that the FOIA rules require that
12 we tell them this?

13 MR. TULL: I think we should adopt a policy about
14 how we do it. The regulation should I silent on it. I think
15 in terms of our own treatment of it we need to make sure that
16 people who contact us that we do not give them any indication
17 that we can keep secret the fact that they've asked about it,
18 because we can't.

19 As a matter of policy, I don't think the
20 Corporation should use FOIA as a barrier. We have, in fact,
21 adopted a policy of if someone asks information of us about
22 information that would be obtainable as a FOIA request, we

1 treat that as a FOIA request. We don't say, "Sorry. You've
2 got to go through some special process."

3 CHAIR BATTLE: And we have a provision that we're
4 going to respond to questions anyway. So if someone calls up
5 and says, "Is there anybody else in the service area where I
6 am?" we can provide them with some information in response to
7 that.

8 MR. McCALPIN: But suppose they say, "Okay.
9 Somebody is going to bid. Tell me what services they're
10 going to offer." Do we tell them that?

11 MS. GLASOW: I think probably what we need to do at
12 the staff level is look at what FOIA would protect in this
13 circumstance, and then we'll develop a policy around that.

14 If FOIA protects all the proprietary information
15 and the only thing we would give out was the name of the
16 applicant, then that as a policy is what we will do, but we
17 need to look at what the law requires at this point.

18 CHAIR BATTLE: I think that's an excellent approach
19 to this problem. Okay. We're now on to the application
20 process.

21 "The Corporation shall set a date for receipt of
22 applications and shall announce the date in the RFP. The

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1 date shall afford applicants opportunity after filing the
2 notice of intent to compete to complete the application
3 process.

4 "The Corporation may extend the application date,
5 if necessary, to take account of extraordinary circumstances
6 to permit the Corporation to solicit additional applications
7 or to permit applicants to supply additional information that
8 is not available by the application date and is needed to
9 complete or correct the application."

10 MS. GLASOW: The word "extraordinary" on the fourth
11 line should be "special."

12 MR. FORGER: We're downgrading it?

13 MS. GLASOW: Yes.

14 MR. BROOKS: Is that a word of art?

15 MS. GLASOW: "Extraordinary" is a heavier burden,
16 and it just opens up more possibilities for someone to say
17 that wasn't an extraordinary circumstance; whereas, "special"
18 we can define that we just have more discretion to define
19 that.

20 MR. McCALPIN: Are you going to read the whole
21 thing?

22 CHAIR BATTLE: Yeah. Let's go through the whole

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1 thing. That way, we can talk about the whole application
2 process jointly.

3 "(b) The application shall be submitted in a form
4 to be determined by the Corporation.

5 "(c) A completed application shall include all the
6 information requested by the RFP, any additional information
7 needed to fully address the selection criteria and any other
8 information requested by the Corporation." Does that make
9 sense?

10 "A completed application shall include all of the
11 information requested by the RFP, any additional information
12 needed to fully address the selection criteria and any other
13 information requested by the Corporation."

14 MS. PERLE: I think that the second one -- I think
15 I drafted this, and I apologize for this, but I think the
16 second one really was intended to be information --
17 additional information not requested by the RFP that the
18 applicant thinks is needed to address the selection criteria.

19

20 MS. GLASOW: We may need to break that out of that
21 sentence.

22 MS. PERLE: "Any additional information needed to

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1 fully address the selection criteria," I think it's
2 additional information the applicant thinks --

3 MS. ROGERS: So you want to take "completed
4 application shall include" and then "it may also include"?

5 MS. PERLE: Well, I think -- yeah. Although I
6 think if the Corporation requests additional information --

7 MR. FORGER: But that's not in the RFP.

8 MS. PERLE: That's not in the RFP. Can the
9 Corporation -- I have a question about this.

10 CHAIR BATTLE: Can I finish -- let me read -- let
11 me just get through the whole thing.

12 (d) During the period between the due dates for
13 the notice of intent to compete and receipt of the completed
14 application, the Corporation will provide information upon
15 receipt and may -- upon request and may, if resources permit,
16 convene bidders' conferences where LSC determines such
17 conferences are appropriate in order to ensure that
18 applications are complete and responsive to the requirements
19 of the RFP and the selection criteria."

20 And finally, "(e) No individual, group or entity
21 shall be considered to be an applicant until notified by the
22 Corporation that the application is complete in accordance

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1 with the requirements of the RFP. The Corporation shall
2 establish a procedure to provide notification of receipt of
3 the application and an opportunity for timely submission of
4 any missing materials."

5 Okay. Let's go back up to (a). We've made one
6 change to (a).

7 MR. MCCALPIN: Let me ask you if two applicants
8 submit timely applications by the date required in the RFP,
9 to permit the Corporation to solicit additional applications
10 can the Corporation then just say, "Well, maybe we'd like to
11 see some other ones. We'll hold this open, and we'll submit
12 some others"?

13 Are not those who have submitted within the time
14 period entitled to have their applications considered without
15 further competition?

16 MR. FORGER: Not unless we say so.

17 MR. MCCALPIN: Well, even if we say so, it seems to
18 me we're creating a problem if we say in advance, "Well, here
19 is the date, but we reserve the right to" --

20 MR. FORGER: Well, we put them on notice to that,
21 right?

22 MR. ASKEW: Well, I agree. What we're doing here

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1 is we're defining an application that's timely filed even if
2 it's missing relevant materials, and I think that's a problem
3 unless you make some sort of distinction about what is
4 critical and what is not critical, because that means just a
5 half-filled out application means they beat the deadline and
6 they can keep working on it.

7 I deal with that every day, and that's something
8 you don't want to get into. There is a deadline. If it
9 comes without the check, if it comes without the sign, if it
10 comes without the affirmation, if it comes without whatever,
11 it's not timely filed, period.

12 MR. McCALPIN: You can't be overly paternalistic
13 about this.

14 MS. GLASOW: I think one circumstance we were
15 looking at is if we had no applications, and so we wanted to
16 extend the deadline to try to get some.

17 MR. TULL: I think Bill and Linda are saying two
18 different issues. Bill's issue about additional applications
19 I think is correct except under the circumstance that Suzanne
20 just describe, which is if nobody is supplied --

21 MR. McCALPIN: If no applications have been
22 submitted.

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1 MR. TULL: Yeah. So it needs to be qualified to
2 say that.

3 CHAIR BATTLE: Well, and I think the critical
4 issue, too, is is there a deadline, or doesn't there a
5 deadline?

6 MR. TULL: Yeah, and then the second one is Bucky's
7 issue of are we going to permit --

8 CHAIR BATTLE: Can you put your name on one of
9 those RFPs send it in and then just, kind of, get the rest of
10 the information --

11 MR. ASKEW: You're working with incredibly short
12 time frames here. You're going to have 30 days or less to
13 review these applications and make a recommendation to the
14 president, right, or something like that?

15 If applications come in that aren't completely
16 filled out, administratively I don't know how you're going to
17 be able to manage the process.

18 MR. TULL: Well, I think we're, sort of, thinking
19 that's correct, but on the other hand, it would be a worse
20 nightmare if an applicant -- only applicant for an area
21 submits an application and it's technically not complete but
22 they haven't submitted something.

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1 We don't want to be in a posture of saying, "Sorry.
2 You're not an applicant. You didn't qualify."

3 MR. ASKEW: Now the service area is --

4 MR. TULL: Now the service area is dead. So we
5 need to have a -- we need to have discretion to make certain
6 that an application is complete without getting into the
7 problems --

8 CHAIR BATTLE: How is this handled? I mean, this,
9 to me, is a common problem with any grants that have
10 deadlines with RFPs. How is this particular issue handled in
11 other instances? Do we have any guidance that we can use on
12 that?

13 MS. WELCH: It's done differently by different
14 agencies. Some agencies, if it's not complete and on time,
15 it's returned unopened, and they don't consider it. Others
16 have a very open policy, and they'll either grant waivers, or
17 they don't say at all in the RFP what the deadlines --

18 MS. SARJENT: Or they will put it into their next
19 round.

20 MR. TULL: I think we need to error on the side of
21 having discretion to address -- we have an obligation under
22 the Act to provide service in area every.

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1 So the returning unopened makes sense if what
2 you're doing is you've got \$500,000 and you got people from
3 all over the country in line for it and you don't -- it
4 doesn't matter if you send someone's application back.

5 But we're talking about where even when we're full-
6 blown -- not in this next three-month period but in future
7 years there are going to be areas where there is only one
8 applicant in possibly many areas.

9 And if that's the case, we just -- we don't want to
10 be in a posture I think where we're locked by regulation into
11 a very hard bureaucratic position.

12 I think maybe the way to address it --

13 MS. WATLINGTON: Special circumstances.

14 MS. ROGERS: End in that period after
15 circumstances.

16 MS. WATLINGTON: And just end it there.

17 MR. TULL: Yes.

18 MS. GLASOW: Maybe we don't have to say it here.

19 MS. WATLINGTON: No. Just say special
20 circumstances.

21 MS. PERLE: I think that's the right approach.

22 CHAIR BATTLE: Okay. Any changes to (b), the form

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1 determined by the Corporation? No problem?

2 (No response.)

3 CHAIR BATTLE: "(c) A completed application shall
4 include all the information requested by the RFP. It may
5 also include any additional information needed to fully
6 address the selection criteria and any other information
7 requested by the Corporation."

8 We changed -- I think that was Nancy's proposal --
9 to make it two sentences. Anything about (d)? Are we happy
10 with (d)?

11 MS. PERLE: What happened to (c)?

12 CHAIR BATTLE: (c), we put a period at the end of
13 RFP. It may also include, then, any additional information
14 needed to fully address the selection criteria and any other
15 information requested by the Corporation.

16 MS. PERLE: Are they required -- in other words, if
17 the Corporation can request additional information, they
18 don't have to provide it?

19 CHAIR BATTLE: If it's not in the RFP, I think that
20 we don't want to say that you don't have a complete
21 application if we make some additional request. Okay.
22 Everybody is happy with (c) and (d). And now (e).

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1 MR. McCALPIN: Wait a minute. Wait a minute.

2 CHAIR BATTLE: Not (d)? Oh, well. I tried.

3 MR. McCALPIN: (d) is full of problems.

4 CHAIR BATTLE: Okay.

5 MR. McCALPIN: We talk about -- we've addressed
6 this in part earlier, will provide information on request.
7 What we said earlier was we'd answer questions.

8 And then, "may, if resources permit, convene
9 bidders' conferences that are appropriate in order to ensure
10 that applications are complete and responsive to the
11 requirements." Does this imply that we're going to have
12 everybody at the bidders' conference considering every
13 application in terms of its responsiveness and completion?
14 It seems to me --

15 MS. WATLINGTON: Period at "where it's
16 appropriate."

17 MR. McCALPIN: Well, and conferences are
18 appropriate, but then what are you going to do at the
19 conference?

20 MR. BROOKS: Whatever is appropriate.

21 MR. TULL: I wonder if we need this section at all.
22 I mean, it just strikes me that a decision at a bidders'

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1 conference is a matter of how --

2 CHAIR BATTLE: It's discretionary, yeah. It's not
3 regulatory.

4 MS. MERCADO: We already discussed that somewhere
5 else on bidders' conference, didn't we?

6 MR. TULL: Well, this time we're not going to
7 have --

8 CHAIR BATTLE: Let's take it out. Anything on (e)?
9 (d) is out. (e) is now the new (d).

10 MR. COOK: Is the whole regulation important? Do
11 we need the regulation at all?

12 (Laughter)

13 MR. McCALPIN: Willie, that's the mildest I ever
14 heard you say.

15 MR. FORGER: We want to wait until we get to the
16 end before we decide that.

17 MS. WATLINGTON: So we're going for a period after
18 "respond to questions upon request" and eliminate the rest?

19 CHAIR BATTLE: Just eliminate the whole thing.
20 Okay. Now we're on (d). Nancy.

21 MS. ROGERS: I was going to propose a new (d).

22 CHAIR BATTLE: Okay.

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1 MS. ROGERS: But actually, if we're going to be
2 working on this tomorrow morning, I'd rather propose it
3 tomorrow morning, but let me just tell you what I see
4 proposing, which is that the staff may include as a
5 requirement for an application that the applicant sign a
6 mediation clause agreeing that any dispute arising out of the
7 application process or decision that culminates from it be
8 submitted first to mediation before any litigation can be
9 instituted.

10 CHAIR BATTLE: Or is the mediation going to be
11 binding and final?

12 MS. ROGERS: No. A mediation would simply be a
13 process to discuss -- to negotiate a bit about it and
14 exchange views. It would not in any way preclude anyone
15 involved in it in filing litigation if they didn't resolve
16 things and didn't feel resolved as a result of the mediation.

17 I was hoping to put it off until tomorrow because I
18 don't think the staff has really had time to think about the
19 pros and cons and so forth, and maybe by tomorrow we could do
20 it.

21 But I would like some mention of it in the rules
22 even if we change it later so that we're not precluded from

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1 adding it after there is a period to think about it for two
2 reasons.

3 I think we do two things. One is that it would
4 provide a cooling-off period, in a sense, when someone gets a
5 decision that's negative.

6 It doesn't take long to schedule a mediation,
7 perhaps two or three weeks so that we would be less likely to
8 be sued in a moment of anger, and we are dealing with all
9 lawyer applicants who are fully able to sue very quickly.

10 The second is that often there are misunderstanding
11 that are the basis for lawsuits, and the mediation provides
12 an opportunity for an exchange of information, including
13 information and argument back and forth about what would be a
14 basis for a valid litigation and opportunity for the
15 Corporation to say to someone who is thinking of suing that
16 they think such a suit is a violation of Rule 11 or whatever
17 it is they might think in a particular instance; in other
18 words, an opportunity for both sides to persuade the other
19 that it should be resolved in a given way without litigation.

20 MR. McCALPIN: Nancy, I agree with you, but I
21 wonder if that shouldn't be a provision in the RFP rather
22 than in the regulation, that if any question arises

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1 concerning the content, the application or rejection or
2 whatever, it's submit to mediation.

3 I just wonder if it's not just as well in the RFP
4 as in the regulation.

5 MS. ROGERS: Well, I've been trying to figure that
6 out, sitting here thinking about it, and I think that there
7 might be an argument that this is so basic to the process and
8 that the regulation has set forth the process that if it's
9 not in the regulation staff don't have authority to do it on
10 their own.

11 It's not like answering a question, for example. I
12 don't know that that's the case, and it may be that if we can
13 put it off until tomorrow there would be a little time to
14 think through that question on that issue as well.

15 MR. TULL: I think it does bear some pondering that
16 would be helpful if we talk about it tomorrow morning,
17 because I think there are issues around does the creation of
18 a mediation then create a litigatable right that does not
19 otherwise exist, and I just don't know the answer to that.

20 I think that's a question that would be useful to
21 think about, and the degree to which, sort of, what the
22 practical impact would be. It's an intriguing issue and

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1 thought.

2 MR. BROOKS: I imagine it would be strictly
3 mediation as distinct from arbitration.

4 MS. ROGERS: I've been thinking about it this
5 afternoon. I am not an advocate for an arbitration.

6 MR. MCCALPIN: When we get around to contracts and
7 so forth, there is no mention of contracts which will result.
8 There may be a place for an arbitration provision in the
9 contract which results from this.

10 MR. FORGER: Or mediation.

11 MR. MCCALPIN: Or mediation.

12 MS. PERLE: But this is dealing with those people
13 who --

14 MR. MCCALPIN: Pardon?

15 MS. PERLE: This is dealing with those people who
16 are not awarded a contract.

17 MR. MCCALPIN: That's right. That's right.

18 MR. BROOKS: Can I go back just a second?

19 CHAIR BATTLE: Okay.

20 MR. BROOKS: Paragraph (c) on the top of page 5
21 where we talk about notice to compete --

22 MR. MCCALPIN: We took that paragraph out. We

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1 scratched that.

2 MR. BROOKS: No. This is paragraph (c), the last
3 paragraph of --

4 MR. McCALPIN: We scratched it out, John.

5 CHAIR BATTLE: We scratched that whole thing out.

6 MR. McCALPIN: We took the whole paragraph out.

7 CHAIR BATTLE: We did. We took it out.

8 MR. FORGER: Could I ask John what is the purpose
9 of the first sentence of the new (d)?

10 MR. McCALPIN: Same as my question.

11 MR. FORGER: "No individual shall be considered to
12 be an applicant," and elsewhere we're saying in order to be
13 eligible, an applicant must submit and each applicant must
14 provide.

15 That's a funny point, but the person -- we keep
16 calling this person an applicant, and then we tell them, no,
17 you're not an applicant.

18 MR. McCALPIN: What is being gained by saying he's
19 not an applicant?

20 MS. GLASOW: Earlier on we talk about applicant.
21 We need to think either -- we need to think of a qualifying
22 word there.

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1 MR. FORGER: What is the purpose of the sentence?
2 What do I gain by considering myself an applicant before you
3 consider me an applicant?

4 MR. ASKEW: Well, in a way, I guess, they're giving
5 them notice you're now in competition. If you don't meet the
6 requirements of this regulation, you're not going to be
7 considered for a grant. You're not in the competition.

8 MS. PERLE: But doesn't the second paragraph take
9 care of that, really?

10 MR. McCALPIN: Second sentence?

11 MS. PERLE: Second sentence.

12 MR. ASKEW: Well, I was going to suggest taking the
13 second sentence out.

14 MS. PERLE: Taking the second sentence out?

15 MR. ASKEW: The last sentence of the -- and leaving
16 "flexibility with the staff to grant waivers if a filing
17 deadline is missed" and not put anything in the regulation
18 about that.

19 MR. FORGER: Well, you'll still be considered an
20 applicant, but your application is incomplete, and you're
21 not --

22 MR. McCALPIN: I think once you send in an

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1 application you're an applicant.

2 MR. FORGER: I would think so.

3 MR. BROOKS: Not according to the definition on
4 page 1, which says "Qualified applicants are those persons,
5 groups or entities who are eligible to submit notices of
6 intent."

7 CHAIR BATTLE: That's a qualified applicant. But
8 there is a difference between a qualified applicant and just
9 a plain old applicant.

10 MR. McCALPIN: I would think you wouldn't be an
11 applicant until you actually filed the application, not the
12 notice of intent.

13 MS. FAIRBANKS-WILLIAMS: So are we doing that last
14 sentence or not?

15 MR. ASKEW: We haven't decided yet.

16 CHAIR BATTLE: Tell us why we have (b).

17 MR. TULL: It's an odd construct. The entity is an
18 applicant. The issue is it's not an application which will
19 be considered, or they're not a competitor.

20 MR. FORGER: So we can say that, right?

21 MR. TULL: Yeah. I think it needs to be
22 redrafted --

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1 CHAIR BATTLE: Is the whole point to give notice to
2 somebody, "We got your application, and you're in the
3 process"? Why don't we just say that, and --

4 MR. ASKEW: And I would say not address the issue
5 of timely submission in missing materials. That's a policy
6 issue to be left to the staff.

7 MR. TULL: Which we do -- a lot of authority for
8 that in --

9 CHAIR BATTLE: Well, you just say, "The Corporation
10 shall establish a procedure to provide notification of
11 receipt of the application." Okay.

12 MR. TULL: And then we're going to fix the first
13 thing; is that right?

14 CHAIR BATTLE: Right. Let me just take a check
15 of -- I don't know if we need a comfort break or if everybody
16 is still revved up, if we want to take on Section 1634.8
17 tonight. It runs until page 7.

18 M O T I O N

19 MR. McCALPIN: I move we stand in recess.

20 CHAIR BATTLE: Okay.

21 MS. WATLINGTON: I second that.

22 CHAIR BATTLE: Well, but let me just say this,

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1 class, before we go, we are going to finish this. We have
2 been -- what I would like for each of the Committee members
3 and Board members and everyone to do is to do some homework
4 tonight.

5 Go through and look at the remaining sections that
6 we have, think through your comments about it so we can move
7 this briskly along in the morning and hopefully finish by 12
8 o'clock.

9 We've got, in addition to this regulation to
10 complete tomorrow, drug evictions and class actions, which
11 will not take as much time, but we still --

12 MS. WATLINGTON: Hopefully.

13 CHAIR BATTLE: Yeah, hopefully.

14 MS. WATLINGTON: Every time you've said that it's
15 taken --

16 CHAIR BATTLE: Well, we did time timely, so we
17 might be able to do drug evictions timely. But I really do
18 want us to try to see if we can complete this in the morning
19 so that we can get on with the other two regs tomorrow
20 afternoon. So with that, class --

21 MR. ASKEW: Let me make an announcement that might
22 help in that sense.

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1 CHAIR BATTLE: Okay.

2 MR. ASKEW: We had noticed a meeting of the
3 Provision's Committee to error on the side of caution in the
4 sense that if we had business to do we would have it noticed
5 properly and the opportunity to do it.

6 We've been discussing that all during this week,
7 and we discussed it today and made a decision that we will
8 not hold a Provision's Committee meeting tomorrow afternoon.
9 So it gives --

10 CHAIR BATTLE: It gives us some flexibility to run
11 into the --

12 MR. ASKEW: There are two reasons why we're not
13 going to do it. One, one of the main reasons for holding the
14 Provision's Committee would be to review the RFP, and we
15 don't have that ready for review, and we come do that two
16 weeks from now when we come back.

17 Secondly, I had gotten a message that the Inspector
18 General wanted to meet with the Provision's Committee about
19 the audit guide and the transfer of the audit function. He
20 called me day before yesterday and asked me please not to
21 have that on the agenda, that he was not prepared to discuss
22 that with the Provision's Committee.

1 So he asked that it be taken off. So really, our
2 two justifications for the meeting have been removed, so
3 there is no point in that, and secondly. It gives you more
4 time to review.

5 We will have both of those items on the agenda in
6 two weeks for our next meeting of the Provision's Committee.

7 CHAIR BATTLE: Okay.

8 MR. ASKEW: So that's, hopefully, notice to people
9 that there won't be a Provision's Committee meeting tomorrow.

10 MR. FORGER: That's timely noticed I think.

11 MR. ASKEW: Thank you.

12 CHAIR BATTLE: Okay. Is there anything else before
13 we recess until tomorrow morning?

14 (No response.)

15 CHAIR BATTLE: With that, I'd like to thank the
16 members of our panel and backup staff and our president and
17 vice president for hanging in with us.

18 I think we have made significant progress so far,
19 and I do anticipate that we will finish everything that we've
20 got on our plate tomorrow. We're in recess.

21 (Whereupon, at 5:40 p.m., the Joint Committee
22 meeting was adjourned.)

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