

LEGAL SERVICES CORPORATION

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MEETING OF THE BOARD OF DIRECTORS

Saturday, April 24, 1976
9:00 a.m.

Room 426
Marvin Center
George Washington University
800 - 21st Street, N.W.
Washington, D.C.

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IN ATTENDANCE

Board Members

Roger C. Cramton	Chairman
J. Melville Broughton	
Marlow W. Cook	
Robert J. Kutak	
Rodolfo Montjano	
Revius O. Ortique, Jr.	
Glee S. Smith, Jr.	
Glenn C. Stophel	
Samuel D. Thurman	

Staff

Thomas Erlich	President
C. Clinton Bamberger	Executive Vice President
Alice Daniel	General Counsel
Francis Hennigan	Budget Officer
Nelson Rios	Director of Administration
Judith A. Riggs	Director of Government Relations
Harriet W. Ellis	Director of Public Affairs
Charles Jones	Director, Office of Field Services
Charles White	Equal Employment Opportunity Officer
Richard Carter	Director, Office of Program Support
Alfred Corbett	Director, Office of Program Planning
Anthony Mondello	Office of Program Support

Also Present

Jeannette Sisson
 Lynn Broydrick
 Leona Vogt
 Alan Houseman
 Mr. Marshall Breger
 Terence Anderson

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P R O C E E D I N G S

9:15 a.m.

CHAIRMAN CRAMTON: The meeting will come to order. When we adjourned last evening, we were in the midst of a discussion on Item 4(c) on the agenda, which was the Affirmative Action Plan.

Perhaps it might be well to start with a review of the purposes and policies of the Affirmative Action Plan by Mr. White and then we could get into any substantive changes or amendments that we have.

Mr. White?

MR. WHITE: Thank you, Mr. Chairman. I would like to give the Board an understanding of the purpose of an Affirmative Action Plan, as well as the process that we went through.

We developed the plan primarily to set up some procedures by which the Corporation could hire females and minorities.

We went into the personnel procedures and practices of the Corporation. The plan before you simply defines the scope of our Affirmative Action Program and our Equal Opportunity Employment efforts.

The process of development that the plan went through was rather extensive in nature. We talked to the management staff and the non-management staff of the

Corporation, including the Regional Directors. We researched the appropriate Federal laws, particularly Title VII of the Equal Employment Opportunity Act of 1972, the D.C. Human Rights Act, particularly Title 34.

We talked at length with various groups in the community to find out what their concerns are to try to incorporate within the plan some broad comprehensive efforts to take into account the concerns of the total community.

The plan represents the end product of this development effort and it represents what the Corporation could reasonably accomplish in safeguarding the employment rights and privileges of people.

If you look at the plan, you will find that it is very simply written. It is a simple document. We did not use technical language. We did not use the typical legalese that you find in typical Affirmative Action Plans. We just simply tried to cover ten primary points.

One, as you can see, it states a policy. The second is that it goes into the communication of that policy. How will the Corporation communicate to the public as well as to its own employees its intent in the area of equal employment opportunity.

Third, who will manage that policy? Fourth, we are looking at the utilization and work force analysis. We want to determine the availability of females and minorities as well

as our own use of females and minorities in the work force.

Fifth, it goes into the projected levels or standards that the Corporation will set in achieving certain goals. These are not quotas, we are using goals in the Affirmative Action Plan.

Six, it goes into the area of personnel practice, specifying recruitment and those procedures that are needed to achieve equal employment opportunity.

Seventh, it goes into areas of the intent of the Corporation to use minority firms and minority supply. The remaining sections are the intent of the Corporation to commit itself to equal employment opportunity and also for the Corporation to abide by the procedures and processes within the plan.

Yesterday, I felt that one of the problems was the time factor. The Board was pushed for time and the Affirmative Action Plan was the last item on the docket yesterday and I did not feel that we gave reasonable attention to the plan.

We heard a great number of remarks yesterday from different members of the Board. One area that you did irreparable damage to, in my estimation, was that you not only struck out the stipulations for discrimination, because some members of the Board did not agree with some of the stipulations in Title 34.

Also, you removed one important sentence from the plan. This was the sentence pertaining to females. One thing that strikes me as rather odd is that the Board is made up of males. Yet, we strike out the only sentence that pertains to affirmative action for females.

This was simply because we used the words "other groups" in that sentence. The sentence is on page 1, Statement of Policy, the last sentence.

MR. CRAMTON: Charles, is that really true? It seems to me that in Parts 4 and 5, where you talk about goals -- these make it very clear what the reference is to minorities and women. Those are the active parts of this.

All the policy does is state a policy against discrimination. It says, "Resolved that the Corporation shall not make a distinction."

Even though the last sentence refers to females, the operative affirmative action parts of the program are actually in the under-utilization provisions and the goals provisions and those speak quite explicitly about the under-utilization of females and the goals of employment of females.

I really do not think it is true that the Affirmative Action Program has been irreparably harmed.

MR. COOK: You also have utilization of work force analysis.

MR. CRAMTON: Right.

MR. COOK: That specifically says that women are under-utilized and gives areas where government can recruit and so on.

MR. CRAMTON: In other words, the last sentence about females and other groups is viewed as redundant in that it only repeats the policy. It says this policy applies to females. We also said above that that we shall not make the distinction on the basis of **sex** and of course, it applies to women. It is redundant.

MR. WHITE: Not so. You must develop Affirmative Action Plans in relation to two concepts. The first of these is that you must recognize that there are two types of discrimination. The Plan tries to address itself to those two types.

One is disparate treatment. This means that individual covert acts of discrimination. The second is disparate effect which means patterns of discrimination. When we talk about marital status, age, and sex, we are dealing with treatment, but when we go into the plan protecting females we are going into the larger form of discrimination which is much greater.

In this it states that the Corporation through this plan recognizes that the status of females is as it is and will attempt as its policy seek to change that. We feel that they have suffered because of discrimination. I think those

two concepts are important and that there is a distinction between the two.

MR. CRAMTON: I guess I still do not quite understand.

MR. COOK: It is a distinction without a difference.

MR. CRAMTON: Does each one of the operative distinctions on page 3 talk about recording sources such as law schools and so on? They will be informed of the Legal Services Corporation Affirmative Action Plan and will be requested to include minorities in their referrals. That appears throughout the document.

MR. ERLICH: I think Charles' point is that it would be helpful to have the Board's resolution that **it** will actually adopt refer to women. Would it be possible to have the first paragraph where it just refers to equal opportunity not include that, but in the second paragraph where it refers to affirmative action say, "The Corporation shall affirm to the implement the policies, rules, and procedures set forth in this plan with regard to blacks, Hispanic Americans, Orientals, American Indians and females."

That would give specific reference to this. That paragraph is an affirmative action paragraph, while the first one is the equal opportunity paragraph.

MR. THURMAN: Are women usually considered as minorities?

MR. WHITE: No.

MR. ORTIQUE: No.

MR. CRAMTON: No, it is not the usual and I was not suggesting that we do that.

MR. WHITE: Women are not looked upon as minorities. This is why we created another sentence.

MR. CRAMTON: It would be very easy to insert the phrase, "with respect to minorities and females", after the word plan. The President is right. The second paragraph talks about the Corporation shall effectively implement and if you just include the words after Affirmative Action Plan, "with respect to minorities and females.", do you not do it?

You have defined that in the first paragraph and now you just enter it into the second paragraph.

MR. ERLICH: We are talking about the Resolution.

MR. THURMAN: I like that better than the editorializing that we had done before.

MR. CRAMTON: What was bothering some members of the Board is that the last sentence of the first paragraph might be taken as a statement or concession by the Board and the Corporation that the Corporation had engaged in discrimination against women during its short period of life.

There was a feeling that was not the case.

MR. SMITH: The objective of this is to commit ourselves to affirmative action in the future, not beating our-

selves on the head about what someone else might have done or what we might have done.

MR. CRAMTON: Does that accomplish your purpose?

(No response.)

MR. CRAMTON: Is that change acceptable to you gentlemen?

MR. BROUGHTON: Why is it any clearer than the first sentence that we voted on yesterday? Mr. Thurman just pointed out that it relates to race, religion, sex, marital status, national origin, and so forth, and such other bases as may have been.

MR. CRAMTON: This is a repetition of what is the law. It says we shall not discriminate on certain grounds. Those include, race, religion, sex, and so on. But it also contains an affirmative action statement that we will search and investigate and look around to try to make a special effort to see that minorities and females are not underutilized and that they do have opportunities in the Legal Services Corporation.

That is the Affirmative Action part of it.

All it does is to reflect that the actual content of the Plan, which then talks about special services and special efforts to employ minorities and females. It does not mean that we will discriminate in favor of one or the other. If we get two applicants for one job and one is a woman and one

is a man, and the male is more highly qualified for the particular position, you are supposed to hire the male, correct?

MR. ERLICH: Yes.

MR. CRAMTON: Otherwise you would be violating the first part of that. You are supposed to search and not follow an automatic assumption that this is a male job or something like that.

MR. WHITE: Correct.

MR. THURMAN: Where are you adding these words?

MR. CRAMTON: In the second paragraph after Legal Services' Affirmative Action Plan.

MR. COOK: Could I give you some substitute language to talk at the same time?

MR. CRAMTON: Yes.

MR. COOK: Why could you not put a sentence in saying that this policy applies to women, notwithstanding any past practice. I do not know whether you mean by other groups. I think you ought to be more specific. This is what gave me problems.

If we were adopting this, then we would admit to a practice I am not familiar with.

MR. CRAMTON: We have taken that sentence out.

MR. COOK: I know, but I am confused with your language in the "resolved" paragraph.

MR. THURMAN: Could I have that language again?

MR. CRAMTON: The total Resolution, as I understand it would now read, the first sentence would read, "Resolved, that the Legal Services Corporation in employment policy shall not make a distinction in the treatment, hiring, advancement of people, due to race, religion, color, sex, age, marital status, national origin, physical handicap, political affiliation, personal appearance" -- and other grounds of discrimination prohibited by law.

MR. BROUGHTON: Such other bases as may be prohibited?

MR. CRAMTON: Yes, that is right. Bases of discrimination prohibited by applicable law. The Corporation recognizes minorities to include, blacks, Hispanic Americans, Orientals, and American Indians. Then Resolved further that the Legal Services Corporation Board of Directors and so forth shall affirmatively implement the policies, rules and procedures as set forth in this plan, with respect to minorities and females.

MR. SMITH: I see nothing wrong with that.

MR. COOK: I see nothing wrong with that. You know, whoever adopted the proposed draft resolution -- if we continue to have problems with it, once we get through the Affirmative Action Plan for employment practices, all you have to do is move the Affirmative Action Plan for employment policies be adopted by the Board and be the policy of the National Legal

Services Corporation. That would fit in with everything you have said in here.

If you say it in the Resolution and it is not in the plan, then I am not quite sure what you have accomplished anyway. It seems to me that we are debating about a bunch of words in a resolution when, in fact, if the Affirmative Action Plan sets forth all the things that we set forth in the Resolution, what is wrong to say that I move that the Affirmative Action Plan be adopted?

MR. ERLICH: The only difference is that you say you adopt the rules and practices and procedures without saying, as Charles keeps on overtime developing arrangements, they cannot be changed in minor form without a policy change.

MR. COOK: I think we are talking about the same thing.

MR. CRAMTON: By inference, do we exclude other groups such as handicapped people?

MR. ERLICH: No.

MR. BROUGHTON: It seems to me that if you talk about females and other minority groups, you are leaving out others.

MR. COOK: The minute you try to start getting specific, somebody is going to be saying, "Well, you did not consider us, such as the blind or the handicapped."

MR. ERLICH: I do not believe we planned an

Affirmative Action Plan with respect to physically handicapped.

MR. WHITE: Yes.

MR. THURMAN: You planned it with respect to handicapped people?

MR. WHITE: They are incorporated, yes. In the Affirmative Action Plan we did not set goals for handicapped people, but we did want to make a statement about employment policy. That was the other point that was alluded to yesterday. We were talking about females and other groups.

Included in the term "other groups" were such things as handicapped persons and veterans and so on.

MR. MONTJANO: Then you are applying the term discrimination in a difference sense than it generally may be understood to be applied. What you really mean is being excluded from the job market.

MR. WHITE: Yes. It is not based on qualifications.

MR. MONTJANO: I see.

MR. WHITE: It is based on personnel procedures. These people would not be equally considered for employment and this is what we are trying to address.

MR. MONTJANO: Many times the institution itself, without knowing it, sets up policies which automatically exclude minorities and other groups, such as handicapped.

MR. WHITE: They might not be aware of that.

MR. MONTJANO: It should be aware of it.

MR. WHITE: That is what this plan sets forth. We want to look and change our personnel practices.

MR. CRAMTON: I would appreciate a motion from someone on this question.

MR. SMITH: I was about to make a motion about the insertion of those words in the next to the last line as you suggested, but I want to clarify one thing.

We are talking about a two-pronged approach. The first is no discrimination and the second is affirmative action.

The language that Roger suggested would include minorities and females in the affirmative action area. We have no discrimination and that involves other categories, such as handicapped and others. Is it satisfactory to limit the affirmative action plan to minorities and females?

MR. WHITE: I would hope that the Board would consider broadening that. I do think we have an obligation to the total society and that we should include as many as possible.

MR. SMITH: We have an obligation not to discriminate but do we have an obligation to conduct affirmative action in going out and seeking them with regard to minorities and females?

MR. WHITE: I am against setting goals for any group, but the problem you have now is that you are concentrating on

females and minorities. I think we should include them in our policies.

MR. SMITH: They are in the next paragraph with regard to no discrimination. After the word plan, Mr. Chairman, I move that we add "with regard to minorities and females".

MR. THURMAN: The more I think about it, the more I think that it is better to have it as is.

MR. CRAMTON: We have discussed it and I think the issues are fairly clear. Is there further discussion on the question?

(No response.)

MR. CRAMTON: Are you prepared to vote on Mr. Smith's amendment?

(General assent.)

MR. CRAMTON: All those in favor say aye.

(Ayes.)

MR. CRAMTON: All those in favor, say no.

(Nos.)

MR. CRAMTON: Now let us have a show of hands on the division.

All those in favor?

(Show of hands.)

MR. CRAMTON: Ortigue, Smith, Montjano, and Cramton.

All those opposed?

(Show of hands.)

MR. CRAMTON: Where is Kutak? I will break the tie so we can adopt the language. By four to three, the motion is adopted and the language is included.

Presumably we will make consistent changes on pages 1 and 16.

MR. COOK: I think we ought to go ahead and make a motion that consistent changes in relation to the language of this paragraph be made.

MR. CRAMTON: I think we can take that as being included in the motion.

MR. SMITH: That is what we did in the motion yesterday.

MR. COOK: Ok.

MR. CRAMTON: I think we can now go on to the elements of the Affirmative Action Plan.

MR. WHITE: I think we are through with the Policy now.

MR. ERLICH: Yes, go ahead.

MR. WHITE: Without going into details, we would just go to the dissemination of policy. This is rather standard and it tells about how the Corporation will communicate to its employees and to the public its policy.

That is broken down into internal communication external communication. There were questions yesterday on

Section 3 on page 4 concerning the administration of the Affirmative Action Program, especially in relation to the President. This is the Corporation's Affirmative Action Plan and it must have total authority from the President to be applied.

We have included in the plan that the President has the primary responsibility for the implementation and overall operation of the plan and that the Director of Equal Opportunity is the person who will actually execute on a day-to-day basis and manage on a day-to-day basis the context of the plan.

MR. MONTJANO: Would he answer directly to the President rather than some other department head?

MR. WHITE: He would answer directly to the President, yes.

Under Section 4 on page 8, the utilization of work force analysis, we simply state the process of the Corporation would develop in order to look at the availability of minorities and women in the areas where the Corporation can reasonably be expected to recruit.

This means that we will look at the work force surrounding the organization. In this case, this is a National Organization and we would look at national figures and we would also look at regional figures, where applicable, to determine how many minorities and what is the exact female breakdown in

those areas. The work force analysis is quite different in that we are concentrating on our own work force to see how we have utilized females and minorities and what problems we are experiencing in trying to develop some solutions to those problems.

So, we have here stated the intent as well as the design for the utilization and work force analysis.

Upon the analysis, we will establish goals. We will look at various factors to determine what standard or level of accomplishment we should achieve, given the availability of females with requisite scales in the areas.

Basically, this is a comprehensive look at the plan. Without going into depth, this is what is contained therein.

MR. BROUGHTON: Before you go on further, let me ask you a question going back to number 3. I have a note here. I refer you to page 5 in Section 3.

I am talking about Division 4 where there is an advisory council established. Is that customarily done? The Federal system in something like this?

MR. WHITE: In the Federal system, I doubt it, actually. Even though I am not familiar with the Federal system at all, I will say that since the Corporation is not Federal, it would not necessarily have to do that.

MR. BROUGHTON: Would this be outside the structure of the Corporation or would citizens be asked to serve on

this advisory council?

MR. WHITE: Yes, the intent here was to establish some form of communication with the public, particularly giving certain groups of the public who are concerned with equal opportunity an opportunity to voice their concerns and an opportunity to become knowledgeable about the thrust of the Corporation, that the Corporation is taking in the area of equal opportunity.

Such groups as project directors and clients, counsel, and so forth, would be included. I think that the affirmative action plan will recognize that all groups in the community have a vested interest in us. We would like these groups to have some type of input and become knowledgeable and also to establish some type of means of communication.

So what we accomplish we will get out.

When I was in Baltimore one of the things I found out is that you could run an affirmative action program and achieve your objectives, but if the community does not know about it, then you are operating in a vacuum.

I think it would serve the Corporation's purpose to establish this type of communication. You can do it through advisory councils.

MR. BROUGHTON: If we have a strong plan, and if we have a strong record, as I am sure we do, is this not another layer that might add to expense or that might create some

confusion and disagreement as opposed to the spelling out very clearly of a plan that is adopted by this Corporation and how it should be carried out and the Director being responsible to the President to execute the plan and so on?

I do not know, but I just wonder if you bring in an advisory council, and I realize it is a discretionary matter and not mandatory, I am wondering whether that would not be another thing that would raise problems.

MR. WHITE: It is very good to sit down with other groups and talk.

MR. ERLICH: It is common, but by no means uniform as a scheme for universities and other groups that have affirmative action plans to have some group with which they can communicate, particularly to see how their actions are perceived by outside groups in the world.

Much of what goes on in an affirmative action requires that those who are in particular minority groups perceive, in our case, that the Corporation really does mean what it says in recruitment.

Without by any means being sure that the council is a good idea, it would certainly be possible that it would be helpful to have the kind of group that might say, "Here is the way your actions are perceived from the outside in a more organized way."

That is the kind of thing we are trying to accomplish.

We are not necessarily saying now it is necessary or even desirable.

MR. CRAMTON: It says may.

MR. BROUGHTON: Yes, I realize it is not mandatory, but I have another question over on page 6, which makes the point that a person in each Regional Office of the Corporation will be appointed as Regional EEO assistant.

Does this carry with it that this would be an additional duty for someone in the Regional Office or would it create another position for this one purpose in the Regional Office?

MR. WHITE: I have talked with the Regional Directors in relation to that. They are saying two things. First, the people that are currently on their staff may not be able to carry out additional responsibility, particularly in Equal Opportunity.

Second, as you know, Charles Jones is working on the Regional design, and he is formulating the staffs for the Regions. He has recommended that the staff in every region should have a management specialist.

The management specialist would be responsible for the personnel procedures and management procedures of the Regional Office.

Therefore, the people that could possibly be selected in the regions would be management specialists. This would

be in tune with their already existing responsibilities.

MR. ORTIQUE: You understand the point that Mel is raising and that is that we are not creating a position which we will call the Assistant Regional EEO Affirmative Action Assistant, but rather this would be assigned to somebody in the Corporation at that level.

MR. WHITE: Yes.

MR. ORTIQUE: Your point is very well taken, Mel.

MR. BROUGHTON: That is my point.

MR. WHITE: We will not hire an extra person.

MR. BROUGHTON: That is exactly it.

MR. ORTIQUE: I would like to follow up on that.

I would have concerns that we, in the Corporation, would know that our Affirmative Action Plan is working before I want somebody outside to size it up. I think it is an excellent idea that you have somebody available. I do not see anything in here that says that we will receive a report. It does not have to be a formal report or a part of the agenda, but I would like to see a piece of scratch paper handed to me at each meeting indicating what we are doing in the area of the Affirmative Action Plan.

It could be part of the newsletter or in some other way. I want this so that as a Director I could be satisfied before I am inviting somebody else to look at my house and I want to look at it myself.

I think it is good to include the possibility of the creation of an advisory council, so that if we are really doing the job, we would want to assess the Federal Government -- not only in terms of the Corporation, but all of the Federal Government which has made an effort -- we want the public to know that things are moving along. It is good for minorities to feel reassured sometimes. I have no problem with that.

But I certainly want to make sure that I know that we are doing the job and I want to have the opportunity to correct it before somebody files a suit against us or charges us publically.

MR. BAMBERGER: If you refer to page 15, part 7, you see that we are required to keep reports and we will keep you informed.

MR. ERLICH: We will be sure to keep you informed.

MR. ORTIQUE: I am not sure that tells me exactly what I want.

MR. MONTJANO: You want something at every meeting?

MR. ORTIQUE: At every meeting, we should have that at every meeting. It does not necessarily have to be on the agenda, but I would like to see it.

MR. CRAMTON: I am just afraid about what will become of our time with the bureaucracy and red tape. From time to time when the President and the EEO Director want to

make reports to us on this very important subject, we want them, but it seems to me we ought to avoid something where routinely we require them to grind out pieces of paper or take up time at formal meetings when they have nothing particular to contribute.

We want them to have to have elaborate reports and tables for every Board meeting.

MR. ORTIQUE: I think you understand what I mean.

MR. ERLICH: I understand what you mean.

MR. ORTIQUE: This man's principal function is to take care of that problem. Everytime I come up here to Washington, I would want to find out about it. Otherwise I might have to write him a letter and he might want to write me a letter.

MR. SMITH: That is if it is something that we can take up from time to time, then that might be appropriate.

MR. ORTIQUE: That is right.

MR. SMITH: You said you had not seen it here, and I do not think it has to be in here. It is just a procedural matter.

MR. ORTIQUE: I am just communicating to the President that at our regular meetings I would like to have something on that.

(Marshall Breger enters.)

MR. CRAMTON: We are delighted to welcome Mr.

Memorandum
10/10/50
10/10/50

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Marshall Breger and to find out that his father is somewhat improved and we are happy to have him with us today.

We are in the midst of discussing the Corporation's Affirmative Action Plan. Mr. White, would you like to go on or does the Board have any further discussion?

MR. SMITH: I move the adoption of it.

MR. MONTJANO: Seconded.

MR. CRAMTON: I gather that the adoption is of the Resolution.

I have a question for information. At various places in the plan, sometimes the word "Job Group" is used, sometimes the word "Job Classification", and sometimes "Job Category" is used.

I think they are intended to be synonymous in all cases. I would feel a little bit better if the President or General Counsel reviewed the whole document for stylistic clarity and unity. If they are intended to be synonymous on every occasion where they are used, then you might substitute some common terminology or phrases.

MR. ERLICH: Thank you. We will look into that.

MR. CRAMTON: I also have one question about your reporting tables and I am not sure they will achieve the objectives that you want.

For example, at the top of IO, paragraph D, you listed the total number of incumbents and male and female

incumbents in the following groups to be given. But since you have no residual category of males -- of whites, excuse me, and people who are not in this category, there is no way you will get the categorization of total females. The only females you are going to pick up are females who are minorities.

We are also interested in other females, so it seems to me you have to revise that to reflect that obvious need.

MR. WHITE: Yes.

MR. ERLICH: We will pick up your and other stylistic changes.

MR. CRAMTON: I have one further change on page 16 that I would like to suggest. The full utilization phrase is used in a number of places here. It tends to carry a tone, particularly when you combine it with goals and affirmative action, that really starts to worry me a little bit about quotas.

MR. BROUGHTON: What page are you on?

MR. CRAMTON: That is page 16 at the bottom of the page. Would there be any objection to adding "that requires affirmative steps instead of saying the full utilization, but to insure the full and non-discriminatory discrimination of minorities and women."?

I just want to reinforce the point that when we finally get down to decisions about promoting people or hiring people, they are supposed to be made on the basis of

merit and not on a discriminatory basis.

Is that not correct?

MR. ERLICH: That is correct.

MR. BROUGHTON: I move the adoption of that.

MR. CRAMTON: There may be other places where that would be appropriate. I do not think it weakens the plan or the intention, but it makes it fairly clear that you do not want to establish quotas or discriminate against people who are not minorities or females.

MR. BROUGHTON: Mr. Chairman, if you look right above that to the paragraph above, you will see the last part of the sentence beginning with affirming. I wonder if we should not change the language there.

MR. ERLICH: Yes, we will do that.

MR. BROUGHTON: Do you plan to do that?

MR. ERLICH: Yes.

MR. BROUGHTON: Very well. Thank you.

MR. CRAMTON: We are really talking about suggestions now for the plan, because I gather that it is going to go through some stylistic polishing and revision, but we are adopting it in a form of a resolution that has been tendered.

Are you ready for the question on the Resolution?

MR. COOK: Before we get to that, could I ask Charlie to get me an explanation about something? He said last night that he would. I would like an explanation of

V at the bottom of page 10 and the top of page 11. I would like a positive statement on his part that this does not, in fact, establish quotas.

MR. WHITE: If you remember yesterday the word quotas was used and it surprised me. The plan was very carefully written as far as the wording is concerned. One of the stipulations is that we do not use the word quotas since it is a loaded word.

MR. COOK: You do not have to use it to have it.

MR. WHITE: Quite true. However, goals are projected levels of accomplishment. They are not rigid numerical figures. They are simply guidelines for the Corporation to go to certain standards. Those standards are set up on the basis of many factors, such as availability and whatever.

If you talk about quotas, you are talking about the very rigid figure that you must have.

MR. COOK: You are talking about a percentage of total minorities and females in the job group being lower than the total percentage of minorities.

MR. WHITE: No, no.

MR. CRAMTON: The total percentage of minorities or females in that particular job classification, so, for example, if you are talking about the hiring of attorneys for Regional Offices, such as one in Denver, the question is how are females represented in the attorney population in Denver? The goal

is to be based on that and not on the question of the females being 50 percent of the population, even though they are only 10 percent of Colorado lawyers.

Is that not correct?

MR. WHITE: Yes.

MR. ORTIQUE: I would like to make a comment. As you well know, certain goals are established and consistently recognized and are within the parameters of attempting to overcome past discrimination. Their language is always "the goal shall be".

It is not necessarily that the Company is continuing to discriminate because they have not reached a quota. While one has a difficult time in attempting to show a difference, it has real significance when, in a given case, that we are working on where we have said that there should be at least 50 employees in a given category, that we did not consider this was a quota, because a quota had been established, then no matter what, you would have to go in and put 50 people in.

On the other hand, if the goal was, because of the percentages and formula that you had finally arrived at, if 50 was the number you were going to work toward, then that is the way you would do it.

It is an effort and you direct all your attentions to it. It may be difficult to believe, but I have seen situations where you have established a goal and then found out you

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could not fill it.

MR. COOK: I am sure that is true.

MR. ORTIQUE: People for one reason or another did not wish to become a part of that group. So, I think it is much better to establish the goal instead of saying this is the quota for a particular job.

MR. MONTJANO: It is necessary to establish goals by which we can measure our progress and performance.

MR. ORTIQUE: Yes.

MR. MONTJANO: I do not think that anyone would reasonably favor a quota. It is too rigid and too much not in the best interest of the Corporation and all of us. Certainly, however, we must have defined specific objective goals, otherwise how do we know if we are performing.

This is a business and like any business you must define goals.

MR. COOK: I am delighted to have that explanation in the record, very frankly. I am delighted to hear your remarks, Mr. Ortique and Mr. Montjano. This way we can get a little legislative history into the discussion of the subject. I would not want it to be considered that way.

I feel that the situation that you talk of could well be handed "in that job group within the surrounding labor group."

MR. CRAMTON: Am I correct in interpreting this as

essentially requiring a reference to the particular employment of job classification or group?

MR. WHITE: Yes.

MR. ERLICH: Yes.

MR. CRAMTON: My Denver example -- The fact that 51 percent of the population in Colorado is women does not mean that 51 percent of all Regional Offices will have all their 51 percent of their attorneys as women. The goal will change over time as the attorney population increases.

MR. WHITE: We will formulate reasonable goals. The 51 percent is, of course, not appropriate. We cannot establish goals based on the population. We will have to go out and look at the availability of skills in a given area. When they become attainable, they become reasonable. I hope you understand this is a process.

MR. CRAMTON: I am sure that is what was intended, but I just wanted to reassure Mr. Cook and some others by making sure we got it on the record.

MR. COOK: Thank you.

MR. CRAMTON: Are there further questions about the plan?

(No response.)

MR. CRAMTON: Are you ready for the question on the plan?

(General assent.)

MR. CRAMTON: All those in favor, say aye.

(Ayes.)

MR. CRAMTON: All those opposed, say no.

(No response.)

MR. CRAMTON: The Resolution is adopted. Thank you very much, Mr. White.

MR. MONTJANO: I have just one more thing I would like to add. Now that we have passed the Affirmative Action Plan, I will become a one-man Advisory Council this morning for just a couple of seconds.

I would rarely do this, but I think it is desirable and necessary at this point.

The Chicano population in this country is quite large. It represents probably the largest minority population in Texas, New Mexico, Arizona, and California.

To my understanding, this Corporation does not have one Chicano on the staff at any level. I think we should do something about that, ok?

MR. CRAMTON: I think that is a feeling we share and if we ever locate our Regional Offices and fill them up and staff them, I would be very surprised and disappointed if your point is not met.

MR. COOK: I would think they might be compelled to do something like that.

MR. THURMAN: In reference to that, I raise the

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recapture for the Board where we are.

Yesterday we approved Regulations 1600, 1607, and 1605. We brought to the Board for discussion Regulation 1611. We brought it for discussion only and advised the Board that we would want, on the basis of that, to rethink, redraft, and then resubmit it in the form of a proposed regulation. We then possibly would publish it.

I would like, if I may, to ask our Counsel to start out with four regulations that are unpublished, but we think appropriate. They are in your book in the section on unpublished regulations. We would like to address ourselves to them because of a special request. Actually, it is a practical request that we will have regarding that.

In thinking of Regulation 1607 relating to Governing Bodies of Recipients, and 1608, Prohibited Political Activities, and 1609, Fee Generating Cases and 1610, Use of Non-Corporate Funds.

These were discussed at our Committee Meeting, or indeed not only discussed at our last Committee Meeting in Kansas City, where we were in session for two days, but indeed discussed at our prior Committee meeting in the lovely home of our colleague Rudy.

They have not been published. In order to move the agenda along, after they are discussed here today, I am going to ask, with your permission, that we then publish the

regulations for comment, in the form found acceptable to you.

If the comments are not extensive or substantive or far reaching in character, so as to require our bringing them back for reprocessing by the Board --

MR. COOK: Or requiring major revisions.

MR. KUTAK: Yes, and I know you would have confidence that we could tell when that would occur -- that we would have authority from you, as you once gave us in another regulation, to then publish in final form so that we could just get these out and behind us as well.

So this block of regulation that our Counsel will now discuss with us, I hope will be considered in the fact they have not been published, but they have been thoroughly discussed and considered by your Committee.

Further, we do not contemplate that the comments on them will be very extensive and therefore, in the interest of expeditiousness and efficiency, might be that you might want to delegate authority for us to publish those.

Alice, would you start with 1607?

MS. DANIEL: The Act requires that 60 percent of the membership of governing bodies be lawyers admitted to practice in one of the states in which the program is rendering service.

The Committee debated long and hard on whether and to what extent it should go beyond statutory requirements and add other Corporate requirements governing the composition

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of the governing body.

Finally, the Committee decided that there were sound and persuasive reasons for continuing what has been the general practice in the past.

In the past, according to the Senate report, about one-third to one-half of the membership of governing bodies has been composed of eligible clients or representatives.

The draft before you suggests that one-third of the membership should be either eligible clients or their representatives.

The reasoning that led behind the Committee's decision, I think, is as follows: The Committee was very concerned about the fact that the client of a Legal Services Program, unlike a private client, has no freedom of choice. If he is dissatisfied with any aspect of the services he receives from the program, he cannot go across the street and go to another law firm.

The only means of insuring that the program and the attorneys would be truly accountable to their clients is through the governing body. The attorneys are accountable to the governing body, and then through them they should be made accountable to the clients.

We are confident that the lawyer-members will seek to achieve that goal of accountability, but we think that to fully achieve it, it would be necessary to have more than

one eligible client on the Board.

There are a number of reasons for this. One is a realistic recognition of how busy and over-burdened most lawyers are, particularly those who do have enough respect in the community so that they would have been enlisted to have been on the governing body. Therefore, it just may be difficult for the discontented client to present his grievance to a lawyer-member of the Board, or a discontented client may be shy or reluctant or somewhat overawed by a lawyer-member and find it easier to communicate with a client member who would presumably be more accessible.

There might be a language difficulty and there might be less problem with client members.

Most of our areas serve heterogenous populations. In some areas, the interests of those different population groups are not only not identical, but sometimes conflicting. I think of my own city of San Francisco, where we have a large community population that is black and another that is Chicano and another that is Chinese and a sizeable population of senior citizens, who see themselves as having some specialized needs.

One of the duties that a governing board has in addition to assuring accountability with regard to the quality of representation, is to carry out the task of setting priorities for the program, and for providing guidance in the allocation of resources.

We think that diverse elements of the population served should all have a voice on the Board when it is carrying out difficult tasks of assigning priorities.

For that reason, the Committee recommended that one-third of the governing body should be either eligible clients or their representatives.

The reason for authorizing eligible clients to be represented, if they should so choose, by others than simply by eligible clients, is a realistic recognition that many eligible clients may find themselves somewhat reluctant or handicapped in speaking up in a roomful of lawyers.

Further, they may prefer to have their own interests represented by someone in whom they have confidence.

As far as the qualifications of the members go, 1607.3 adopts the language previously adopted and incorporates the language previously adopted by the Board concerning the qualifications for State Advisory Council memberships. It requires that attorney-members of the governing body be supportive of the purposes of the Act and "have interest in, and knowledge of, the delivery of quality legal services to the poor."

As far as the total appearance of the board and what it should be, the Committee considered and rejected the proposal that we include a laundry list, so to speak, of those interests that would be represented. There were even

some suggestion of percentages or proportions of the population served.

The Committee felt that was unrealistic and unworkable and in a way unwise, because it might be desirable in some situations to have perhaps over representation of attorneys who were very influential in the community.

What we required was that the governing body "reasonably reflect the interests and characteristics of the eligible clients in the area served."

Turning to the Regulation itself, there are one or two minor amendments that the Committee has suggested since the time that this draft was prepared and I would like to bring them to your attention.

The first one is in 1607.3(b).

MR. CRAMTON: Is that (b) or (c)?

MS. DANIEL: I am sorry. It is (c). The Committee's recommendation as to that provision is as follows. The attorneys shall be selected from, or designated by, a variety of appropriate bar associations and other groups interested in legal services for eligible clients.

There is no real difference in substance intended by that change in language, but it seemed to the Committee to be a better formulation of what its intention was.

Then in Sub-Division (h) on the next page, a minor amendment that the Committee recommended, partly because it

was impressed by the requests made by some Regional Directors who felt that they needed to have strong authorization to impose the requirements on the governing body, recognizing that they could always grant a waiver where local situations required it, but nevertheless they felt that there was more bargaining power if the language was a little stronger.

So, what the Committee has suggested is that (h) be amended to read: "Insofar as possible, no category of governing board membership shall be dominated by representatives of a single association, group, or organization."

MR. COOK: I would like you to read paragraph (c) back to me again.

MS. DANIEL: Fine. "The attorneys shall be selected from, or designated by, a variety of appropriate bar associations and other groups interested in legal services for eligible clients."

MR. CRAMTON: The intent is that the groups that can be involved in the selection process have to be "interested". There are bar associations or other groups that would be interested in the eligible clients. The governing body shall be supportive of the purposes of the Act and have an interest in, and knowledge of, the delivery of quality legal services to the poor.

One of these points reflects on the job and the other on the people themselves and there is a third requirement

that the total group has to reasonably reflect the interest and characteristics of the client served. If you are down in the Chicano area and did not have any Chicanos on the Board, there would be an argument that did not reasonably reflect the interest and characteristics of the eligible clients.

MS. DANIEL: That is right.

MR. BREGER: I would like to ask a question. If a group felt that it was not adequately represented on the Board, would they then make a complaint through the normal complaint process?

MR. COOK: That is why I feel that the broader language covers it so all inclusively as to almost defy anybody being eliminated from consideration.

My problem about that is this. I will show my ignorance. Are we also talking about state groups in this section?

MS. DANIEL: No.

MR. THURMAN: No, recipients.

MR. COOK: Let us take small communities where you have no local bar association. You do not have a group. Let us suppose you have "x" number of lawyers in town and they do not have any association or anything else.

MR. CRAMTON: No county bar or state bar?

MR. COOK: There are a lot of them with no county bar.

MR. CRAMTON: What about state bar?

MR. COOK: But you are talking about a local situation.

MS. DANIEL: 1607.5 talks to that.

MR. COOK: I think your language is limiting rather than expansive. That is my problem. That is what I want to point out. I am just concerned about that kind of situation.

MR. KUTAK: Marlow, if upon further reaction and response that seems to be the case, it can certainly be, and would be, reviewed in that light.

What we were trying to do was to get language which was generic as possible without trying to flag, frankly, any category or any vested interest group and by exclusion inadvertently offend some other one.

MR. COOK: That is where the flag is to say, bar associations, to some people. We are all sitting here being members of one bar association or another.

MR. CRAMTON: That comes from the statute.

MR. COOK: I understand that.

MR. KUTAK: But from a variety of bar associations, we have not excluded anything. Mr. Chairman, if it is in order, I would move that Regulation 1607 be published for comment and the Regulations Committee be authorized, after considering the comments received and making whatever revisions would be deemed appropriate, to publish the regulation in final form.

MR. MONTJANO: Seconded.

MR. COOK: Now we are up to discussion?

MR. CRAMTON: Yes.

MR. COOK: I would like to discuss this a little bit longer, Bob, for the record.

MR. KUTAK: Yes.

MR. COOK: The thing that bothers me is when you get to small jurisdictions and small counties and you are saying, "The broad term, other interested groups", that means whoever is making appointments either has to seek out those other groups or those groups will have to seek him out.

If you have some local areas that all of us are familiar with, where whoever it is is going to pick the members of the bar association and they are going to be the most reluctant supporters of the Act, and you will look at other groups in the community as a whole, he is going to get a delightful group that will run it, but not know a thing about it and not be one interested in seeing that a particular problem or program is really vitalized in any way, shape, or form.

It seems to me that for those areas of the country that are recalcitrant to take on this program and have no great interest in seeing that it is done other than that they have to, if they are going to get a little money in their area to do something.

At that point I must go back and say that I sure like the idea that it also includes civil rights or anti-poverty organizations and organizations of eligible clients. That, in fact, says you cannot ignore these groups whether you want to or whether you do not want to. Whether you are opposed to this particular group or whether in the court house or in the community, they are a pain in the neck to you and bother you, is immaterial.

The regulation says that you have to take into consideration civil rights, anti-poverty, and organizations of eligible clients. You cannot bypass that authority.

I just really have to point this out. The phrase "other groups" leaves it up to the discretion of that agency or that program that is going to pick those people or not pick those people at their discretion and within their own wisdom to determine whether those other groups fall into that category or not.

MR. KUTAK: There were only two reasons why we chose this approach, Marlow. One was that this language refers to the lawyers and not to the non-lawyer groups.

This section (c), or sub-section (e), refers to the groups from which the lawyers could come.

MR. COOK: But suppose a civil rights or eligible client might want to recommend a lawyer in that community?

MR. KUTAK: Yes.

MR. COOK: Who might be vitally important, and the guy says, "I am not concerned with that. All I have got to do is go to the bar associations and other groups and I do not worry about those others at all."

MR. CRAMTON: You would bring it back to the original language?

MR. COOK: Yes.

MR. ORTIQUE: But take out State and local bar. We would have a problem.

MR. KUTAK: First of all I would like to say --

MR. CRAMTON: You understand there is a waiver of provisions here.

MR. COOK: Yes, but what bothers me is that you are talking about programs all over the country and now you are talking about holding up a grant because you have to get a waiver provision from the President of the Corporation and so forth.

MR. THURMAN: Why don't you make a motion in that regard?

MR. ORTIQUE: Why not take out State and local bar because there are several areas in the south where black lawyers have not been welcomed into the local bar associations. They have their own bar associations. They ought to have some input and ought to be eligible. As long as it says a certain attorney shall be selected from appropriate groups.

MR. KUTAK: I will read what I think should be appropriate and acceptable. "The attorney shall be selected from or designated by a variety of appropriate bar associations and other groups including, but not limited to, -- and track the language that was in.

MR. CRAMTON: Don't you want to also include groups that are interested in legal services for eligible clients?

MR. KUTAK: I had better ~~read~~ the whole thing so it will not be confusing. "The attorney shall be selected from or designated by a variety of appropriate bar associations and other groups including, but not limited to, associations, law schools"-- and we do not need to say law schools and so forth. "civil rights or anti-poverty organizations and organizations of eligible clients"-- shall we say organizations interested in legal services for eligible clients?

MR. ERLICH: Yes.

MR. KUTAK: Does that meet with your satisfaction?

MR. COOK: That tracks much better.

MR. KUTAK: The specificity here we thought was hazardous only because we were afraid that other legitimate groups would be left out. It is not intended to minimize the problem.

MR. COOK: I would like to take out the word "associations" and put "bar groups". After all, we are what we are. In the instance of black bar associations in the south --

MR. ORTIQUE: Not necessarily.

MR. COOK: You would not?

MR. ORTIQUE: That means the same thing.

MR. CRAMTON: Any association of attorneys is a bar group.

MR. COOK: Ok.

MR. BROUGHTON: Ok.

MR. KUTAK: Would the Committee accept the amendment and would consider the language reflecting that point?

MR. COOK: Thank you.

MR. BREGER: I would like to make clear to myself at least what the monitoring or enforcement process of this would be.

MS. DANIEL: Yes.

MR. BREGER: Would someone from the Corporation sign off on that?

MR. CRAMTON: I refer you to paragraph 5.

MR. BREGER: That is what I am trying to focus on.

MS. DANIEL: It would be one of the duties of the Regional Director. The Regional Director would be the person charged with the duty of generally reviewing the recipients conformity with our regulations to insure that they conform with this regulation.

Further, because of the nature of the population of the area served, it might not be possible to comply exactly,

and then a waiver could be granted under 1607.5, where it says the President may waive certain requirements.

Again, the Regional Director would either approve it or apply for a waiver and so forth.

MR. BREGER: He would make the decision as to whether or not, not merely that the Board was representative, but also that a certain group is worthy of being included as an interested group?

MS. DANIEL: It says that the method of selection and composition is defined.

MR. BREGER: Ok.

MS. DANIEL: I think that would apply. For example, if a lawyer chose to not give a public speech the day before saying that legal services was a terrible idea, then they might be able to say he did not meet the qualifications.

MR. BREGER: Thank you.

MR. KUTAK: May I ask for the question?

MR. CRAMTON: Mr. Houseman is seeking our attention. Do I have the unanimous consent to have him make a statement?
(Unanimous consent.)

MR. CRAMTON: Mr. Houseman?

MR. HOUSEMAN: I had not seen this language before or I would not bring it up at this point. Our original point say, "insure" and you now say "insofar as possible". There is a big difference.

MS. DANIEL: It was not our intention to weaken it.

MR. KUTAK: In fact, it was intended to strengthen it.

MR. HOUSEMAN: I know.

MR. KUTAK: This was a Kutakian change. I thought it sounded milque-toast to say care should be taken.

MR. CRAMTON: The alternative I preferred was "no category of governing members shall be dominated by --" and then let the waiver govern the rest.

MR. HOUSEMAN: We would much prefer that.

MR. KUTAK: So the old middle of the road Kutak came down and came up with something that I thought was stronger than what was there and not as pre-emptory as Roger's. I think the Committee would accept striking the prefatory "insofar as possible". It seemed that the tone seemed abrasive.

MR. CRAMTON: Then it shall say "A category and so forth".

MR. THURMAN: Does Kutakian mean middle of the road?

MR. COOK: You are saying no category of governing membership shall be dominated by a single association?

MR. KUTAK: So accepted.

MR. CRAMTON: Is there further discussion concerning Regulation 1607?

(No response.)

MR. CRAMTON: Are you ready for the question?

(General assent.)

MR. CRAMTON: All those in favor please say aye.

(Ayes.)

MR. CRAMTON: Those opposed, no.

(No response.)

MR. CRAMTON: It is my understanding that this Regulation will now be published for comment again --

MR. KUTAK: No, published for comment originally. It has not been published.

MR. CRAMTON: Published for comment, but we are delegating to the Committee the authority to review the comments that come in and if the comments do not raise substantial questions, which it believes ought to be considered by the Board, then it has authority to publish the Regulation as final after the review.

MR. KUTAK: That was my motion.

MR. CRAMTON: That motion has been adopted.

MR. KUTAK: Thank you.

MR. CRAMTON: How about 1608?

MR. KUTAK: This is Prohibited Political Activities.

MS. DANIEL: As pointed out in the comment, Congress was concerned with the need to "preserve the strength of Legal Services program by keeping them free from the influence of or use by" and I am not quoting any more to protect political programs against political pressures and to prevent Legal Services employees or attorneys from using the programs as a

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means of promoting their own political interests as distinguished from providing legal services to the poor.

The provisions of this part simply track the statutory sections. It is no simple task to track them, but also to find them and put them in and that is not an easy task.

The only difficult problem that we had here is to construe two sections of the statute that refer to the Hatch Act.

One of those 106(e)(2) states that Corporation employees "shall be deemed to be state or local employees" for Hatch Act purposes.

The problem arose because after the passage of the Legal Services Corporation Act, the Hatch Act was amended. The question we had to decide was whether it was the old unamended Hatch Act that should be referred to in our regulations or the newer, amended, Hatch Act.

We resolved it by looking at the statutory language. In 106(e)(2) where the Act says "Corporation employees shall be deemed to be State or local employees" for Hatch Act purposes, it appeared that the emphasis of Congress was on the parity of treatment that Corporation employees should be treated the same as State and local employees.

Therefore, we concluded that Congress would have applied the amended Hatch Act to Corporation employees and so we did in Section 1608.4. We preserved the identify of

treatment and Corporation employees will now be treated under this Regulation the same as State and local employees under the Hatch Act.

The other provision of the Legal Services Corporation Act that refers to the Hatch Act is Section 1007(a)(6), which requires the Corporation to insure that staff attorneys refrain from activities "of the type" prohibited by the Hatch Act.

In addition to requiring that Corporation employees refrain from activities "of that type", it goes on to add that they should refrain from them whether or not those are activities which are partisan or non-partisan.

The Hatch Act has never been applied to non-partisan activities.

Taking two two factors, the use of the curious phrase of the type and the extension of the prohibition to non-partisan activities, we concluded that this provision was not a direct incorporation of the Hatch Act, but rather a direction to the Corporation to look toward the Hatch Act for guidance to use its own experience and discretion in establishing restrictions that would be like the restrictions of the Hatch Act.

Therefore, we have concluded that neither the un-amended or amended version of the Hatch Act directly affects staff attorneys.

As to the matter of policy, the question was then

what the Corporation should do and what prohibitions they should promulgate concerning the Hatch Act type activities?

We had no experience that would justify us at this point in deviating from the Hatch Act in any way. Therefore, what the Committee decided was for the present, at least, we should track the Hatch Act directly and apply its prohibitions to Corporation employees with the provision that they should also abide by the non-partisan section.

I am sorry that was not clear.

MR. KUTAK: That was very clear exposition of a very complicated part. It was so unclear and complicated that we wanted to put side notes on the draft so you could correlate the sections with a very complicated reference system in the Act itself.

We have some stylistic recommendation for change in the draft and that is wherever the word he or she appears, we would so phrase it to avoid the awkwardness. It would come out like saying, "During the period for which compensation is received", rather than "He or she received compensation."

MS. DANIEL: There is one thing I forgot to mention.

MR. KUTAK: Go ahead.

MS. DANIEL: I think that the Committee decided that the definition that was approved in 1600 yesterday should be inserted here.

MR. KUTAK: Yes, again, Mr. Chairman, I move that Regulation 1608 be published for comment and the Regulations Committee be authorized, after considering the comments received, for making whatever revisions would be deemed appropriate, to publish such Regulation in final form.

MR. MONTJANO: Seconded.

MR. CRAMTON: Is there further discussion?

(No response.)

MR. CRAMTON: All those in favor of the motion, please say aye.

(Ayes.)

MR. CRAMTON: Those opposed, no.

(No response.)

MR. CRAMTON: The motion is unanimously adopted.

MR. KUTAK: We will move then to Regulation 1609, which is Fee Generating Cases.

Alice, please go ahead.

MS. DANIEL: Thank you. Generally the private bar is eager and willing to accept contingent fee cases and cases in which there is a possibility of a fee.

There may be certain situations in which no private attorney is willing to represent an individual or is unwilling to accept a case because the possibility of a fee is too remote or that the fee is too small or for some other reason.

The Act contemplates, according to legislative history, that the Corporation should promulgate regulations

to guide Legal Services attorneys in those situations where there is the possibility of a fee, but not the possibility of obtaining private representation, because eligible clients should be entitled to obtain representation in such cases.

In case there is no private attorney, then the burden falls upon the Legal Services Corporation attorneys.

We have defined a fee generating case to be any case or matter if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to be resulting in a fee for services from an award to a client or from public funds or from the opposing party.

That means we would include here not only contingent fee cases, but also cases such as Title VII, where there is a statutory provision for possibility of attorney's fees for the successful claimant.

We think it is wise to encourage the private party to take such cases. Therefore the Legal Services program should not themselves take them unless no private attorney is willing to accept the case.

If no private attorney is available, then we encourage Legal Services programs to utilize that additional source of funds for their program.

However, when a fee generating case is undertaken by a Legal Services attorney, it is needless to say that the proceeds should be turned over to the program and not retained

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by the attorney.

In contrast to the distinction where a court makes a direct award of attorney fees, there may be situations in which a client receives an award where a private attorney would ask for a fee.

We do not authorize Legal Services Programs to accept contingent fees in that situation. They are authorized to accept reimbursement for actual out-of-pocket expenses. They can accept such reimbursement only if the requirements of 1609.4 are fulfilled that there was no private representation available, and if the reduction of cost expenses will not reduce the client's recovery below the amount necessary to compensate the client fully and the client has agreed in writing to reimburse these expenses.

The Board might want to direct its attention to 1609.4, which attempts to set forth the situations in which adequate representation is deemed to be unavailable.

The basic pattern that is set forth here is that there has to be a good faith effort to find private representation.

That effort might be made by the client himself or the program or in certain situations, we do not require our over-burdened lawyers to go through futile motions. If the case is of a type that the program knows from experience that no private attorney will undertake, the case they need not

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go through the motions of attempting referral.

In addition, referral can be postponed if there are emergency circumstances that require immediate action. In such a situation, the assumption is that after the emergency has passed, referral would be attempted.

One furthersituation which we deem adequate representation to be unavailable as a general matter is when the request for damages may be made, but it is not really the principal object of the case. It is sometimes included for tactical reasons and to provide some leverage for settlement or when the real relief sought is equitable or other kinds of judgements, but it is thought this is of some value.

For example, this might be against a public body. The addition of damages might be thought useful.

Another situation is where a counter-claim is latent in the case. For example, in landlord tenant cases, the client may come in to be defended against eviction for failure to pay rent. In the course of developing the case, the attorney may discover that the client has some small counter-claim for damages arising out of the landlord's failure to provide adequate services.

That is the type of situation in which a private lawyer would be unwilling to take the case because the possibility of damages would be so small, and yet we feel that when the counter-claim is discovered, the Legal Services attorney

should not have to then stop everything and go out and try to make a referral and then continue with the case.

MR. KUTAK: Mr. Chairman, I would move that Regulation 1609 be published for comment and the Regulations Committee be authorized, after considering the comments received and making whatever revisions would be deemed appropriate, to publish such regulation in final form.

MR. SMITH: Seconded.

MR. CRAMTON: Is there discussion?

MR. BREGER: Excuse me.

MR. CRAMTON: Mr. Breger?

MR. BREGER: Could you refer please to 1609.6? As I gather from this language, we are not taking any position as to whether or not a local Legal Services organization would have as an ordinary custom, a form that they would require reimbursement for out-of-pocket expenses, if damages were given.

MS. DANIEL: That is right. I think that the presumption here is that there would not be such a form as a matter of course. Reimbursement can be sought by the program only if the production of cost reimbursement would not reduce the client's recovery below the amount necessary to compensate the client fully.

Unless those were met, then you are right.

MR. CRAMTON: Is there any further comment?

(No response.)

MR. CRAMTON: Is there any further discussion?

(No response.)

MR. CRAMTON: Are you prepared for the question?

(General assent.)

MR. CRAMTON: All those in favor of the motion, please say aye.

(Ayes.)

MR. CRAMTON: Those opposed, no.

(No response.)

MR. CRAMTON: The motion is unanimously adopted and we move to 1610.

MR. KUTAK: The use of funds from other sources other than the Corporation.

MS. DANIEL: As I have indicated in the comment, the Committee did not perceive any legal or policy matters in this part. There is a change that should be made in 1610.3, because inadvertently we went beyond the statute in a way which we did not intend to do.

1610.3 should read "A recipient may receive public or private funds and use them for a purpose for which they were provided.

That is the statutory language. We were not attempting to say that tribal funds from Indian funds, we will not stipulate how those funds must be used. There are no other

changes.

MR. CRAMTON: Would the word "organization" be better than the word "society" down there? I am talking about a legal aid organization which has a program.

MS. DANIEL: That is the statutory language, but we do not have to follow it if other language is clearer.

MR. KUTAK: I think organization would be clearer.

MS. DANIEL: Yes.

MR. CRAMTON: It strikes me as being broader.

MS. DANIEL: Yes.

MR. CRAMTON: It seems that it is broader.

MR. KUTAK: I think we wanted to do something on 1610.4 to clarify that the reporting would be in accordance with the guidelines used by the Corporation. We wanted some direction on that.

It is just administrative. Well, since there are no policy questions here and this is again articulating the substance of statutory mandate, I would move, Mr. Chairman, that Regulation 1610 be published for comment and the Regulations Committee be authorized, after considering the comments received in making whatever revisions would be deemed appropriate, to publish the Regulation in final form.

MR. SMITH: Seconded.

MR. CRAMTON: Is there any discussion?

(No response.)

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MR. CRAMTON: Are you ready for the question?

(General assent.)

MR. HOUSEMAN: I would like to say something.

MR. CRAMTON: Mr. Houseman wishes to be recognized.

MR. HOUSEMAN: I have a small problem. I did not catch everything you said, Bob. Maybe it has been taken care of. With regard to the Accounting Section, there is some question in my mind as to whether the accounting for other funds has to be reported to the Corporation.

As I read the statute, it does not. If -- Perhaps this is something we should take up in Committee and I would be willing to wait.

MR. KUTAK: My comment was to clarify that by the addition of language that would read something to the effect, "After the word disbursements in this last line, in accordance with the guidelines issued by the Corporation, there will be instances where it is deemed necessary and there will be others where it will not be necessary.

Is that right, Alice?

MS. DANIEL: Yes, I think Alan's concern about whether it is necessary to account is appropriate.

MR. KUTAK: It is.

MS. DANIEL: It is.

MR. HOUSEMAN: I agree that is necessary to account for it.

MS. DANIEL: To the Corporation.

MR. HOUSEMAN: Ok. I think that misreads the statute. That is my problem. I do not think there is a requirement of that nature, but I would be glad to take that up in the Committee, if it is more appropriate.

MS. DANIEL: We are just publishing it for comment and that is something that could be brought up in the Committee. It is a technical thing.

MR. CRAMTON: We have a motion before us and have not voted.

MR. KUTAK: That is right.

MR. CRAMTON: Is there further discussion on 1610?

(No response.)

MR. CRAMTON: All those in favor of the adoption of the motion, please say aye.

(Ayes.)

MR. CRAMTON: Those opposed, no.

(No response.)

MR. CRAMTON: The Regulation is unanimously adopted for comment and the Committee has the discretion to publish, if the comments do not reveal any substantial policy questions that affect the Board.

Now let us return to 1606.

MR. KUTAK: Now it is appropriate to go to Regulation 1606 which has been published for comment. Of course,

comments have been received.

MR. CRAMTON: Mr. Kutak, would this be an appropriate time for a five-minute break since this is likely to take a little while?

MR. KUTAK: We were doing so well, I thought we would whiz right through it, but I suspect you are right.

MR. CRAMTON: We will take a ten-minute break. We will reassemble at 11:00. That is eight minutes.

(Short recess taken.)

MR. CRAMTON: We had started on Regulation 1606, which I think is very important and raises some more serious questions. Mr. Kutak, go ahead.

MR. KUTAK: Mr. Chairman --

MR. CRAMTON: First I will tell you what our plans are. I circulated a sheet to the Board to try to find out when the various members of the Board had to leave. It looks as though we are going to run out of a quorum sometime between 1:00 o'clock and 1:30. So we plan to push straight ahead full blast and try to complete all the business that we can complete until 1:00 o'clock or 1:15 and then we will adjourn because we do not have a quorum.

Those of you who have planes later in the afternoon will be able to make them and get home this afternoon.

That is our current plan. With that encouragement for expedition, we now turn to 1606. Go ahead, Mr. Kutak.

MR. KUTAK: Regulation 1606 is fully developed in your file as you will see. I urge you first to look at the commentary and for that reason ask Alice to focus on it with us.

This is a Regulation which has been published for comment in the Federal Register on March 12 and for which we have received a great number of comments.

I am sure that you will understand that Alice's comments reflect the Committee's thinking on those comments.

MS. DANIEL: Before going into any particular provision of the regulation, I would like to spend a minute or two developing and sharing with the whole Board the perspective that I think the Committee brought to 1606.

We were struck by the statutory language that is worth reading. Section 10111 says that the Corporation shall prescribe procedures to insure that:

An application for refunding shall not be denied unless the grantee or contractor or person or entity receiving financial assistance has been afforded reasonable notice and opportunity for a timely, full, and fair hearing.

The reason that I think the language deserves close attention is this. Since we are lawyers, many of us, when we hear the word "hearing", are alert to the bell and think in terms of a particular kind of proceeding or context.

I think we think of an adversary proceeding or a

proceeding that is designed to review a decision.

The Committee feels certain that is not what Congress had in mind here. The provision does not say "after a decision has been denied, there shall be an opportunity for a full and fair hearing.", but that an application shall not be denied unless there has been an opportunity for hearing.

I think the difference is this. What Congress wanted was for the Corporation to develop a decision-making procedure that would give the recipient a full and fair opportunity for involvement before a decision was reached.

It is from that prospective that 1606 has been developed.

The notion throughout is no final decision for denying an application would be reached until after a hearing.

The particular significance of that will emerge as we go through the provisions. One change that was made from the published version is in the definition of denial of funding.

The published draft treated any reduction in the annual rate of financial assistance as a denial of refunding, entitling the recipient to a hearing. In the draft before you now, we treat only as a denial of refunding a reduction of more than 10 percent or \$50,000.

Of the many, many comments that we received, I think it is fair to say that there are three points upon which there

was particular emphasis. These were: the absence of articulated criteria for denial in the published version;

On the question as to who is entitled to make the final decision or recommend the final decision to the President and, thirdly, on what the burden of proof should be and who should have the burden of proof as to whether refunding should be denied. Those are the three.

As to the question of who is entitled to be a responsible official with the power to recommend a final decision to the President, the published version stated that the responsible Corporation official would be the one. That was the presiding officer and it should be a person who has not been "directly involved" in the preliminary determination to deny refunding.

Many of the comments we received urged us to go beyond that and to seek an impartial outsider to be the presiding official.

I think that the suggestions received and even the initial draft were mistaken in their attempts to establish an "impartial presiding officer".

A decision to deny refunding is when it has to be made in the context of the Corporation's overall allocation of resources and development of policies and goals in the whole operation by which it attempts to implement the purposes of the Act.

A decision of that type cannot be delegated to an

outsider. To attempt to delegate it to an outsider would be to strip from the Corporation all discretionary power to make its own decisions.

On the other hand, I think it would be equally mistaken to try to insulate particular high corporation officials from the preliminary considerations and questions.

We are still a small corporation and have a small senior staff. We need all the help we can get in reaching decisions.

For one corporation official to attempt to sequester himself to remain pure, is to deny us a source of wisdom that we cannot do without.

Therefore, in this version we define the responsible official as simply the official who has the authority to recommend a final decision as to granting or denying refunding.

As I mentioned earlier, the published version did not attempt to articulate what the grounds of denial of refunding might be. In Section 1606.4 we do attempt to spell out all possible grounds. We do this with some hesitation and uneasiness because it is a very difficult task to predict ahead of time what all the possible grounds might be.

I think that section is worth the attention of the Board.

Two of the grounds that would be proposed as grounds of denial of refunding set forth in (a) and (b) are ones which

would apply across the board to all recipients in the same class, that is, a reduction of the Corporation's appropriation which is apportioned among all recipients of the same class, or a change in Corporation policy, which is generally applicable to all recipients of the same class.

MR. COOK: May I stop you there just a moment?

MS. DANIEL: Yes.

MR. COOK: I notice that you consider a denial as to anything below \$50,000 or 10 percent. I wonder why Bob is throwing in (a) in there and not making an exception of that 10 percent when, in fact, an across the board, as a result of those financial problems, they would be considered as denials?

MS. DANIEL: If the denial is on the grounds of (a) or (b) -- an across the board cut, no hearing under this section is provided.

MR. COOK: Where do we go?

MS. DANIEL: We go to 1606.5(a) which says, "If denial is proposed" --

MR. COOK: Is it an exception?

MS. DANIEL: Yes.

MR. KUPAK: Yes.

MR. COOK: Ok.

MS. DANIEL: As a procedural matter, it should have been stated as a ground.

MR. COOK: The reason I say it is that you have it

as a grounds for denial of refunding affirmatively in 1606.4.

MR. KUTAK: Right.

MR. COOK: And then 1606.6 or 1606.5(a) says otherwise.

MS. DANIEL: We say that if denial is proposed on that ground, then there should be no further proceedings under this section.

MR. COOK: No wonder you make everybody read 29 regulations and confuse everybody.

MR. CRAMTON: I think they have done a good job on this.

MR. COOK: I am not fussing. The point of this is this. If it is an exception, why do you not have a 1606.4(a) that just flat out says, "If there is an across the board reduction, this constitutes an exception and not a denial of refunding."?

If you do that, you could cut a lot of language out of 1606.4. Certainly also the same out of 1606.5. You could combine them and have them say the same thing.

MS. DANIEL: That would be one way of doing it.

MR. KUTAK: Yes.

MS. DANIEL: I refer you to 1606.2.

MR. KUTAK: Whatever is the most clear and less confusing, would be satisfactory to us.

MR. COOK: What I am saying, Roger, is that first

of all a denial will constitute a denial and then if you give a figure which is in excess of 10 percent or more, or in excess of \$50,000, but there is not a denial when, of necessity, by reason of appropriations, everything is cut across the board, then I think it is very easy to explain that all in one instead of bouncing it all around through the regulations. That is the only point.

MR. CRAMTON: There might be a situation in which total defunding or much greater defunding might affect Corporation policy as to a group of recipients.

Do you see where it says a change in Corporation policy that would be applicable?

MR. COOK: I guess you could put that all together.

MR. CRAMTON: That would cause a total denial.

MR. KUTAK: We get your point and we will see how it works.

MR. COOK: The only thing I am saying is that I go back to 1606.2 as to definitions. You would merely have to have another section in there that says, "When it is an across the board reduction, as a matter of appropriations, this does not constitute a denial." That is all.

Then you have eliminated all the problems.

MS. DANIEL: I think that would simplify things.

MR. CRAMTON: Let us go forward.

MS. DANIEL: The rest of 1606.4 goes on with what

we anticipate would be the general scope of grounds for denial of refunding.

1606.5 requires that a recipient be given written notice whenever there is reason to believe an application for refunding should be denied. A notice must state the grounds for proposed denial and identify with reasonable specificity any facts relied upon as justification for denial.

I think that 1606.5 should be read together with the grounds set forth in 1606.4. This would indicate clearly that we would never anticipate that it would merely be a citation of the particular part of the regulation, but rather an actual statement of the grounds and reasons for denial.

A slight modification, but one worth noting, perhaps, is in 1606.5(b). There are many ways in which a recipient might seek to be heard and might not be interested in having the full hearing that is envisioned later on in this part, but really might be seeking an opportunity to make a submission to the President of the Corporation, for example. We just make it explicit here as was implied earlier that a recipient may seek any other form of hearing or any other opportunity to be heard.

All of those are allowed here without necessarily having a formal hearing.

What had been called a pre-hearing conference is now called an informal conference. The purpose and scope are

the same. That is, to identify and if possible, to resolve the issues.

MR. COOK: Alice, before you go further?

MS. DANIEL: Yes?

MR. COOK: Let me make one more point, if I may, Bob.

MR. KUTAK: Sure.

MR. COOK: I would like to have this considered in the 1606.2 section.

It seems to me if you leave it where it is, even though it does not constitute that, and you have got it somewhere else in here, then you run into the situation that unless you close the door because that is the instance, and reason for an across the board cut, you have got everybody who considers, in effect, that they have a denial or can request a hearing because of a cut.

As such, you have everybody coming in and everybody is at everybody else's throats and everybody else is comparing their budget to everybody else's. You have a situation where you can have all of your recipient programs in the United States all at each other throats.

Whereas, if you close the door in your definition in 1606.2, and say when there is an across the board reduction, this does not constitute a denial and there is nothing else that has to take place and these are the reasons, then

you do not create that kind of atmosphere.

MS. DANIEL: Yes, I think we can make that change easily enough in 1606.2 and it would be a useful change.

MR. KUTAK: It would certainly stop a long procedure from being triggered.

MR. COOK: That is the way I see it. I feel that it would be a procedure that would be triggered that would make everybody else say, "you are giving him too much money and we ought to have part of his and they are getting more than they ought to get and so on."

We get enough of that as it is. When you put it all on a denial-basis, because of an across-the-board cut, then I think you totally ignite the situation and highlight it tremendously.

MR. KUTAK: That will be noted.

MR. CRAMTON: One note I would like to make about future plans with respect to this particular regulation is this. It is my understanding that the Committee plans to re-publish this regulation for further notice and comment and to consider those comments at a meeting to be held at the end of May.

MS. DANIEL: Yes.

MR. CRAMTON: Prior to the Board meeting on June 3 and 4. Then final action on the revised procedures would take place at the June 3 and 4 meeting.

MR. KUTAK: Correct.

MR. COOK: I would like to raise another point. I would like Alice to make sure that any limitation of an across the board reduction, not being a denial, that limitation should be only in the event of a reduction in appropriations. There should be no other language, because I have trouble with this "Denial is required by a reduction in the Corporation's appropriation which is apportioned among all recipients in the same class appended to the Corporation by Congress."

You might get an appropriation which might not be a reduction and someone might be entitled to a hearing based on that, that could, in effect, constitute quite a conflict between the existing law that we are now under and some appendage to an appropriation bill.

I would not want to get those two things in conflict. The only one that I want to get cleared up is if there is an across the board cut, as a result of an appropriation, and no other means, then I want to see what would occur and leave Section (b) in 1606.4 right in there along with the language you track in 1606.5.

I am referring to where it says "Denials Required by Change of Law or Condition Appended by Congress to the Corporation's Appropriation."

MR. KUTAK: We can take that up. Thank you.

MS. DANIEL: The section dealing with written sub-

missions is essentially unchanged from the temporary regulation.

One thing I would like to point out is that throughout here we have loosened the time frame somewhat. Our experience has shown us that the time frame in the temporary regulation proposes constraints which are difficult to meet. In this we have allowed longer periods of time and we do not have the outside unwaivable time limitations.

The temporary one has it and this one does not.

MR. COOK: I have another problem.

MS. DANIEL: Yes?

MR. COOK: 1606.4 says "or by a change in Corporation policy which is generally applicable to all recipients of the same class." That is in (a).

When you get over to 1606.5, if denial is proposed on the grounds as set forth in paragraph (a) or (b) of section 1606.4, no further proceedings shall be held and the proposed decision shall become final 15 days after receipt.

Let us suppose that the Corporation makes a policy which is contrary to law. Then what?

MS. DANIEL: What we had in mind here was that where there was formal adoption by the Corporation of policy that would affect all recipients, then the proper form in which to consider that was not in 300 separate proceedings.

MR. COOK: Wait a minute, Alice. You are not talking

about all recipients. You are only talking about all recipients of the same class. We just went through the discussion of the same group when Charlie was here and those groups are the same groups: lawyers and secretaries and somebody else.

You used the words "same class" and I assumed your definition would be that this class of recipients and that class of recipients and so on, so would not it be all recipients but all recipients of the same class?

Really and truly you have dissected it by saying "of the same class". Consequently, you could make a policy decision that is not a denial because you are prohibited a denial under 1606.5 because of the exclusion in paragraph (a), but it applies to a particular class as distinct from all other class of recipients within the framework of Legal Services.

MR. CRAMTON: You would presumably have a role making hearing and oral argument on the policy questions and on the questions of law and so on.

MR. COOK: If we presume that would take place, then I would feel better about it, but that is primarily a presumption.

MR. CRAMTON: We can include it. It clearly would occur and then questions of law would be subject to judicial review.

MR. COOK: I would not be against it if you would take out "of the same class", and then it would be applicable

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to all recipients.

MR. ERLICH: But we want it for the same class and not to all.

MR. COOK: Then I question the wisdom of saying "by reason of that, that you automatically close the door for a rehearing", as a result of a policy decision by the Corporation that applies to a class, when, in fact, there may be valid arguments for hearing it out.

MR. CRAMTON: When a change is made that affects a number of recipients, class or group of recipients, then a public proceeding would be held in which argument and policy can be ventilated and discussed. I say policy and law.

MS. DANIEL: Certainly that is what we envision.

MR. COOK: I did not mean to be picky about it but I can see some problems arising.

MS. DANIEL: That is a question that the Committee was concerned about. The only question is whether this regulation is the appropriate place to discuss that or another would be better. Certainly it is the intent of the Committee any expectation that if there were to be an adoption of a policy, that would have affected a large group, then beforehand there would be notice and an open forum and public adoption, so that instead of having individual hearings, there would have been a previous large hearing.

MR. CRAMTON: If it involves a change in policy which

affects a group of recipients, then you would have it. I say this because the Corporation can always apply existing policies or existing statutes to make decisions in a refunding context.

MR. COOK: I agree, but what really bothers me is that many of the major decisions that are made by the Board or by the Executive Division of the Corporation, when they get down to implementation and staff level, all of a sudden all these people are denied.

All of a sudden you wake up one morning and come in and here are all these petitions for hearings and you say, "Where in the Hell did all these come from?"

Then all of a sudden you find out that something went wrong down the line and you say, "That is not the way we intended that."

I think by doing this you somehow or other get the latitude that you will not get yourself in those problems.

MR. KUTAK: That is noted, Marlow and we will pick up the suggestion.

This is not the final form.

MR. CRAMTON: Mr. Houseman is asking for attention and I think our time is very limited. You will have an opportunity to submit comments in writing and you will be at the meeting when the Committee considers the regulation and so forth.

MR. HOUSEMAN: I yield.

MR. CRAMTON: Let us continue.

MR. KUTAK: For the benefit of the Board, the reason that I have asked Alice to go through this draft at some length right now, in contemplation of what the procedure will be is that it is such a material re-draft of the original regulation that was published, that I wanted the Board to have the benefit of it.

There will be another whole process. Let us move on.

MS. DANIEL: 1606.9 sets out the provisions governing the actual conduct of the hearing in the event that one is held.

There are no very significant changes here. Section (d) and Section (e) may be worthy of attention. The Committee recognizes that the Hearing Office will not have subpoena power and sought to provide some means by which the corporation or recipient could be required to produce either witnesses or evidence and then to provide some sanctions for failure to do so.

Sections (d) and (e) are the ways in which that was done.

This permits the responsible official to require production and then authorizing it as an adverse finding or issue with respect to which production was required, if a party fails without good cause to produce a person or document required.

In Paragraph (d), this is the case.

We have added section (g) permitting official notice to be taken of any matter which judicial notice may be taken in a Federal court and so forth.

Section (h) says that a record or summary of the hearing shall be made in a manner determined by the responsible official and shall be made available to a party upon payment of costs and we allowed a provision for a party seeking to avoid costs to make its own record of the proceeding.

Perhaps there should be language in here indicating that to avoid disruption that the manner utilized by the parties should be approved by the official.

1606.10 is a new provision assigning the burden of proof.

There are two situations in which the Corporation bears the burden of proving by preponderance of evidence the existence of any disputed fact relied upon as justification for denial of refunding. Those situations are one when the recipient is charged with violating the Act and with failure, after timely notice, to take corrective action or failure to observe standards of practice and failure to correct deficiencies after notice.

As far as the standards of practice are concerned, you might note that in 1606.4(d), there has been substantial failure by a recipient to provide high quality, economical, and

effective legal assistance as measured by generally accepted professional standards, the provisions of the Act, or a rule, regulation, or guideline issued by the Corporation; and the recipient has not taken effective and timely corrective action after due notice from the Corporation.

It may be that at some time in the future the Corporation will issue rules or regulations setting forth particular standards. Until that time recipients are required to meet the standards that might reasonably be expected of any member of the profession, or indicated by the Act.

MR. CRAMTON: Mr. Broughton has to leave momentarily and Chairman Kutak would like to offer a Resolution for the Board to consider before he leaves. When they return to a discussion of the proposed or revised 1606 after --

MR. KUTAK: I think we can quickly summarize where we are at this point, Mr. Chairman, and simply say that your Committee would like to redo Section 1606.13.

MR. CRAMTON: Is that 1606 entirely?

MR. KUTAK: 1606.13 and also 1606.17, the notice requirement.

The thrust of this is this. As you can tell having walked through this, is that it is substantially different in form and substance from the regulations brought before you once before and published for comment.

It is so substantially different that we thought we

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would have to go through it again.

I have two motions that I would like to make with the Board's indulgence.

The first is that I move to the Board that the temporary regulation, 1606, which has been published, and which is now in effect, be adopted as final, pending any revisions at any subsequent time.

You recall at the earliest meetings of our Board, we adopted a temporary regulation 1606, which has been published and is now in effect. I move --

MR. CRAMTON: Is this the regulation that carried the number part 1606, Applications for Refunding and was published on what day?

MS. DANIEL: That is the Federal Register material.

MR. CRAMTON: Yes, it is the Federal Register material that you have behind the other.

MS. DANIEL: It was published for public comment on March 12.

MR. KUTAK: This temporary regulation 1606 is adopted as final pending any revisions at any subsequent time.

MR. MONTJANO: With revisions contemplated?

MR. KUTAK: And of course revisions are contemplated.

MR. CRAMTON: The objective is to make sure. We think that these procedures are essentially in effect now, on an interim basis and we put them into effect on an interim

basis until and unless they are revised. We expect that they will be revised in early June when the Corporation will have before it that which we have discussed today.

Is that correct?

MR. KUTAK: Yes.

MR. THURMAN: But the form of this is somewhat different from the others?

MR. CRAMTON: That is correct.

Is there discussion?

MR. COOK: I would like to discuss it a little bit. I do not mean to be arbitrary. If it is essential that 1606 be basically approved in substance because it is essential to the operation of the Corporation between now and June, and in fact it is vital, then I really do not have any objection.

Those section changes which are to occur -- we ought to see that they do occur.

If it is not essential that this section be approved for the benefit of orderly operation of the Corporation between now and the next meeting, I am wondering why 1606 cannot fall into the same category as 1611.

I do not find that the suggestions that I have made are that onerous.

Obviously, I think it is your intention to publish these again and to ask for comments again, is that correct?

MR. KUTAK: Yes.

MR. COOK: To the extent that one would not publish for comment unless they intended to receive comments, and unless they intended to honestly act on those comments, then I am really not that concerned.

Would that have to be away from me to comment on it to get that done?

MR. KUTAK: Marlow, the first of your two explanations is your reason for my motion. It is in the interest of the orderly administration of the Corporation.

MR. COOK: If that be the case, then I think we should not miss the trees for the woods and vice versa. That is the only reason I made the point. I very frankly would not be opposed to your motion. I think the changes are valid changes that have been recommended and I think they ought to be made.

I do not want to get frozen in. Also, I do not want to impede the progress of the review of applications and the funding of applications between now and June if we fail to have an orderly process by which we can act. I think we would be doing a great disservice if we do that.

MR. KUTAK: That, sir, is the logic and reason for my motion.

MR. MONTJANO: And I second that.

MR. COOK: Very well.

MR. CRAMTON: We have a procedure which is in place

right now. It is the procedure which was published in the Federal Register on March 12, 1976. Grantees were given notice of it, and it is now in effect.

I understand we are adopting it as a temporary matter to make that crystal clear.

They are in effect as a temporary matter and we will have final regulations on the subject in June.

MR. COOK: All right.

MR. HOUSEMAN: Mr. Chairman?

MR. CRAMTON: Do I have the unanimous consent to recognize Mr. Houseman?

(Unanimous consent.)

MR. CRAMTON: Go ahead, Mr. Houseman.

MR. HOUSEMAN: I did not know about this. The field has indicated a strong opposition to the proposed regulation for the various grounds that the General Counsel outlined earlier.

Now it seems what we are doing is to impose this proposed regulation on a few grantees, maybe. We are not even sure of that. These are ones who may be covered between now and June.

Other than by general conclusions, I am not clear that the efficient operation of this Corporation is at all affected, and that there is no regulation at this stage is not final and something which could not be postponed until June.

I do not see how the efficient operation of this Corporation is in any way impeded by allowing us to work under a temporary regulation and I do not see why this one needs to be implemented at this point.

MR. CRAMTON: We are and we are going to continue to work on a complete set of regulations that will govern in the future. In the meantime, we have to have something in place. We have something in place in the sense that we have informed grantees and recipients of these procedures.

The Board is merely making it crystal clear that until our final procedures can be refined and adopted, we will have something in place.

MR. HOUSEMAN: I do not understand why you need to make this final adoption, even for a temporary period. If the recipients are informed about the process, they are not covered by the Act.

I do not understand how this regulation is going to be applicable. It does not take into account the changes that have been proposed and it returns to the original publication that was hurriedly put together as we all know.

There was not a great deal of time for Committee discussion and no time for Board discussion before it was promulgated. Now this Board is promulgating this regulation without a full discussion of the original regulation. Only a discussion for a short period of time, and I do not know what

has to be done.

MR. KUTAK: It is so simple that I do not think it needs any more discussion. We are acting under the regulation and so there is no confusion on the part of the Board or anyone following our regulations that we are following, are temporary regulations, we are stating by the motion that I have made, that the Board is unambiguously intending to act under the interim regulation.

That is the whole thrust of it.

MR. THURMAN: We are approving the motion.

MR. SMITH: All it does is make the temporary motion all that much more temporary.

MR. CRAMTON: There is a gentleman in the back who wishes to be recognized. I do not know who he is to have a unanimous consent. Go ahead, and please identify yourself.

MR. ANDERSON: I am Terence Anderson and I am the Academic Dean at the Antioch School of Law. I had not wished to speak at this meeting, but this action suggests something to me.

To clarify the issue, I would take the position of how it deals with Antioch. We have received a two page denial of refunding based on policy grounds without reference to how the policy is to be articulated.

I gather very strongly that this is an action to clean up a legal record to allow that decision to go forward

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without the kinds of protection which I understand Ms. Daniel to say where a change in policy -- and this is clearly a change of policy -- and Legal Services has funded a program for many years, you would want to avoid the kind of rigorous proceeding where you would make presentations to the policy maker and before this is instituted, you would bring it to the attention of the Board.

I gather this is a mechanism to make it crystal clear that Antioch can be dealt with outside the context of other recipients for whom the protections are now being designed.

The greatest problem is that the Board and the community should be aware, aside from the Para-Legal Institute, which is fully considered by the Board in terms of the Podikoff Study, the only other denial that I am aware of is the Urban Law Institute of the Antioch School of Law.

That is all I have.

MR. KUTAK: Mr. Chairman, I revert to my earlier observation as to the purpose and intent of the motion. It is not addressed to any recipient. It is addressed to the Board.

We want to say simply, so that all will understand that the regulation under which it has been proceeding, is understood to be the regulation under which it will continue to proceed until a subsequent regulation is adopted by this Board.

MR. CRAMTON: I might add that the Board has given

no consideration to the refunding or non-refunding of any particular grantee, including the one mentioned. We have been informed by the staff that there are a number of situations in which some partial or total non-refunding may come up in the relatively near future.

This particular resolution is designed to make it clear that the procedures about which those grantees have been notified would continue in effect unless and until we adopt further or different regulations. That is all.

Ms. Daniel, would you like to add something?

MS. DANIEL: No.

MR. THURMAN: I move the question.

MR. CRAMTON: Is there further discussion?

(No response.)

MR. CRAMTON: Are you prepared for the question on Mr. Kutak's resolution?

(General assent.)

MR. CRAMTON: All in favor say aye.

(Ayes.)

MR. CRAMTON: All those opposed say no.

MR. ORTIQUE: I would like to be recorded as abstaining.

MR. CRAMTON: The motion is carried with Mr. Ortique abstaining.

MR. KUTAK: The second motion is that the revised

regulation 1606 be published or in this case, more technically speaking, republished for notice and comment.

MR. COOK: I second that.

MR. CRAMTON: Before we pass on that motion, is there anything further that the General Counsel wants to present concerning the proposed changes in the procedures or issues on which expressions of view on the part of the Board may be appropriate?

MR. ORTIQUE: Mr. Chairman, I have to be excused at this moment.

MR. CRAMTON: Revius, have a good trip home. The record should reflect that Mr. Broughton and Mr. Ortique have now left the meeting.

MS. DANIEL: I have nothing further except to respond to questions that the Board members may have.

MR. CRAMTON: Mr. Breger?

MR. BREGER: You are starting to talk about the new 1606.10 the burden of proof. There is something that is unclear to me.

What if there were a case in which a grantee was not being charged with a failure to comply with the Act or a failure in performance, but an alternate group comes in and says, "It is not that they stink, but we are better, in fact, we are great."?

Do we contemplate that kind of situation at all?

MR. COOK: You do not mean that in this section, do you? This is on denials.

MR. BREGER: You would not refund it. You might switch the funding.

MS. DANIEL: That would be covered in Sub-Section (f) of 1606.4, which is a more economical and effective method or structure for providing legal assistance available in the general area served by the recipient.

If there was a denial of refunding on those grounds, after consideration of the recipient and the resources and the service and what might be offered by competing structure, then there were some preliminary recommendation made, perhaps by a Regional Director, there would be a hearing on that.

There would be no burden of proof upon the Corporation to prove by a preponderance of the evidence that the new structure was better, but the recipient would have the burden of persuasive.

That is, if the matter was in equipoise, then the recipient would have the burden of coming forward to make a case.

MR. BREGER: Yes.

MS. DANIEL: If the recipient failed to do that, then the responsible official could go ahead and make the final recommendation supporting the Regional Director's recommendation.

MR. BREGER: Thank you. I just wanted to clarify that.

MR. THURMAN: Would the terms "burden of proof" and "burden of persuasion" used advisedly? Do you want a distinction there?

MS. DANIEL: Yes.

MR. COOK: I would hope so.

MS. DANIEL: Yes.

MR. KUTAK: I agree.

MR. CRAMTON: Does Mr. Houseman want to address the Board on this?

MR. HOUSEMAN: What?

MR. CRAMTON: Procedures.

MR. HOUSEMAN: I thought I was ruled out of order a few minutes ago. I have a lot of comments about this on this specific question. I have some question about what the burden of persuasion is intended to be. Maybe that was answered?

MR. KUTAK: I would recommend, Alan, that be laid over until you see the regulation and until we have our discussion in our Committee and thrash it out there and come back with our judgement to this Board.

MR. HOUSEMAN: I do not want to get crossed up here. I am not speaking on the regulation pursuant to our earlier conversation. I have many things to say, but I will wait.

MR. KUTAK: Are there any other questions?

(No response.)

MR. CRAMTON: Is there any further discussion on Mr. Kutak's resolution which merely says that a revised procedure or set of procedures will be published for notice and comment in the Federal Register and the comments will then be considered by the Committee of Regulations in a meeting to be held on Friday, May 28, probably in the Hilton Hotel at the O'Hare Airport in Chicago?

(No response.)

MR. CRAMTON: Are you ready for the question?

MR. COOK: I did not know about all the rest of it, but I second that.

MR. KUTAK: If I get the motion carried, I will get into that.

MR. CRAMTON: All those in favor, say aye.

(Ayes.)

MR. CRAMTON: Those opposed, say no.

(No response.)

MR. CRAMTON: It is carried.

MR. KUTAK: Mr. Chairman, I want to make the announcement which you have done is to say the Regulations Committee will meet in open session, so the record is straight, and my facetious remarks earlier were not mis-interpreted, we will meet in open session on May 28, in Chicago, Illinois, date and place and time to be published later. We hope to make it on that date.

At that time we would like to frankly go into not only this regulation, but frankly go into a number of other regulations.

If I could read Alice's handwriting, I would tell you about them, but I cannot quite make them out.

MS. DANIEL: Let me see that. I think I remember them.

MR. KUTAK: Go ahead.

MS. DANIEL: At the next meeting of the Regulations Committee, the staff will prepare consideration by the Committee draft regulation concerning eligibility and restrictions on juvenile representation and restriction of criminal representation and restrictions on certain forms of civil representation and attorney hiring.

MR. KUTAK: Thank you. That is what it says.

MR. CRAMTON: Does that complete the Committee on Regulations?

MR. KUTAK: Yes.

MR. CRAMTON: Thank you. The next item on the agenda is Item 5, the discussion of the role of the Directors of the Corporation.

Mr. Broughton, who proposed that subject, asked that it go over to the July meeting of the Board, and therefore, we move to Item 6, which is dates and locations of future meetings.

We had earlier set a tentative date for our next meeting of June 3 and 4 and then for July, 23 and 24. Board members have received details about the location of the July 23 meeting and presumably the June 3 and 4 meeting will be here in Washington.

Are those dates agreeable?

MR. MONTJANO: Is there a compelling reason why it is a Thursday and Friday instead of a Friday and Saturday? That is an on-going battle, I suppose.

MR. CRAMTON: It is a policy of alternative Friday and Saturday, with Thursday and Friday. Some Board members prefer to work on the weekends and other Board members prefer to be with their families on the weekends.

MR. ERLICH: I will follow whichever you prefer. I think there is some American Bar Association meeting on Saturday.

MR. THURMAN: I think we set these up some time ago.

MR. CRAMTON: That is right. So, our next meeting will be on June 3 and 4 here in Washington. The next meeting after that will be in Salt Lake City on July 23 and 24. We should discuss very briefly, if we can, the proposed agenda and form of that July meeting, which is going to be concerned with long range issues and avoid an immediate agenda item and day-by-day routine business.

In other words, that session is designed as a session in which the Board can think about the role of the Corporation and the direction in which to move and about some fundamental issues or problems which need ventilation in a more relaxed setting than the meetings in which we have a very organized and busy agenda.

Mr. President, would you like to comment? I would like to refer you to Tab 8 in your book.

MR. ERLICH: There is by no means anything fixed about this suggested list of discussion topics, which include the basic purposes of Legal Services and futures issues concerning Legal Services' programs and the role of the Board of Directors in determining Legal Services and resource allocation for the future.

These are all topics that individual Board members have suggested at various times. With your mandate, we would go forward and work out the arrangements of that.

MR. KUTAK: Mr. Chairman, I am very excited by the scope and direction of this novel kind of Board meeting. I hope it would become at least an annual tradition, where we, in a sense, lapse into a framework of a think tank, and rather than have an agenda of regular business, step back and really ask ourselves where to and what next, in a larger context.

I am hoping that our President will be encouraged. I do not think he needs to be authorized, but I think he might

be encouraged to enrich the dialogue by selecting possibly some guests who could be observers and commentators on our reactions and interpretations of these topics and assignments and show us where we have fallen off the track or gotten off the track, if we have, or how we can better follow the track, if we will.

Likewise, not to stultify the conversation, but to help structure it and promote it, a background paper of the nature and scope suggested, I think, would be terribly productive and quite stimulating.

MR. CRAMTON: I do not think we need to take formal action on this. The President would be interested, if there is a general sentiment that he should go ahead and make plans for such a meeting.

Board members who have some ideas of how it should be framed and conducted and possible participants therein, should be urged to communicate those views to the President. He has authority to go ahead and organize the agenda for the meeting and invite participants and make arrangements.

Do we proceed under that understanding?

MR. COOK: I guess this is another time for me to be contrary to general policy. As Tom knows, I sent him what I would phrase a letter where there was P.S. - nasty note to follow.

Having a Board meeting at the Bar Association Annual

Meeting in Atlanta, I find that when we have meetings, we have quite a group. These meetings become quite an extensive obligation of the Corporation and the Corporation's funds.

I guess that I want to be frugal about that if I can and I would like to see the money go where it ought to go.

Somehow or other, that not ought to be spent in extended facilities such as this.

I took the position relative to going to the American Bar Association meeting that it was a delightful way for an awful lot of Board members, but members of the Bar who are on our own staff to go to the American Bar Association meeting and have their hotel room taken care of and their meals taken care of and so on at the expense of an appropriation.

I just hope that we hold this to a minimum. There comes a time when it is awfully good for a Board with a very limited amount of its own staff not to all of a sudden all be there and to be overpowered by a general meeting that looks to the future of Legal Services, and not to the day-to-day expertise or day-to-day discussion that we have to take as a matter of meetings here when the staff walks down here, just like I do, or catches a cab.

I only do these things cautiously. One of these days we are going to be told about our expensive meeting and so and so and such and such and how we had everybody and

half of the staff was there and there was nobody in the shop to answer the phone.

I guess I am one of these people that everybody is going to say, "Boo on him.". I think we are playing a rather dangerous game sometimes when we overload these things. I just really have to present it as a matter of my own conscience.

I looked out yesterday at one time during the course of the meeting and I wondered how many people were answering the phone.

There is some merit in that feeling.

MR. KUTAK: If I may, I would like to reply. I do not think there is any disagreement in what we have both said.

I do not think that you are being cautious. I think you are being constructive. I would only differ in one choice of words. I do not think it is dangerous. I think it is necessary and proper. I think we have an obligation as a Board to do more than process documents. We are, if you please, the spirit and the conscious of this Corporation, to some degree.

We must think beyond the day-by-day tasks in order to discharge that function properly.

MR. COOK: The basis for the meeting is fabulous, I think. I do not disagree with you.

MR. CRAMTON: We have not contemplated taking 50

staff members to Salt Lake City. In fact, it may save the Corporation some money, because of the geographic location of some of the Board members in that vicinity.

MR. KUTAK: I see.

MR. SMITH: Mr. Chairman?

MR. CRAMTON: Mr. Smith?

MR. SMITH: Marlow may remember that a few months back when we had a suggestion to meet in Austin, Texas, that I was opposed to that for basically the reasons that he mentioned, because of the logistics involving all the material and transportation of staff.

I think most of the meetings should be here in Washington. However, I found that our meeting in Texas was much more productive than I anticipated it would be. I think it was a very good thing that we met in Austin, Texas.

I say this not just for the work that we did, but for the effect that our presence had on the general esprit de corps of our people in the whole Southwest area. I think it is a good idea that we met there.

However, I agree with Marlow that we should limit these out of Washington meetings and not have a profusion of them and not make a habit of meeting all over the country.

For the reasons it was beneficial to meet in Austin, I think it will also be beneficial to meet in the Salt Lake City area and bring to the far west part of the United States

the feeling of our presence as we brought it to the southwest when we met in Austin, Texas.

I was opposed in meeting in Atlanta at the ABA meeting for a different reason. A number of us are going to be in Atlanta anyway, but the reason we are going to be there is that we are going to be very busy with those meetings and we could not do justice to the reasons that we were going to be there in the first place and try to load this on top. I do not believe we could do both.

I am glad that decision has been changed and we will not meet in Atlanta.

MR. COOK: I am gunshy. I have seen so many of my colleagues take trips and all of a sudden after starting off needing a Piper Cub, you will then take a lot of staff and need a 727. I am gunshy of that, and I think we have to think about our responsibility.

MR. SMITH: I agree.

MR. COOK: I disagree and I think you ought to have meetings around the country. I absolutely do. I do not think that is wrong at all. I do not think it is. There is nothing sanctum sanctorum about Washington, D.C. All you have to do is ask the candidates who are out all over the United States.

MR. SMITH: I think the majority ought to be here, but for the reasons I mentioned and that you just recognized, I think it is important that we meet out of Washington as well.

MR. COOK: I think it is important how we load it up as well.

MR. CRAMTON: This is only the second meeting that the Board will have had outside of Washington in what amounts to virtually a once a month a meeting. We are fortunately getting to a point where we will not have to meet every month, but maybe every other month.

Have we finished this item on the agenda, Mr. President?

MR. ERLICH: Yes.

MR. CRAMTON: There is another item on the agenda for other business. Is there any other business that the Board should take up?

MR. SMITH: I have one small follow-up on this item. I notice you made a tentative assignment of two Directors to each topic. Was that for the purpose of preparing background materials or merely for the purpose of leading the discussion at the meeting?

MR. ERLICH: Primarily for the latter. My thought was that one of the staff could help the two Directors to organize an agenda for the discussion and background materials if that would be helpful.

MR. SMITH: I noticed in a couple of areas you specifically assigned a staff member and a couple of others you did not.

MR. ERLICH: I believe there was only one that had not mentioned what I thought would be helpful if we asked Alice Daniel to prepare a paper on the role of Directors and other entities, similar to this.

MR. KUTAK: Are you sure you want those two Directors discussing that issue?

MR. SMITH: I was going to make a request that I be switched to that issue and change places with Bob because I think Mr. Broughton and I have both written letters to the Directors on that topic.

MR. ERLICH: That is fine.

MR. THURMAN: I think Glee ought to be on that.

MR. COOK: It is really going to make any difference?

MR. CRAMTON: These are suggestions that the President can take in mind.

MR. COOK: I envision that as being a good general discussion and everyone having their say. I think if anybody wanted to be extremely critical, then they had better be prepared.

MR. CRAMTON: Is there any new business that needs to be taken up?

(No response.)

MR. CRAMTON: If not, I undertake a motion to adjourn.

MR. BREGER: I make that motion.

MR. CRAMTON: All those in favor say aye.

(Ayes.)

MR. CRAMTON: We are adjourned.

(Whereupon,

at 12:15 p.m., the Board Meeting was adjourned.)

C E R T I F I C A T E

This is to certify that the attached proceedings of the Legal Services Corporation (Meeting of the Board of Directors) on Saturday, April 24, 1976 were had as herein appears, and that this is the original transcript thereof.

COURT REPORTERS AND TRANSCRIBERS

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