

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

Sunday, January 5, 1997

10:20 a.m.

LEGAL SERVICES CORPORATION  
750 First Street, N.E.  
Washington, D.C.

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair  
John N. Erlenborn  
F. Wm. McCalpin  
Ernestine P. Watlington  
Edna Fairbanks-Williams

STAFF PRESENT:

Suzanne Glasow, Senior Counsel  
Operations and Regulations  
John Tull, Director  
Office of Program Operations

ALSO PRESENT:

Linda E. Perle  
Center for Law and Social Policy  
Alan Houseman  
Center for Law and Social Policy  
Laurie Tarantowicz  
Office of Inspector General  
Renee L. Szybala  
Office of Inspector General  
Rick Teitelman, Executive Director  
Legal Services of Eastern Missouri

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

1  
2 MS. BATTLE: We're going to get started. I'd  
3 like to first welcome here all of the members of the  
4 committee. As well, I'm glad to see that Edna has  
5 joined us this morning for our review of regulations  
6 that we undertook to draft and revise at the last  
7 meeting.

8 We have a full house in that we have all of  
9 the members of the committee present this morning. And  
10 I'm happy to see that.

11 Welcome, John. I'm glad you're able to be  
12 with us today.

13 We have before us 11 regulations that we will  
14 review today. I'm going to be ambitious and say that  
15 we won't be here all day. But it will all depend on  
16 the number of questions that we have about the  
17 regulations that we have before us.

18 You should have in your Board book a copy of  
19 the agenda for this meeting today. This committee has  
20 one day for its meeting, so I hope that we can go  
21 through all of the items that we have listed on our  
22 agenda, all 14 of them, in a very efficient way.

1           Are there any additions, deletions,  
2 suggestions or changes to the agenda? Hearing none,  
3 then I will entertain a motion for approval of the  
4 agenda.

5                           M O T I O N

6           MR. ERLNBORN: So moved.

7           MS. WATLINGTON: Second.

8           MS. BATTLE: It's been properly moved and  
9 seconded. All in favor?

10                   (Chorus of ayes.)

11           MS. BATTLE: All opposed?

12                   (No response.)

13           MS. BATTLE: Motion carries. You should also  
14 have in your Board book a copy of draft minutes for our  
15 previous meeting held December 13th and 14th. And I've  
16 had a chance to quickly look through them. I hope that  
17 the other committee members have had an opportunity to  
18 do that, as well.

19                   Are there any changes to the minutes of the  
20 meeting that was held on December 13th and December  
21 14th?

22                   Hearing no changes, I will entertain a motion

1 to approve the minutes of the December 13th and 14th  
2 meeting, 1996.

3 M O T I O N

4 MR. McCALPIN: So moved.

5 MR. ERLNBORN: Second.

6 MS. BATTLE: Okay. It's been properly moved  
7 and seconded. All in favor?

8 (Chorus of ayes.)

9 MS. BATTLE: All opposed?

10 (No response.)

11 MS. BATTLE: Motion carries. The first  
12 regulation that we have for our consideration today is  
13 Part 1612, the Corporation's Interim Regulation  
14 Restricting Lobbying and Certain Other Activities by  
15 Grantees.

16 You should have in the materials provided to  
17 you that regulation. We don't have 1609 on here?

18 MS. GLASOW: It's at the very end.

19 MS. BATTLE: Okay. All right. Fine. I see  
20 that Alan has joined us at the table as a stakeholder  
21 representative from CLASP. I'd like to hear from our  
22 staff, Suzanne and John, what we have as changes to

1 this regulation from what it is that we considered at  
2 our December 13th and 14th meeting first.

3 MS. GLASOW: What we attempted to do with this  
4 draft is to highlight the changes that were made by the  
5 committee at the last meeting, as well as any  
6 additional changes we recommend.

7 MS. BATTLE: For some reason, your mike, it  
8 doesn't appear, is up. I don't know if --

9 MS. GLASOW: Maybe we just need to get very  
10 close to them today.

11 MS. BATTLE: I'll do the same thing.

12 MS. GLASOW: What we tried to do with these  
13 drafts is to highlight the changes made by the  
14 committee at the last meeting, so that you could review  
15 that, as well as point out any additional changes that  
16 we recommend at today's meeting.

17 If you turn to page 2 of 1612, also, what we  
18 did this time is to put comments on these changes and  
19 footnotes, so that you could look at the text and the  
20 explanation for the change on the same page. That  
21 first change was made by the committee at the last  
22 meeting.

1 MS. BATTLE: Okay. And the first change  
2 essentially deletes the reference to non-LSC funds and  
3 replaces the reference to fund-raising with the  
4 language that you believe is more consistent with the  
5 statute.

6 MS. GLASOW: Right. There was comments  
7 indicated that there was a misunderstanding of the use  
8 of the term "fund-raising."

9 MS. BATTLE: Okay. Are there any questions  
10 about that change? I think we used the term previous  
11 to this, "fund-raising," which has broader implications  
12 than the intent here.

13 MS. GLASOW: That is correct.

14 MS. BATTLE: And the language that we now have  
15 really focuses on the efforts to encourage state or  
16 local governments to make funds available and doesn't a  
17 connotation that potentially fund-raising to private  
18 entities might be included in this.

19 MS. GLASOW: That is correct.

20 MS. BATTLE: Okay.

21 MS. GLASOW: Page 3, we recommend an  
22 additional change to the definition of grass roots

1 lobbying. And it would be in paragraph A-2, where it  
2 says, grass roots lobbying does not include.

3 We suggest deleting the language, "or the  
4 effect which such legislation or regulations may have  
5 on eligible clients or on their legal representation."

6 There was some concern that this language  
7 would be interpreted more broadly than is intended and  
8 it's not necessary to the provision, so we suggest  
9 deleting it.

10 MS. BATTLE: Now, if we delete the language  
11 that you propose deleting, is the intent that the  
12 language that remains is clear enough that it  
13 communicates to people that it's already included in  
14 what's left?

15 MS. GLASOW: That's correct.

16 MS. BATTLE: Okay. Now, I've got a question  
17 about that deletion. You had a qualifier in the  
18 language on the "effect" phrase, which said -- in other  
19 words, legislation or regulations and the effect they  
20 may have on eligible clients or on their legal  
21 representation.

22 And when you delete that, you're saying that

1/ it does not include communications that are limited to  
2 reporting the content or status of pending or proposed  
3 legislation or regulations regardless of whether or not  
4 it has anything to do with particular clients.

5 It's a broader statement.

6 MS. GLASOW: Yes, it's a broad statement about  
7 the program could, for instance, have a training on  
8 some legislation, explain what the status of that law  
9 is currently and the effect it might have on certain  
10 types of situations that clients may get into.

11 It certainly does not undercut the definition  
12 of grass roots lobbying, which basically says, you  
13 cannot go out to the public and encourage the public to  
14 go to the Hill or somewhere else and try to have an  
15 influence on pending legislation. There is no intent  
16 in this provision to do that.

17 MS. BATTLE: Okay.

18 MR. ERLENBORN: May I ask a question?

19 MS. BATTLE: Sure.

20 MR. ERLENBORN: I get the impression from  
21 reading this with the deletion of the last two lines  
22 roughly, that all that could be done would be to send a

1 copy of the proposed legislation without comment.

2 MS. GLASOW: No. If you're --

3 MS. FAIRBANKS-WILLIAMS: Analysis of the  
4 proposed legislation and how it would affect.

5 MR. ERLNBORN: Content or status, without any  
6 comment as to how the proposed legislation would affect  
7 the recipient of that information. Is that the intent?  
8 I see what we left is, "limited solely to reporting  
9 content or status."

10 MS. GLASOW: We would interpret "status" as  
11 including the implications of it and the meaning of it.

12 MR. ERLNBORN: Status, I would think, would  
13 be it's in subcommittee, it's in full committee, it's  
14 on the floor, it's passed one house or the other. That  
15 would be status.

16 MS. BATTLE: Can you just then add, "content,  
17 status, or effect of pending or proposed legislation"?

18 MR. McCALPIN: What did you say? I'm sorry.

19 MS. BATTLE: I'm making a suggestion that we  
20 say, "reporting the content, status or effect of  
21 pending or proposed legislation or regulations."

22 MR. TULL: I believe that the -- although I

1 wasn't present at the conversation where this concern  
2 was raised, my understanding was that the staff,  
3 Congressional staff's concern was that they viewed  
4 content as including the impact -- the intended impact  
5 in terms of who would be affected by legislation, but  
6 that by having singled out the writing about the effect  
7 which such legislation would have as being something in  
8 addition to the content, which, in our view, is that  
9 content can address those who are affected.

10 But when you single it out in the regulation,  
11 it implies that the kind of letters which they were  
12 concerned about, where someone would, for example,  
13 would send a description of legislation, and if the  
14 description of legislation then said, this is going to  
15 affect hundreds of thousands of recipients of welfare,  
16 and blah, blah, blah, that that, without saying more,  
17 they viewed, as being an indirect call for grass roots  
18 lobbying.

19 And I think if such a letter were sent, one  
20 could view it that way.

21 So they wanted to make certain that the  
22 language and the definition did not imply that that was

1 proper, nor would we interpret it as being proper.

2 MR. ERLENBORN: Let me just ask you, when you  
3 look at the limitation, that it only contained content  
4 and status. Do you believe there is any opportunity  
5 then to go beyond the language of the proposed  
6 legislation or regulation and where it is in the  
7 legislative or regulatory process?

8 MR. TULL: Yes, because -- I mean, certainly,  
9 I think all of us have learned that the language of  
10 statutes often doesn't full describe the intended  
11 content, that it takes an explanation of it. And so an  
12 explanation --

13 MR. ERLENBORN: Wouldn't that be saying, the  
14 effect that it would have?

15 MR. TULL: It would. The effect in terms of  
16 the intended effect, it could encompass that, yes.

17 MR. ERLENBORN: And we've taken out "effect."

18 MR. TULL: Not intending by that to say you  
19 could never describe "effect," but intending by that to  
20 not single out "effect" as something which is  
21 particularly protected because of a concern that -- the  
22 Congressional staff's concern that specifically citing

1 that implied that a writing about legislation could go  
2 beyond merely describing who would be affected by it  
3 and what the effect might be as to that individual.

4 MR. ERLENBORN: Do you believe from the -- I  
5 was not privy to the conversation where the concern was  
6 raised by staff. But do you believe that it would  
7 offend them if we would add the word "analysis"?  
8 That's usually what you would do, is analyze the  
9 language.

10 MR. TULL: I think that's --

11 MS. GLASOW: We could do that.

12 MR. TULL: Yeah, that would certainly  
13 encompass the narrower and appropriate, analyze, yes.

14 MS. BATTLE: Solely to analysis of the content  
15 or status.

16 MR. McCALPIN: Reporting the content, comma,  
17 status or analysis of.

18 MR. ERLENBORN: Not "or," maybe "and." You  
19 wouldn't want to put it in the disjunctive because they  
20 might want to do all three. Content, analysis and  
21 status.

22 MS. GLASOW: We have a comment that's more

1 comfortable with, "to reporting or analyzing the  
2 content or status." Would that do it?

3 MS. BATTLE: To reporting?

4 MR. McCALPIN: What is it?

5 MS. GLASOW: "To reporting or analyzing the  
6 content or status." Will that do it?

7 MR. McCALPIN: To reporting or analyzing the  
8 content or status?

9 MR. ERLENBORN: I would have a problem with  
10 analysis of the status, because that does get you into  
11 the realm of lobbying.

12 MS. GLASOW: To reporting the status and  
13 analyzing the content?

14 MS. BATTLE: To reporting the content,  
15 status --

16 MR. ERLENBORN: I'm not sharp enough this  
17 morning to give you language that I think will  
18 accomplish this, but I --

19 MR. McCALPIN: Could we simply say, "content,  
20 status and analysis of."

21 MR. ERLENBORN: Well, again, if the analysis  
22 gets into the status, I think you are possibly getting

1 into the realm of lobbying, arguably you might. I  
2 think it would be content, analysis of the content, and  
3 status.

4 MR. McCALPIN: But then you're analyzing  
5 status.

6 MR. ERLENBORN: No.

7 MR. McCALPIN: Yeah, the way that sounded.

8 MR. ERLENBORN: Well, I was trying to do just  
9 the opposite, to make the analysis apply only to the  
10 content, not to the status.

11 MR. HOUSEMAN: We have a contrary proposal  
12 here.

13 MR. ERLENBORN: It would probably be a lot  
14 better.

15 MS. GLASOW: To reporting the content or  
16 status of or analysis of pending legislation. Would  
17 that do it?

18 MR. ERLENBORN: Analysis of the pending  
19 legislation, which would not, I take it, then refer to  
20 the status.

21 MR. HOUSEMAN: Status would be before.

22 MR. ERLENBORN: So is content, before.

1 MR. HOUSEMAN: Yeah, but then an analysis of  
2 pending or proposed.

3 MR. ERLNBORN: I think that does it.

4 MS. BATTLE: The proposal is, the content,  
5 comma, status, comma, or analysis of pending or  
6 proposed legislation or regulations.

7 What this gets at is the underlying issue of  
8 whether content was a broad enough term to take into  
9 account an explanation of a pending piece of  
10 legislation. The word "analysis" gets at that without  
11 sending the message as Congressional staffers have  
12 raised, of "effect," which could be a broader category,  
13 which could speak to the impact on groups of clients,  
14 which might be viewed as a call to action on that  
15 issue.

16 MR. ERLNBORN: The reason I think it's very  
17 important that we go beyond the text of the pending  
18 legislation is, if you're familiar with legislation, it  
19 doesn't repeat the existing law. It may say, strike  
20 this, strike that, insert, but it is meaningless unless  
21 you have the current law and know exactly what the  
22 result will be when you read the current law together

1 with the proposed changes.

2 MR. TULL: Can I suggest a different word for  
3 analysis, which would be "explanation"?

4 MR. ERLBORN: That's probably better.

5 MS. BATTLE: Explanation.

6 MR. HOUSEMAN: Or "explain."

7 MR. McCALPIN: I don't know. John, I think  
8 that could get to your 100,000 people affected. You  
9 explain the statute. You will -- you would open the  
10 door to explaining its impact. I think "analysis" is  
11 probably better.

12 MR. TULL: Yeah, we certainly want the word  
13 which conveys the narrowest intent. And if that's  
14 -- if you hear "explain" as being broader, then we  
15 should certainly go with "analysis."

16 MS. BATTLE: What does the committee think?  
17 We've got two analysis's. Any explanations up here?

18 MR. TULL: Right. Do we have an analysis or  
19 an explanation of how we feel about this?

20 MS. BATTLE: An explanation for the analysis.

21 MR. ERLBORN: I think explanation is  
22 probably better. I would go with it.

1 MR. McCALPIN: You do?

2 MR. ERLENBORN: Yeah.

3 MR. McCALPIN: I think it's too broad.

4 MR. ERLENBORN: I think "analysis" is broader  
5 than "explanation."

6 MS. GLASOW: Whichever we use, we can --

7 MR. McCALPIN: We're reading from different  
8 dictionaries.

9 MS. GLASOW: Whichever term we use, we can  
10 explain it in the commentary of what we're trying to  
11 do.

12 MS. BATTLE: You know, I was about to say,  
13 particularly because we're taking this "effect" piece  
14 out, that it does bear some mention in the commentary,  
15 so that people understand the scope of what is excluded  
16 from grass roots lobbying.

17 So, either way we go, with "explain" or  
18 "analyze," "explain" to me is a common -- a more common  
19 term that may not signal in any way the grass roots  
20 lobbying issue as did "effect." So, you know,  
21 analysis, explain.

22 MR. ERLENBORN: I'll go for "explain."

1 MS. BATTLE: You'll go for "explain." I think  
2 "explain" is a more common term, and lawyers and non-  
3 lawyers read this. It might be a little bit easier to  
4 use "explain."

5 MR. ERLENBORN: But I think that the  
6 explanation of what we've done here should point out  
7 that the text, which would be the content of pending  
8 legislation, is difficult or impossible to understand  
9 without -- for a layperson, and lawyers as well,  
10 without the underlying existing legislation that's on  
11 the books.

12 MS. GLASOW: And we can explain that this  
13 needs to be read with paragraph A-1, which describes  
14 what grass roots lobbying is. And, as soon as they get  
15 into that type of activity, then -- that this is not  
16 meant to undercut that.

17 MS. BATTLE: I think that's good.

18 MR. McCALPIN: You might help it a little if  
19 you say, "an explanation of the meaning of," and that  
20 would keep it from explaining the effect.

21 MR. ERLENBORN: That's certainly the intent.

22 MS. BATTLE: We can get into that in the

1 commentary, it seems to me. Because what we've done in  
2 A-1 is to give the broader definition of what grass  
3 roots lobbying is. And then in A-2, we're giving an  
4 exception to that and carving out an area and saying,  
5 this is an area which is not grass roots lobbying.

6 And I think it bears mention in the commentary  
7 where there might be an intersection between some  
8 interpretation of A-1 and A-2 how to cut it and how to  
9 make that distinction. So we'll spend some time  
10 reviewing that to make sure that it's consistent with  
11 what our intent is here.

12 MS. GLASOW: Okay.

13 MS. BATTLE: Is there anything else on page 3?

14 MS. GLASOW: There's not another change until  
15 page 7.

16 MR. McCALPIN: Let me ask a question on page  
17 5.

18 MS. BATTLE: All right.

19 MR. McCALPIN: Subparagraph F, where does the  
20 term, "similar procedure," occur in the regulation?

21 MS. GLASOW: In Section 3(a)(2), which is  
22 right below it.

1 MR. McCALPIN: All right.

2 MS. BATTLE: Okay?

3 MR. McCALPIN: Yeah.

4 MS. BATTLE: We may now move on to page 7.

5 MR. McCALPIN: Let me stop on page 6.

6 MS. BATTLE: Okay.

7 MR. McCALPIN: A minute. Is there a conflict  
8 between Section 3 -- no, Section 1612.3(b) and  
9 1612.5(b)? It's the top and the bottom of page 6. It  
10 says, "except as provided in .5 and .6, recipient shall  
11 not participate in or attempt to influence any  
12 rulemaking or attempt to influence the issuance of  
13 amendment or revocation of an executive order."

14 Then, under 5, it says, "A recipient may  
15 initiate or participate in litigation challenging  
16 agency rules, regulations or guidelines, unless it's  
17 otherwise prohibited by a law or regulation."

18 It seems kind of circular to me.

19 MR. HOUSEMAN: You're worried about our  
20 corporation regulations in that phrase? I'm not sure.

21 MR. McCALPIN: Well, up above, it says, you  
22 can't participate in any attempt to influence

1 rulemaking.

2 MR. HOUSEMAN: That's like in the rulemaking  
3 itself.

4 MR. McCALPIN: Or the issuance or amendment or  
5 revocation of an order.

6 Then, down below, you say, you can do it  
7 unless the litigation is otherwise prohibited by law or  
8 corporation regulation.

9 MR. ERLENBORN: This is a chicken and egg  
10 proposition. Well, B refers to the rulemaking process  
11 at the top of the page, B. B at the bottom of the page  
12 assumes the rulemaking process is completed. And now,  
13 after the rule has become law, it's being challenged.

14 MS. GLASOW: Yes, the difference between this  
15 rule generally prohibits lobbying efforts --

16 MR. ERLENBORN: Not litigation.

17 MS. GLASOW: -- but not litigation. And  
18 Section 5(b) allows you to litigate after the  
19 rulemaking is over, in essence.

20 MS. BATTLE: I think that's right. And I  
21 think that's the distinction between the two. It's  
22 also interesting to note that this permissible

1 activity's regulation in 5(b) speaks to agency rules,  
2 regulations, guidelines, but it doesn't get to law.

3 So it seems --

4 MR. McCALPIN: Yeah, it's only regulation.

5 MS. BATTLE: It's only regulations that are  
6 permissible and not challenging the actual law, even in  
7 litigation.

8 MR. HOUSEMAN: That's not what's going on.

9 MR. McCALPIN: Well, of course, the top of the  
10 page is only agency action, too, up at B at the top of  
11 the page.

12 MS. BATTLE: Yes. I hear Alan saying that's  
13 not what's intended, but it does -- it limits the  
14 permissible activity to agency rules, regulations,  
15 guidelines and policies. It does not broaden it to  
16 challenges of the law under which these particular  
17 rules are being promulgated.

18 MR. HOUSEMAN: She may be right, actually.

19 MS. BATTLE: Yeah.

20 MS. GLASOW: Yeah, because we're only talking  
21 about rulemaking there, right?

22 MR. HOUSEMAN: Yeah, there may be a slight

1 glitch. If you go back to 1612.3(a), we say "except as  
2 been provided," you can't engage in lobbying.

3 And then in B, we don't mention statutes,  
4 which is the problem. It's just not -- I think this is  
5 just a minor oversight.

6 MS. BATTLE: Well, we say that's it's  
7 prohibited. That one of the prohibited acts is  
8 engaging in any kind of lobbying as it relates to an  
9 act of Congress or a state legislature.

10 When we talk about permissible acts and then  
11 we cover both the making of law and the making of  
12 regulations in what's prohibited as a lobbying issue.

13 But when we get into permissible acts, we  
14 cover as permissible only the agency rulemaking piece  
15 and not the law piece. And I just want to make sure  
16 we're all clear that there is that distinction.

17 MR. HOUSEMAN: But it's not intended -- let me  
18 say, the prohibition doesn't prohibit litigation.

19 MS. BATTLE: I know that.

20 MR. HOUSEMAN: So this is a clarification that  
21 doesn't fully cover the entire waterfront. In other  
22 words, the fact -- if it's not prohibited in the first

1 place, there's not a problem. This is -- the  
2 permissible activities are an attempt to clarify where  
3 there's confusion about what may or may not be  
4 prohibited. It would probably be better if statutes  
5 were put in B, but I don't -- but -- I'm not sure it's  
6 necessary, but it would probably -- that would clean up  
7 the parallelism.

8 MS. BATTLE: Suzanne.

9 MS. GLASOW: We might be able to clarify that  
10 in the commentary. In other words, the fact that we  
11 don't have a permissible activity allowing to litigate  
12 against legislation doesn't mean that it's prohibited  
13 by this part.

14 MS. BATTLE: Okay. All right. Now, are there  
15 any other questions on 6? I think, Suzanne, you  
16 mentioned the next change that we have is actually on  
17 page 7.

18 MS. GLASOW: Yes. This is permissible bar  
19 association activities by recipient, employees. And  
20 you asked that we come back with a new provision on  
21 that. And what we've done is, on page 7, it's C-5, and  
22 it's in bold.

1           And we're suggesting, permitting recipient  
2 employees to participate in bar association activities  
3 provided that recipient resources are not used to  
4 support and the recipient is not identified with  
5 activities of bar associations that are devoted to  
6 activities prohibited by this part.

7           We're attempting to clarify that participation  
8 in bar association activities is okay, as long as the  
9 recipient -- well, it repeats the provision.

10           But the use of the term, "devoted," is  
11 intentional and it means the activities are not  
12 dedicated to or centered on prohibited activities. So,  
13 for instance, if a recipient employee attended a CLE  
14 course and it incidentally touched upon class actions,  
15 that's not going to prohibit -- that's not going to  
16 cause a problem. Or if they attended a four-day-long  
17 conference put on by a bar association. And something  
18 in there might implicate some type of advocacy, as long  
19 as its recipient resources aren't being used to  
20 something that's devoted or focused or centered on  
21 that, then there won't be a problem.

22           MS. BATTLE: Now, the major distinction

1 between this language and the language that we  
2 discussed at our December meeting is the fact that we  
3 had a modifier on "devoted," is that it?

4 MS. GLASOW: Well, it was similar to this, but  
5 I think we've rephrased the whole provision. But we  
6 were having trouble finding the exact standard. We  
7 basically settled on the word "devoted," rather than  
8 trying to say "primarily" or "substantially," because  
9 those have a lot of fine line distinctions, more than  
10 50 percent less and 50 percent, and even 50 percent we  
11 felt was too much. So we've used the word "devoted."

12 MS. BATTLE: Okay. Did I hear something  
13 concerning that?

14 MR. ERLENBORN: Yeah. There were a couple of  
15 comments. More than a couple. Several comments that  
16 were devoted to this particular issue.

17 One got to the question of the payment by the  
18 recipient of bar dues. This would seem to prohibit  
19 that. And I'm not certain that the payment of bar dues  
20 would be something that we ought to prohibit.

21 MS. GLASOW: Actually, we have another  
22 regulation on payment of bar dues, which is 1627, which

1 will be coming up very shortly.

2 MR. ERLENBORN: Okay. So it's addressed  
3 elsewhere.

4 MS. GLASOW: Yes.

5 MS. BATTLE: It is.

6 MR. ERLENBORN: All right.

7 MS. GLASOW: This wouldn't preclude that.

8 MR. ERLENBORN: The other question was, there  
9 was an example given by the one who made the comment  
10 that if a lawyer from a recipient agency attended a bar  
11 meeting, where one portion of the bar meeting might  
12 have been devoted to something that would be a  
13 prohibited activity, that as long as the lawyer from  
14 the agency did not participate as a presenter in that,  
15 that he or she should be able to attend the meeting.  
16 That that one activity in the meeting shouldn't poison  
17 the entire meeting.

18 Now, is that covered here?

19 MS. GLASOW: Well, if he's not participating  
20 in something that's devoted to a prohibited activity,  
21 then he would have to do it on his own time and without  
22 recipient resources. But if it's something that's just

1 incidental or just a little section of something, yes.  
2 Then it would be okay.

3 MR. ERLBORN: I think what bothered me is  
4 the phrase, "and the recipient is not identified  
5 with" --

6 MS. GLASOW: That is correct, because what  
7 we're not prohibiting here is attorneys doing something  
8 on their own time with their own resources. They can  
9 always do that. We're talking about any situation  
10 where they're appearing for the recipient or they're  
11 using recipient resources in the name of the recipient.  
12 That's what we're trying to restrict.

13 MR. ERLBORN: So then an attorney of a  
14 recipient agency could participate as long as he or she  
15 is not identified as representing the thinking of that  
16 agency.

17 MS. GLASOW: That's correct.

18 MR. ERLBORN: Could participate in a  
19 prohibited activity?

20 MS. GLASOW: Yes, if he's doing it on his own  
21 time and own resources, and it's focused on that, yes.

22 MR. ERLBORN: It seems a little touchy.

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1 MS. GLASOW: Well, it's sort of like the Hatch  
2 Act restrictions, in essence. You can't -- the Hatch  
3 Act said there were certain activities you can't do and  
4 identify the agency you're working for with it. But if  
5 you do it on your own time, you're okay. There are  
6 other restrictions in there you can't even do on your  
7 own time.

8 But it's that type of idea. On a person's own  
9 free time, they have certain rights that they can  
10 exercise, as long as they're not using federal funds or  
11 they're not identifying their agency with the activity.

12 MR. ERLNBORN: I can see this causing  
13 trouble.

14 MS. WATLINGTON: Especially for COE training.

15 MS. BATTLE: I think what we struggled with at  
16 our last meeting was how to make the cut to address the  
17 concern that John has raised. And it is a difficult  
18 one, because no matter how you make that cut, there is  
19 going to be some level of judgment that falls into  
20 this.

21 I think Rick, who has been the president of  
22 his bar for his state, raised the issue when we

1 discussed this before. That in that position, you've  
2 got many, many duties and responsibilities that you  
3 -- if to say that you cannot attend a meeting, even  
4 though one of the underlying things I think that  
5 Congress really does want is for attorneys to be able  
6 to participate in their state bars, as do other  
7 attorneys -- to say that you cannot attend a meeting  
8 because a portion of that meeting is going to address  
9 concerns that lawyers have about pending legislation,  
10 is too far reaching.

11 But, on the other hand, you have to strike a  
12 balance and there has to be some judgment reached as to  
13 which ones you participate in, number one; which ones  
14 you identify the recipient with, number two; and which  
15 ones you must completely exclude yourself from.

16 If there is a session solely on the issue of  
17 what legislation we're going to challenge that is being  
18 considered by a state legislature or by Congress, then  
19 it's real clear that that's not something that you need  
20 to identify the recipient with in your participation.

21 If you're talking about a complete bar meeting  
22 that spans a number of different issues and one session

1 for 30 minutes covers that, then I think you're in a  
2 different ballgame.

3 But what we wanted to do here was to come up  
4 with some language. And I think that's what the staff  
5 and our stakeholders have struggled that sends the  
6 message that we don't want recipient resources devoted  
7 to any of these things that are prohibited which have  
8 to do with lobbying.

9 And I think that the point that John has  
10 raised bars some mention in the commentary, so that  
11 people are fully aware that there is no way that we can  
12 come up with specific language that would cut -- slice  
13 this thing in black and white. There are going to be  
14 some gray areas that require judgment, but that it's  
15 our intent that the judgement be exercised on the side  
16 of ensuring that no recipient resources are ever  
17 devoted to or used for the purpose of lobbying for any  
18 purpose and with any organization.

19 Now, how we do that, John, are you saying that  
20 the language in 5 doesn't really communicate this  
21 essence as we've talked about it now? And if it  
22 doesn't, then we need to spend some time on some

1 alternative language that can really do it.

2 MR. ERLNBORN: Well, my concern, again, is to  
3 the phrase, "and the recipient is not identified with."  
4 That would seem to me to open the door to an attorney  
5 for a recipient agency not identified with the agency  
6 in any of the literature or so forth, attending a  
7 meeting, and engaging in prohibited activities. It may  
8 be a meeting solely devoted to prohibited activities.

9 But, as long as the attorney has not  
10 identified himself or herself as participating and  
11 representing the thinking or the position of the  
12 agency, this would seem to permit it.

13 And I think that that would be unfortunate if  
14 that was the interpretation that was put upon it.

15 MS. BATTLE: Well, let's get back to what 504  
16 says about lobbying, because it gives us guidance, it  
17 seems to me. Okay. 504(a)(2) says, "None of the funds  
18 appropriated in this act of Legal Services may be used  
19 to provide a financial assistance to any recipient that  
20 attempts to influence the issuance, amendment,  
21 revocation of any executive order, regulation, or other  
22 statement of general applicability and future effect by

1 any federal, state or local agency."

2 And it goes into advocating or opposing plans.

3 But the real restriction is on the use of  
4 funds based on 504.

5 MR. McCALPIN: Well, 3 and 4 are also  
6 affected.

7 MS. BATTLE: Yes, 3 and 4. So, Section  
8 504(a)(1), (2), (3) and (4).

9 Now, what we're attempting to do with this  
10 regulation, I think, is to get at that source of fund  
11 use for these prohibitive activities. And that is the  
12 reason why the use of recipient here.

13 However, what John is saying is that, even  
14 though that's our intent, that when you read it, it  
15 comes across potentially as a loophole. So we have to  
16 try to construct the language here to make it true to  
17 what 504 prohibits, which is the use of funds, of LSC  
18 funds, for these prohibited activities in a way that it  
19 doesn't communicate the concern that he's raising.

20 MR. ERLENBORN: Yeah, obviously if the  
21 attorney for the agency, recipient agency was on  
22 company time and attending, that would be using

1 recipient funds, right?

2 MS. BATTLE: If he does it on -- if it's on a  
3 Saturday meeting, he's not on company time --

4 MR. ERLENBORN: And is not associated --

5 MS. BATTLE: Not associated, that's right.

6 MR. ERLENBORN: -- with the agency officially.

7 MS. BATTLE: Yeah, right. Then that's not  
8 prohibited by 504(a).

9 MR. ERLENBORN: Maybe that could be covered by  
10 the explanation in the regulation. Probably it could  
11 be.

12 MR. HOUSEMAN: It seems to me the problem that  
13 you've identified is the phrase, "and the recipient is  
14 not identified with," and which, if you -- I'm not  
15 saying we should do this. But if you eliminated that  
16 phrase, I think what this is saying is recipient  
17 resources are not used to support activities of the bar  
18 associations that are devoted activities prohibited by  
19 this part, which is what the prohibition is. No funds  
20 of a recipient shall be used for lobbying or influence  
21 rulemaking.

22 And what this phrase has been in here over the

1 last several meetings, in an effort to say, if you're  
2 on your own time, then you can't be identified with the  
3 recipient. And part of the problem I hear, I think, is  
4 a drafting problem that we've been struggling with  
5 constantly from day one on this particular provision.

6 MR. ERLNBORN: Well, I think you could be on  
7 your own time and still identified with the agency.  
8 That's the problem that I see here.

9 MS. FAIRBANKS-WILLIAMS: Well, in a state as  
10 small as mine, they know --

11 MR. HOUSEMAN: Sure, I understand that. But I  
12 think -- and I don't know whether the best way to  
13 approach this is to strike the phrase and clarify the  
14 commentary or the delete the phrase and clarify it in  
15 the commentary.

16 MS. BATTLE: Well, for example, let me just  
17 -- let me raise another issue. Nothing in this part is  
18 intended to prohibit a recipient from permitting its  
19 employees to participate in bar association activities.

20 Inherent in the way that we've drafted this  
21 provision is a sanction, one way or the other, by the  
22 recipient of the activity. And, by doing that, you're

1 in a sense holding the recipient responsible for  
2 potentially non -- for example, the example I gave of a  
3 Saturday activity that an employee might engage in,  
4 having some oversight over whether or not that's  
5 permissible or not.

6 Now, is that part of our intent from a  
7 drafting standpoint of view?

8 MS. GLASOW: Yes, because the restriction is  
9 we can't give a grant to a recipient who does this  
10 activity. So we get into funds and whether you can use  
11 certain funds to do this or that with. But I don't  
12 think we want an employee of a recipient on his own  
13 time and without recipient resources getting into a bar  
14 association activity that's lobbying on pending  
15 legislation and identify a recipient with it, because  
16 we said the recipient can't engage in that kind of  
17 activity.

18 So I think the better fix is what we talked  
19 about earlier, is in the commentary.

20 MS. BATTLE: It may be, but I guess the issue  
21 I'm raising is and the flag that I'm seeing is,  
22 potentially the responsibility for recipients to give

1 oversight on non-LSC time activities of attorneys, as  
2 well, and having to either grant or not grant  
3 permission to participate in those activities. That's  
4 an underlying issue, it seems to me here.

5 MR. HOUSEMAN: This language appears, also, in  
6 the statute. This language -- the identification  
7 language doesn't appear in this section of the statute.  
8 But, in the underlying LSC act, this language does  
9 appear in the context of political activity.

10 And I think what we're working together to try  
11 to draft was to try to bring in that notion that  
12 appears in political activity. What it says is you  
13 can't engage in political activity while you're working  
14 for a recipient.

15 I'm not talking about a staff attorney that's  
16 running for election now. I'm just talking about the  
17 general.

18 While you're working for a recipient, you  
19 can't engage in political activity. But if you're not  
20 working during your off hours, you can engage in  
21 political activity, so long as you don't identify the  
22 recipient with that political activity. That was

1 -- the intent here was to draw -- try to pull in a  
2 similar concept to that.

3 Now, yes, there is a problem with policing  
4 that. But I think we've lived with that sort of  
5 understanding for years in the political activity  
6 thing. I think that everybody understands what this  
7 means in this context. And we've essentially lived  
8 with something like this for years in the bar  
9 association framework.

10 I'm not -- I'm just saying, I think from a  
11 practical point of view, representing the Legal  
12 Services programs, this can be -- we can live with  
13 this. The programs can live with this. It can be  
14 clear about what is and what is not required and clear  
15 with their staff about what they can and cannot do,  
16 which is what's attempted here. It's very hard with  
17 language. We've been struggling with this.

18 MS. BATTLE: Sure.

19 MR. HOUSEMAN: You know, we've gone through 15  
20 different drafts of it.

21 MS. GLASOW: I think if we take out the commas  
22 before, "and the recipient is not identified with." and

1 the one after that, that might fix the problem.

2 This -- a similar clause is used in the Hatch  
3 Act, so it's not -- if someone identified -- you know,  
4 some third party comes up and says, well, I saw Mr.  
5 Jones at a meeting and he was in a lobbying thing and  
6 he works for Legal Services of Manhattan, or something,  
7 it's only when Mr. Jones himself gets up and says, I am  
8 speaking on behalf of the Legal Services of Manhattan,  
9 that there's an identification with it. So there is  
10 some law on this type of an idea.

11 MS. BATTLE: Let me suggest something. I  
12 thinks the commas may be what are throwing people off.  
13 Permitting -- okay. So let's try this. And this is  
14 really just some comma changes. "Nothing in this part  
15 is intended to prohibit a recipient from permitting its  
16 employees to participate in bar association  
17 activities," comma.

18 Then you're going to put all of the qualifiers  
19 in the middle of these two commas, "provided the  
20 recipient resources are not used to support and the  
21 recipient is not identified with activities of the bar  
22 association," then comma, "that are devoted to

1 activities prohibited by this part." So that you are  
2 permitting its employees to participate in bar  
3 association activities that are devoted to activities  
4 prohibited by this part.

5 MS. GLASOW: Comma where?

6 MS. BATTLE: Separated by commas.

7 MS. GLASOW: Do we need that last comma?

8 MS. PERLE: I don't know if that works or not.

9 MR. TULL: I think it works, although I'm not  
10 sure the last comma is necessary. I think we're taking  
11 out the -- because the devoted --

12 MS. BATTLE: Yeah, it modifies that earlier.

13 MR. TULL: -- activities is a qualifier of the  
14 whole thing.

15 MS. BATTLE: But if you take all of the others  
16 out, what you're doing is you're setting out what the  
17 standards are. You can permit them to participate, but  
18 you can't have resources or identification with  
19 activities that are prohibited.

20 MR. ERLNBORN: I guess coming full circle, I  
21 find little problem or no problem with the language as  
22 it is here, given the concept that we do intend to

1 allow individual attorneys of recipient agencies on  
2 their own time, without identifying this as a recipient  
3 position, to engage in these prohibited activities.

4 My concern, frankly, was that even though you  
5 had those qualifiers, on their own time and not  
6 identifying themselves as representing the agency's  
7 thinking, that on the Hill, if you found much of this  
8 activity going on, even though it met the restrictions  
9 here, there could be an adverse reaction.

10 MR. TULL: The intent of this language is to  
11 solve a practical problem, which I think arises  
12 differently from the problem which would indeed be a  
13 problem if we had a pattern, as you describe it, of  
14 programs using -- seeing this as a loophole or as  
15 encouragement in some way to go off on your own time  
16 and use the bar association as a vehicle for something  
17 you can't do in your own office. That would be a  
18 problem.

19 The issue is -- but there is, as Alan said  
20 from his perspective and certainly from ours and what  
21 we've seen of programs, that's never been an issue.  
22 That the issue rises in practicality another way. And,

1 that is, there is a value in the program and being  
2 engaged in the bar association activities for a variety  
3 of reasons that have to do with good relations with the  
4 bar, with the stature of the program in the bar, and  
5 that bar association activities themselves, as a  
6 practical matter, sometimes have a portion of their  
7 work, which will implicate lobbying on a particular  
8 public issue, for instance.

9           And if somebody is a chair of a committee or a  
10 vice-chair of a committee, the effort here is to give  
11 that person some guidance about what they should do,  
12 because if they are -- and we've had present today and  
13 had present in every discussion of this a director of a  
14 program who is the president of a local bar, which  
15 meant that he has surely ran meetings in that context  
16 where there were items somewhere working on an agenda  
17 which would relate to the bar's position on public  
18 policy, for instance. And this is simply an effort to  
19 try to provide guidance to do that.

20           And I think you're correct, that the  
21 commentary is extremely important to explain precisely  
22 what is meant. And, certainly, and not in any way to

1 imply that this is viewed as a giant loophole that is  
2 available to programs. It's not ever been seen that  
3 way or used that way, but we certainly don't want to  
4 give any impression that we have any intent that it  
5 would be used that way.

6 MS. BATTLE: And it may be helpful to -- in  
7 the commentary, to kind of give some outer limit  
8 examples of what's permissible and what is not, so that  
9 people can look at this and understand it is our intent  
10 to honor what Congress has set out in 504 about this  
11 and to give you some guidance about your bar  
12 association participation.

13 MS. FAIRBANKS-WILLIAMS: Our bar association  
14 is working on getting more money from public defenders  
15 and that is going to be one of the young lawyer's  
16 projects. And that will definitely be lobbying because  
17 it would be getting money from the state and from the  
18 public defenders.

19 MS. BATTLE: Right. That's an example of an  
20 activity that may be prohibited by this section, for  
21 which Legal Services lawyers could not identify, either  
22 through funds or identification of a program,

1 participation in that effort.

2 Are there any other questions? I'm sorry.

3 Bill.

4 MR. McCALPIN: I suggest that the use of the  
5 word "employees," in the first line assumes that the  
6 recipient is going to be a not-for-profit corporation.

7 While Section 502.1 authorizes grants through  
8 a private attorney, I would assume that that would  
9 include a law firm with partners, so that you may not  
10 be talking entirely about employees. Because if a  
11 grant is to a law firm, then I think the partners in  
12 that law firm are not employees.

13 MS. FAIRBANKS-WILLIAMS: That's already  
14 happening in Pennsylvania, right, Ernestine?

15 MR. McCALPIN: Well, I'm just suggesting that  
16 there are situations likely where persons who are not  
17 employees would be affected by this, and that maybe the  
18 word "employees," is too restrictive.

19 MR. TULL: Does the word "staff" include a  
20 partner?

21 MR. McCALPIN: I don't know. Good question.

22 MR. HOUSEMAN: Can this be covered in the

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1 commentary?

2 MR. ERLENBORN: If I were a partner, I  
3 wouldn't want to be referred to as staff.

4 MR. TULL: Staff and other important persons.

5 MS. GLASOW: Or similar persons.

6 MR. ERLENBORN: But might I suggest in the  
7 definition portion, you might put a definition of  
8 employee to say that it includes partners? And then if  
9 it shows up any place else, you've taken care of it  
10 wherever it might be. It might easier to do that than  
11 to rephrase it here.

12 MS. BATTLE: Person or entity receiving  
13 funding is the language that comes out of 502. And, to  
14 the extent that we're using the word "employees," and  
15 we've got to breathe into it the broader context that  
16 recipients now may take, it may be helpful to use that  
17 language, "Persons receiving funding." or, "Entity  
18 receiving funding," so that it's broad enough to cover  
19 not only the private attorney, you've got state or  
20 local governmental entities that receive funding, as  
21 wells.

22 MS. GLASOW: Well, that's covered up in the

1 first opening clause in paragraph C, "Nothing in this  
2 part is intended to prohibit a recipient from." But  
3 the recipient isn't the one who goes to the bar  
4 association meetings.

5 So we need some sort of a term that means  
6 people who -- individual employees, staff, members.

7 MS. BATTLE: But the recipient, if it's a  
8 partnership, or let's say it's one attorney who  
9 receives it, the recipient then becomes that attorney  
10 who has received the funds for his firm to do this  
11 Legal Services work. So, you do have instances now.

12 Before, when you were talking about a  
13 corporate entity, you always had to distinguish the  
14 corporate or the not-for-profit entity and employees,  
15 agents and others. Now, if you've got a private  
16 attorney who receives funding, that private attorney  
17 then begins to embody the recipient.

18 MR. McCALPIN: He is the recipient.

19 MS. BATTLE: The private attorney has been the  
20 one to receive the funds.

21 MS. GLASOW: In that case, the recipient would  
22 be the only employee in that sense.

1 MR. McCALPIN: He's not an employee.

2 MS. GLASOW: I know.

3 MR. TULL: Well, I wonder if Mr. Erlenborn's  
4 suggestion isn't the safer, sounder one here, in that  
5 our regulations are filled with the use of the term  
6 "employee," which I think Bill is correct in a world  
7 with partnerships, will raise the same question.

8 And I think that, rather than try in this  
9 particular one, to fashion language which will cover  
10 -- which well might have implications throughout the  
11 rest of this regulation, we have to go back and think  
12 it through. I think it would be sounder and easier and  
13 more -- sort of a quicker and more thorough fix to --

14 MS. BATTLE: To define employee to encompass  
15 it.

16 MR. TULL: -- to define employee elsewhere  
17 wherever that is used to include partners in any other  
18 -- I mean, we're talking about state governments.  
19 We're also talking about perhaps a different --

20 MR. McCALPIN: Yeah, you also have a good many  
21 situations nowadays where there are so-called contract  
22 employees, who are not employees, but do 100 percent

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1 within the firm for the period of the contract. But  
2 they're independent contractors, not employees.

3 MS. BATTLE: What about just having a  
4 definition of employee on the front end of this reg,  
5 because we really run into this problem when you're  
6 trying to distinguish a person and their private  
7 activity, as well as their recipient activity. If we  
8 do a definition that breathes the language of 502, so  
9 that as you use the term "employee" in this regulation,  
10 you encompass all of those entities. I think that's a  
11 good way to do it. So let's try that.

12 It looks like this one is not going to be  
13 recommended to the Board tomorrow.

14 MS. GLASOW: We can have one for you by  
15 tomorrow.

16 MS. BATTLE: Can you? Okay. When we take our  
17 lunch, we'll take a look at it today.

18 MR. HOUSEMAN: We need to be careful that  
19 we're not doing something unintended by that definition  
20 in this regulation, because the word "employees" is  
21 used several places here.

22 MS. BATTLE: You'll get together --

1 MR. HOUSEMAN: I'm going to have to be present  
2 for some of the rest of the morning. I'll go through  
3 and see if I can spot any other problems that could be  
4 raised by that.

5 MR. TULL: The term "employee" is now defined  
6 in 1600, not to solve the problem that Bill has pointed  
7 out we now have. But "employee" as defined means a  
8 person employed by the corporation or by a recipient or  
9 a person employed by a sub-recipient whose salary is  
10 paid in whole or in part with funds provided by the  
11 corporation. That definition doesn't solve the  
12 problem, but I think the proper fix probably belongs  
13 not in 1612, but in 1600, since the issue doesn't  
14 appear just here. It's going to appear in other  
15 places.

16 And what that means in terms of how we go  
17 forward, it seems that probably the -- it strikes me  
18 the most effective way to go forward is to go ahead and  
19 adopt this in the commentary, speak to that issue, and  
20 move as quickly as we can to redefine 1600, the  
21 employee in 1600.

22 MS. BATTLE: Well, but if we redefine employee

1 in 1600, I think that Alan's point is accurate. We'd  
2 have to look at the implications of its application in  
3 all of the regulations that follow as it relates to how  
4 it would apply.

5 And I would be hesitant for us to undertake  
6 that, without doing that look and that review of all of  
7 the other regulations.

8 MR. TULL: Yeah, I wasn't suggesting that that  
9 be done tomorrow, because that obviously wouldn't be  
10 possible. And I think we do need --

11 MS. BATTLE: I think we just need to put that  
12 on our agenda to look at that and then see if the fix  
13 after you've looked at this issue, requires us to do a  
14 1600 change or whether we can do it specifically in  
15 this reg.

16 MS. GLASOW: We have one suggestion that may  
17 solve this problem. Instead of using the word  
18 "employees," to use the word "personnel."

19 MR. McCALPIN: That may do it.

20 MS. BATTLE: That might do it.

21 MR. ERLNBORN: Would that include the single  
22 practitioner who gets a grants?

1 MS. BATTLE: Yeah, he's still personnel of the  
2 recipient.

3 MS. GLASOW: And in the commentary, we can say  
4 what that means for the purposes of this rule.

5 MS. BATTLE: That's a quick fix.

6 MS. GLASOW: Thank you, Renee.

7 MR. TULL: That was Renee's suggestion, which,  
8 while we were all wrestling with changing the world,  
9 she was coming up with a practical way.

10 MR. HOUSEMAN: That may work. But this issue  
11 that you spotted in this narrow context does raise a  
12 broader question in terms of our overall definition of  
13 employees.

14 MS. BATTLE: Yeah, it does. And I think we  
15 need to do a look at all of the implications.

16 MR. HOUSEMAN: That, I think, you have to do a  
17 process that identifies that as an issue you're going  
18 to consider.

19 MS. BATTLE: Yeah. Okay. All right.

20 MS. GLASOW: The only other changes, I  
21 believe, to this rule are changes adopted by the  
22 committee at the last meeting. One is reflected on

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1 page 9. It's just a clarifying addition of words in  
2 paragraph E, about mid-page.

3 MS. BATTLE: Okay. And that is, the use of  
4 the use of the term, "use non-LSC funds to provide."

5 MS. GLASOW: Right.

6 MS. BATTLE: Okay.

7 MS. GLASOW: Then on page --

8 MS. BATTLE: I'm sorry. Bill.

9 MR. McCALPIN: On page 8, may I ask why you  
10 have both under 1612.6(a), (1) and (3) seem to me to  
11 overlap. Why don't you simply move the words, "orally  
12 or in writing," down to follow the word "testify" in  
13 (3) and have only two subs instead of one? In other  
14 words, you say, "to testify in orally or in writing,"  
15 and then you say, "testify before or make information  
16 available to." It seems like --

17 MR. HOUSEMAN: Well, they're different  
18 concepts, Bill. Three is talking about commissions,  
19 committees, or advisory bodies, which would not  
20 -- which does not -- which is a subset of the bigger  
21 issue here. This is a legislator or an administrative  
22 official or an administrative body or a legislative

1 body may ask you to do something.

2 So, (a)(1) says you can testify orally or in  
3 writing before them or before -- not just before a  
4 commission, a committee or an advisory body.

5 In other words --

6 MR. McCALPIN: Are you saying that you can use  
7 number one to testify before a legislative body and  
8 three only before an administrative body?

9 MR. HOUSEMAN: No, no, no. One is a broad, if  
10 you're asked by any of the above, government agency or  
11 official, elected official, legislative body, committee  
12 or member, you can -- if you're asked to testify, you  
13 can testify before either the body or the individual,  
14 depending on the context of that.

15 Three is, if you're asked to be on or appear  
16 before, say, an advisory committee, then this just says  
17 you can testify before or make information available to  
18 an advisory body of some sort if you're asked to do so  
19 by one of the above officials.

20 They're different. Three is a much narrower  
21 concept that's dealing not with -- you know, not  
22 necessarily with members of Congress or committees of

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1 Congress. It's dealing with commissions and advisory  
2 bodies that are set up by agencies or by members of  
3 Congress and they're on it, and they ask you to make  
4 -- you know, appear before it. It's a minor  
5 technicality.

6 MR. McCALPIN: Then why isn't (3) included in  
7 (1)?

8 MR. HOUSEMAN: It is. This was a clarifying  
9 thing, and if it's confusing --

10 MS. BATTLE: Yeah, the question I think that  
11 Bill is raising is that (1) is a broad statement, which  
12 allows a person to respond in any forum, if requested  
13 by an elected official. And they may respond either  
14 orally or in writing.

15 There are various subsets that one could have  
16 to (1). But we point out a specific subset, which has  
17 to do with commissions, committees, or advisory bodies  
18 in (3).

19 And I think that Bill's question is, why have  
20 we pointed this particular one out and not all of the  
21 other various subsets that one could have to (1)?

22 MS. GLASOW: The first one is basically to

1 allow -- if a governmental agency asks you to testify  
2 before it, you may do so. If that governmental body  
3 asks you to testify, not before it, but over here to  
4 this commission that they've established, you can do  
5 that.

6 We could either eliminate (3) as maybe  
7 unnecessary -- well, that doesn't go with what I just  
8 said.

9 MR. HOUSEMAN: No, that would be fine. If we  
10 eliminated (3), we could -- as well -- as long as we  
11 clarify in the commentary we're not changing -- we're  
12 not changing the intent, I don't think that's a  
13 problem.

14 MS. BATTLE: What about, testify orally or in  
15 writing before it or before commissions, committees or  
16 advisory bodies. You can pull them together.

17 MR. HOUSEMAN: That's fine, too.

18 MS. BATTLE: Yeah, that's one way that you  
19 cover responding directly --

20 MR. HOUSEMAN: That's not it, though. It's  
21 either --

22 MR. TULL: I think the question that raises,

1    though, is if what that means is, is that a change in  
2    the impact of (b), because the limitation is you can  
3    only testify or provide information to the party  
4    requesting it. I think the way you worded it, it would  
5    be a request from a legislator to appear before a  
6    commission, which would -- which may not be permissible  
7    under the restriction in the appropriations --

8           MR. HOUSEMAN: My suggestion, if there's  
9    confusion here, would be just to strike (3) and cover  
10   it in commentary. I think that would, as long as we're  
11   not making a substantive change.

12           MS. BATTLE: By giving examples -- okay.

13           MR. HOUSEMAN: That won't be a problem.

14           MS. BATTLE: Okay.

15           MR. HOUSEMAN: At least from our point of  
16   view.

17           MS. BATTLE: All right. Then what we're going  
18   to do is give examples of the various places that you  
19   can be directed by an elected official to give  
20   information. And (3) just is one example.

21           MR. HOUSEMAN: So you move the (4) up to (2),  
22   you'd strike (3). And (4) would be (3).

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1 MS. BATTLE: Right. John.

2 MR. ERLENBORN: That's fine with me, but let  
3 me raise another issue here. The words "employees" and  
4 "employee" are both used in 12.6 in the first paragraph  
5 under (a). Now, if we're going to be consistent, we  
6 should change that to personnel or go back to the idea  
7 of defining "employee" at the beginning of the reg.

8 If we don't make that change and you use  
9 "personnel" in one place and "employee" in another, I  
10 think the rules -- maybe not properly, but the rules of  
11 interpretation assume that you don't do something for  
12 no reason at all. Now, sometimes that is exactly what  
13 we do.

14 MS. GLASOW: They'll think it has different  
15 meanings, yes.

16 MR. ERLENBORN: Unless we conform one way or  
17 the other, we're going to be in trouble.

18 MS. GLASOW: We're checking the statute. The  
19 statute may itself use the term "employee," which --

20 MR. HOUSEMAN: I think the statute uses the  
21 term "employee."

22 MS. GLASOW: That means we're going to have to

1 look at this.

2 MS. BATTLE: Yeah, that's important. Also,  
3 here it says, "recipients and their employees." It  
4 seems to me if you've got a law firm, then the partners  
5 are the recipients. So you've covered -- in this  
6 particular context, covered both recipients, who may be  
7 law firm owners, and their employees, by the  
8 terminology.

9 But I think that John's point is accurate.  
10 Why do we then use "employee" here and "personnel"  
11 somewhere else? It may be that the fix in the other  
12 places to use, permitting by -- by putting some  
13 language in that says, recipient itself and its  
14 employees.

15 MS. GLASOW: Okay.

16 MS. BATTLE: That might be the way to fix it  
17 in the other place, as well.

18 MS. GLASOW: John says the statute doesn't use  
19 the term "employees," so I think we're okay. We'll go  
20 through this rule and identify and replace employees  
21 and see if we have any problems with substituting  
22 "personnel."

1 MS. BATTLE: Yeah. And one way to fix it is  
2 to say, "recipient and its employees." When you do  
3 that, I think you cover all entities, governmental  
4 entities that may become recipients, as well as the  
5 people employed by it.

6 MR. TULL: Isn't recipient personnel as  
7 opposed to employee? Doesn't "employee" get us back in  
8 the --

9 MS. BATTLE: Well, when you say recipient, I'm  
10 saying the attorney is the recipient. So, whatever the  
11 attorney does --

12 MR. TULL: I mean, that assumes -- we're very  
13 unlikely, I think, to ever give a grant to one sole  
14 lawyer who has no staff. That's -- they're always  
15 going to be a part of a firm even if it's only a one-  
16 person firm. And the grant presumably will go to the  
17 firm, which will have some legal -- it will either be a  
18 partnership or a professional corporation or something.

19 MS. BATTLE: Well, we say recipients and their  
20 employees. Yeah. You say recipients and their  
21 employees. I don't know that a firm -- well, I guess a  
22 firm could have someone on contract who is not an

1 employee.

2 MR. TULL: No. I think the term -- the  
3 suggested term is "recipient and its personnel" as  
4 opposed to "employee," to use a term which is much  
5 broader, to encompass partners, contract employees,  
6 independent contractors, the whole range of it.

7 MS. BATTLE: All right. Well, we'll take this  
8 personnel, employees, recipients issue and --

9 MS. GLASOW: Work on it.

10 MS. BATTLE: -- work on it.

11 MR. ERLNBORN: And we might say in the  
12 commentary that we mean to cover partners when we say  
13 personnel.

14 MS. BATTLE: Is there anything else that we  
15 find on page 8? Any of the members of the committee?  
16 Page 9?

17 MR. McCALPIN: Yeah, I got a couple.

18 MS. BATTLE: Bill.

19 MR. McCALPIN: Why in E and F on page 9 do we  
20 specify, "may use non-LSC funds," when that is in the  
21 title of 1612.6? 1612.6 says, "permissible activities  
22 using non-LSC funds."

1 MS. BATTLE: The title doesn't have legal  
2 effect, but it is mentioned in A. So I think that's  
3 the critical piece.

4 MS. GLASOW: I think it's just safer to say it  
5 in both places to make sure they don't miss the title  
6 somehow.

7 MS. BATTLE: You know, I don't know that when  
8 you go back to A-2, and you get down to E, it doesn't  
9 read well, because you say in A -- well, E is a  
10 separate one, so you shouldn't have to do that.

11 Not only that, you know, Bill, since E is a  
12 separate section, I think that the title doesn't cover  
13 it and I think you do need to say it.

14 MR. McCALPIN: Let me ask, can you use E with  
15 or without a request?

16 MR. HOUSEMAN: Yes. The statute says you can  
17 use non-LSC funds to engage in public rulemaking and  
18 you do not have to have a request.

19 MR. McCALPIN: Okay.

20 MS. GLASOW: I can't guarantee the legal  
21 effect of the title right at this moment.

22 MS. BATTLE: Yeah, that's why I --

1 MS. GLASOW: So I would feel safer keeping it  
2 in the restriction.

3 MS. BATTLE: That's my concern, as well.  
4 Anything else on 9?

5 MR. McCALPIN: Let me ask one other question.  
6 On 1612.7, does this imply that a recipient could use  
7 IOLTA or other public funds to engage in the activities  
8 prohibited by .7?

9 It says, "during working hours or while using  
10 recipient resources provided by the corporation or by  
11 private entities, which does not include IOLTA and  
12 other public funds," so that a recipient may use other  
13 public funds?

14 MR. HOUSEMAN: Yes. The answer is yes. I'm  
15 sorry. Suzanne.

16 MS. GLASOW: This is also covered in 1610,  
17 where we define IOLTA funds. This restriction is not  
18 in our appropriations act. It's in the LSC act. And  
19 it only reaches certain funds. It's not totally  
20 restricted as the 504 restrictions are.

21 So that's why we have it in a separate  
22 provision and use different language.

1           But, because 1610 also covers this and there  
2 we have defined IOLTA funds as being treated the same  
3 as public funds, so wherever you see public funds  
4 mentioned here, it would include IOLTA.

5           MS. BATTLE: Okay.

6           MR. McCALPIN: Well, I guess, first of all, I  
7 have some problem with having recipients participate in  
8 demonstrations, picketing, boycotts and so on.

9           MR. HOUSEMAN: I think we may be misreading  
10 this, Bill. "While providing legal assistance or  
11 representation, or while using resources by the  
12 corporation." In other words, if you're -- you can't  
13 use non-LSC funds for this activity of a program,  
14 because -- I mean, you can't do this while you're  
15 participating in legal assistance activities or when  
16 you're using funds provided by LSC or private party.

17           MS. BATTLE: I think that Bill's concern is  
18 the no employee part, because you cover the funds part  
19 well in the first part of A. It's when you limit the  
20 application of this to just employees.

21           And so it seems to me --

22           MR. HOUSEMAN: No recipient or employee?

1 That's all right.

2 MS. BATTLE: No recipient --

3 MS. GLASOW: This has been in our regulation  
4 for a very long time. This is not new language.

5 MR. TULL: I mean, we would have to do a more  
6 detailed search of the relationship between this and  
7 the restrictions in 1608. But the use of the language,  
8 "while providing legal assistance or representation of  
9 recipient's clients" is language which reflects a  
10 concept, which is also in 1608, which is a regulation  
11 prohibiting engagement in political activities. Both  
12 are grounded in the act. And the use of those terms, I  
13 believe -- although this has been a long time since  
14 I've looked at it and probably any of us at this table  
15 have looked at it. I believe that the use of that term  
16 comes from the way the restriction is reflected in the  
17 act.

18 As Suzanne says, this was -- this language was  
19 hammered out 12 years ago or 15, whenever. This is one  
20 of the original regulations, I believe, to reflect  
21 that.

22 It was certainly not intended then, nor has

1 any program, I believe, ever interpreted it to mean  
2 that it is permissible to engage in writing or other  
3 legal activities as long as you do it with IOLTA funds.

4 MS. BATTLE: Well, here's the way it used to  
5 read. A used to read, "while carrying out legal  
6 assistance activities and while using resources  
7 provided by the corporation, by private entities or by  
8 a recipient directly or through a sub-recipient, no  
9 person shall."

10 The use of the term "person" covers partners.

11 MR. ERLENBORN: That's pretty broad.

12 MS. BATTLE: That covers anybody.

13 MR. ERLENBORN: Corporations.

14 MS. BATTLE: Yeah. It covers anything. So I  
15 thinks that language actually which precedes the use of  
16 the word "employee" is broad enough that it covers all  
17 of the concerns that we've got. Can we do that?

18 MR. McCALPIN: Just simply substitute "person"  
19 for "employee" or "recipient."

20 MS. BATTLE: Yeah. I think that's broad  
21 enough to cover it. Does that reach your concern,  
22 Bill?

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1 MR. McCALPIN: Yeah, I think so.

2 MS. BATTLE: All right. Is there anything  
3 else on page 9? Can we take a real quick five-minute  
4 break?

5 (Brief recess.)

6 MS. BATTLE: We're on page 10 of 1612.

7 MR. McCALPIN: let me ask you a question about  
8 the very last line on the page and the first line on  
9 the next page.

10 Does this leave it open for a recipient to  
11 support or conduct a training program that trains  
12 participants to engage in activities prohibited by  
13 state law?

14 MS. BATTLE: No. I would think that  
15 activities that are prohibited by state law would be  
16 covered under a lawyer's ethical requirements. I mean,  
17 in other words, you wouldn't have a CLE on how to do  
18 drugs or how to do anything that is prohibited by state  
19 law.

20 MS. GLASOW: The LSC act and appropriations  
21 act, as implemented by our regulations and guidelines,  
22 would include any restrictions on anything that we

1 couldn't do under this. So we don't -- I don't think  
2 we have to add federal or state, because the only  
3 prohibitive activities you can't engage in are defined  
4 in the LSC act and appropriations act, as implemented  
5 by our regulations.

6 So I think all of that is covered by the  
7 terminology that we have here.

8 MR. McCALPIN: Well, I think that the problem  
9 is you certainly leave open the implication that  
10 somebody can conduct a training program that involves  
11 something that's contrary to state law. By specifying  
12 federal, you leave open the state.

13 MS. BATTLE: Well, what we're attempting to do  
14 here is to implement 504, which is federal law. And it  
15 seems to me --

16 MS. GLASOW: Maybe we should say, other  
17 federal law applicable to the corporation. All we're  
18 trying to do is include the appropriations act, as well  
19 as the LSC act. That's all we're trying to do here.

20 MR. McCALPIN: I understand, but my question  
21 is, is that too narrow a focus.

22 MS. GLASOW: Well, first, I guess I should

1 point out that this restriction is to train  
2 participants to engage in activities prohibited by  
3 everything we have listed here is not expressly  
4 expressed in the LSC act or appropriations act. This  
5 is something that the corporation has included as a  
6 matter of discretion in this rule for several years.

7 And all we were trying to do with this is say,  
8 Congress said you can't train to -- train to advocate  
9 particular public policies or what's in number one, two  
10 and three. We added the corporation's matter of  
11 discretion, four. We weren't trying to cover the whole  
12 field. We were just saying that if we prohibited  
13 something in our regulations or it's prohibited in our  
14 act, we don't want you to waste recipient resources to  
15 train in that area.

16 MR. TULL: Bill, can I ask, is your concern,  
17 activities prohibitions that might exist in state law  
18 as to how a program uses its funds? Or are you talking  
19 about violations of state law, such as a prohibition  
20 against stealing money, picketing, setting up a liquor  
21 store too close to a school?

22 MR. McCALPIN: Driving while intoxicated, use

1 of marijuana, you know, apparently if some drug was  
2 prohibited by state law, you could train people how to  
3 avoid it.

4 MR. TULL: No. I think this particular  
5 provision intentionally does seek to provide guidance  
6 regarding our restrictions and what a program may do or  
7 not do with regard to those. A program could not,  
8 under any of our cost standards, use its funds to  
9 participate, train, encourage or in any way support an  
10 illegal activity such as you described. Without  
11 stating that in a regulation, that's clearly something  
12 that would be a questioned cost and would be a  
13 violation of what we would expect them --

14 MR. McCALPIN: Well, if that's true, then why  
15 have you got 4 in here?

16 MR. TULL: Because this has to do with  
17 providing guidance to programs about what they should  
18 do in the -- or what they can and can't do in the  
19 context of what restrictions on their activities by  
20 Congress -- on their activities using the funds which  
21 we provide to them or using their other funds. It's  
22 seeking to provide guidance in a narrow area. And I

1 think the concern is to broaden it as if it is about  
2 not using funds to train about any activity, is that  
3 the broadening of the focus will rob it of providing  
4 guidance in a narrow area where we're seeking to answer  
5 questions persons generally have.

6 MR. ERLNBORN: Could I ask, would it do  
7 violence to the concept that you've just described if  
8 you take out the word "federal" and just say, "other  
9 applicable law"? It would remove Bill's concern and I  
10 think it would still do what you want.

11 MR. McCALPIN: Yeah, that would satisfy my  
12 concern.

13 MS. GLASOW: Okay. This is just an attempt to  
14 say, if the LSC act and the appropriations act prohibit  
15 abortion litigation, we don't want you to waste  
16 recipient resources in training to do abortion  
17 litigation. That's all it is. It's a gloss.

18 MS. BATTLE: "Applicable laws" will cover  
19 that. Okay. Anything else on 11? Or 12?

20 MR. McCALPIN: I want to ask a question on 12.

21 MS. BATTLE: Okay.

22 MR. McCALPIN: Subparagraph C at the top of

1 the page seems to limit the legal advice or assistance  
2 to eligible clients in creating an organization to  
3 preparing articles of incorporation and bylaws.

4 If clients decide to create a community  
5 economic development corporation, for instance, would  
6 the activity be limited to simply preparing articles of  
7 incorporation and bylaws?

8 MS. GLASOW: It uses the term, "such as  
9 preparing articles," so that it's not exclusive of  
10 other.

11 MR. McCALPIN: When you specify, you limit.  
12 It just seems --

13 MR. HOUSEMAN: Bill, this language has been  
14 here from day one.

15 MR. McCALPIN: Alan, that's no argument.

16 MR. HOUSEMAN: Well, I mean, nobody has  
17 interpreted "such as" to be limited to just these  
18 things.

19 MS. BATTLE: I think what you have here is an  
20 example of one of the things that one might be able to  
21 do to assist an eligible client in developing a plan or  
22 operation.

1           Generally, what we have done in the past when  
2 we've made examples of things is that we've done the  
3 examples in the commentary, rather than in the actual  
4 rule.

5           MR. McCALPIN: Why don't you put a period  
6 after "organizations" and put the rest of it in the  
7 commentary?

8           MR. TULL: Just a caution on that, and that is  
9 that we have found again and again that when we have  
10 taken language out, it is often interpreted as an  
11 intent to broaden -- to encourage -- it's often taken  
12 as an intent to change the nature of the restriction.  
13 Certainly, as a matter of matter, I would agree with  
14 Bill. But I think the risk may well be that it might  
15 be looked at by those who pay close attention to the  
16 regulatory process as suggesting a broader engagement  
17 in helping organizations to formulate themselves.

18           And I think it's -- I think given  
19 -- certainly, I think staff's counsel would be, given  
20 the fact that this has been language which has been  
21 with us for many years and has not created a problem in  
22 terms of being interpreted more narrowly than is

1 intended, that we may avoid having to explain why we  
2 took it out or have it be misinterpreted by leaving it  
3 in, although I think, as a legal matter, I think Bill  
4 is absolutely correct. It makes no difference. And it  
5 probably would appear to be narrowed than is intended.

6 MR. ERLNBORN: This is the let sleeping dogs  
7 lie proposal?

8 MR. TULL: Particularly little poodles like  
9 this one.

10 MS. BATTLE: I will say this at this juncture,  
11 since this is our look-through before we make our  
12 recommendation to the Board, that I see the merit in  
13 what John is saying given that we've got some specific  
14 tasks before us to try to make the changes to meet what  
15 504 requires. That it probably makes sense on this  
16 particular one, if there is absolutely no problem with  
17 it one way or the other, just leave it as it is.

18 Anything else on 12? Okay.

19 Now, we can move on to the next reg, which is  
20 1620.

21 MS. GLASOW: LaVeeda.

22 MS. BATTLE: Yes.

1           MR. HOUSEMAN: We had this side bar  
2 conversation earlier. We're concerned, because  
3 -- about the word "employee" being changed and trying  
4 to change it throughout here. How should we, who are  
5 going to try to work on the drafting of this, proceed  
6 at this point?

7           MS. BATTLE: I think that Bill raised a  
8 significant point in raising the issue about "employee"  
9 in the context of the changes that we now have in 502.  
10 I think it is an issue that doesn't just affect 1612,  
11 but it's an issue that affects everything that we have  
12 from 1600 all the way to 1642.

13           My suggestion would be -- and I'll hear from  
14 Board members on this -- that we in the commentary,  
15 make it clear that the word "employee" here should take  
16 into account what 502 sets out as to what new  
17 recipients might include.

18           In the one specific place that I suggested,  
19 "person," "person" was consistent with the language  
20 that was in 1612 before. So I think if we go back to  
21 "person" there, we haven't done anything, but use  
22 language that was in place before.

1           But, to the extent that there are other places  
2 throughout this regulation where the term "employee" is  
3 used, I think we ought to give some definition to it in  
4 the commentary here. And I'd like to see our staff do  
5 a look-through of the entire regs to the use of the  
6 term "employee" and come up with a definition that we  
7 can put in the 1600s that will make it consistent  
8 throughout, taking into account the implications of  
9 502.

10           Now, Bill, does that meet your concern?

11           MR. McCALPIN: I think so.

12           MS. BATTLE: Anybody else?

13           MR. ERLENBORN: Just a question. You said a  
14 definition in the commentary?

15           MS. BATTLE: An explanation in the commentary  
16 of "employee" and the implications of 502.

17           MR. ERLENBORN: Let me just once again suggest  
18 it could be done with a definition at the beginning of  
19 1612, I guess we were working on.

20           MS. BATTLE: It could be.

21           MR. ERLENBORN: If, in context, that new  
22 definition you would incorporate there actually has

1 application everywhere you use "employee" throughout  
2 the reg -- and I don't know.

3 MS. GLASOW: We just hesitate to do it at this  
4 point, because we haven't had the time to go back and  
5 really look at the implications. So, for this  
6 particular rule at this time, I think all interested  
7 parties would feel more comfortable if we dealt with it  
8 in the comments and then went back to 1600, had a  
9 chance to really look at it carefully before we do  
10 something that has an effect we just haven't  
11 anticipated.

12 MR. ERLBORN: Now, does that mean that we  
13 will not change "employee" as it was originally in this  
14 since we started working; or are we going to change to  
15 "person" in some places, "personnel" in other places?

16 MS. GLASOW: No. It means we will use the  
17 term "employee" in this rule. But in the comments,  
18 we'll say that "employee must take into consideration  
19 the 504 restrictions and the types of entities that can  
20 receive grants now from the corporation," for instance,  
21 for the purposes of this part. In some instances,  
22 "employee" may include a partner in a law firm or

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1 something like that, and just make it clear.

2 MR. ERLNBORN: So we're reversing the  
3 decision we made earlier --

4 MS. GLASOW: Right.

5 MR. ERLNBORN: -- to use "personnel" and  
6 "person"?

7 MS. BATTLE: Well, not -- the "person" is  
8 going to stay.

9 MS. GLASOW: Not the "person."

10 MS. BATTLE: Because "person" is consistent  
11 with what was in the reg before. But "personnel" we're  
12 not going to use, because we want to use "employee"  
13 throughout.

14 MR. ERLNBORN: Just so I understand.

15 MS. BATTLE: Okay. Now, are there any other  
16 concerns about 1612 before we move on to 1620?

17 MR. McCALPIN: Are you ready for a motion on  
18 1612?

19 MS. BATTLE: Yes, I will entertain a motion, I  
20 guess. I really would rather look back this afternoon  
21 when they -- can we take a look at this early  
22 afternoon, just to see how all of the other changes

1 fall out so we can entertain a motion for what we're  
2 going to present to the Board? Okay. All right.  
3 Let's hold that over until we have a clear sense of  
4 what changes have been made.

5 MS. GLASOW: Okay.

6 MS. BATTLE: 1620, which pertains to the  
7 corporation's interim reg on priorities in the  
8 allocation of resources. There are some changes that  
9 have been made to this. There are essentially  
10 technical changes, changes for purposes of making the  
11 reg read a little bit better and changes to make it  
12 work a little bit better is, I guess, the best way that  
13 I can characterize my view of some of the proposed  
14 changes that we have in 1620.

15 MS. GLASOW: There are very few changes to  
16 this from the last draft on page 3. May is highlighted  
17 in paragraph A. That's a change adopted by the  
18 committee at the last meeting.

19 In paragraph C at the bottom of the page,  
20 again -- the interim rule used the word "should,"  
21 whereas the prior rule that was revised by the interim  
22 rule used the word "shall." And, again, that raised a

1 concern with Congressional staff that there was a more  
2 substantive meaning intended.

3 So we recommend going back to the prior rule's  
4 use of the word "shall." And, also, note to the  
5 committee as we have in the past, that we intend to  
6 come before the committee sometime in the near future  
7 as we review these factors in this section in light of  
8 competition process and in light of the changes in law,  
9 that we'll look at the change of the word "should" or  
10 "shall" at that point.

11 But, at this point, we recommend going back to  
12 the word "shall," so that there is no misunderstanding  
13 that we had a substantive intent behind changing it.

14 MS. BATTLE: Okay.

15 MS. GLASOW: Page 4.

16 MR. McCALPIN: Could I suggest a couple of  
17 minor drafting changes? In subparagraph 3 at the top  
18 of -- yeah, subparagraph 3, I suggest that the phrase,  
19 "difficulties of access" is not a very apt -- we're  
20 talking about difficulties in gaining, obtaining,  
21 access. Is that what we're talking about? It seems to  
22 me difficulties of access is not a very apt way to say

1 it.

2 MS. GLASOW: This may be a phrase that comes  
3 out of the LSC act, but I understand your concern. It  
4 would be 1007 (g) or (h) somewhere.

5 MR. McCALPIN: H, I think.

6 MS. GLASOW: Where we did the access studies.  
7 Difficulties of access is the term used in LSC act.  
8 And I'm sure that's why we used that here.

9 MR. ERLENBORN: They don't do as thorough a  
10 job as we do.

11 MS. BATTLE: It is difficulties of access.

12 MR. McCALPIN: I guess we're barred from  
13 improving on what Congress has done.

14 MR. ERLENBORN: That's not wise to try it.

15 MS. BATTLE: We get to just interpret. Okay.

16 MR. McCALPIN: In 7, "the relative importance  
17 of particular legal problems to" -- is it "importance  
18 to the clients"?

19 MS. GLASOW: I'm sorry. Where is this?

20 MR. McCALPIN: Seven.

21 MS. GLASOW: Seven.

22 MR. McCALPIN: I don't think that's in the

1 statute. It's, "importance of legal problems to  
2 clients," I would think.

3 MR. ERLNBORN: Yeah, you're going back to  
4 "importance," "importance to the clients," not problems  
5 to the clients.

6 MR. McCALPIN: Yeah, it's "importance" to the  
7 client, "importance of legal problems to the client."

8 MS. GLASOW: Okay.

9 MS. BATTLE: Ernestine.

10 MS. WATLINGTON: Is these regs -- has to be  
11 adhered to by every recipient that's receiving these  
12 funds?

13 MS. BATTLE: Yes.

14 MS. FAIRBANKS-WILLIAMS: Okay. Because, like  
15 the purpose of this one said, this part is designed to  
16 provide guidance to recipients that are setting  
17 priorities and to assure the recipient's governing  
18 bodies adopt written priorities for the types of cases  
19 that is included in the emergency with which the staff  
20 limits its commitments of time and resources.

21 So, like if a -- you know, a private attorney  
22 gets that -- so they have to abide by these rules and

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1 things.

2 MS. BATTLE: Yes.

3 MS. GLASOW: Yes.

4 MS. WATLINGTON: And to have proven that they  
5 can do that.

6 MS. GLASOW: Yes, and that's in the RFP that  
7 went out to all applicants.

8 MS. WATLINGTON: I just wanted to make sure.  
9 If someone asks the question, I'll know how to answer  
10 it.

11 MS. BATTLE: Any other changes or observations  
12 on page 4?

13 MS. GLASOW: Paragraph A that starts at the  
14 bottom of page 4, the changes you see there were either  
15 adopted by the committee or they're just stylistic  
16 changes we recommend to just make it more easily read  
17 and understood. There is no substantive change meant  
18 there.

19 MS. BATTLE: Okay.

20 MS. GLASOW: And we also recommend that the  
21 commentary point out that in most instances, a  
22 recipient would have sufficient notice in a change in

1 law, and this factor would only be appropriate when the  
2 change in law is, in fact, unanticipated.

3 I should amend what I said before. We did  
4 strike "such as natural disasters" or anticipated  
5 changes in the law as examples that are unnecessary.  
6 And we can discuss them in the commentary.

7 MS. BATTLE: Was that in the original?

8 MS. GLASOW: That was in the version, I  
9 believe, adopted by the -- not adopted, but there was  
10 consensus of the committee on this last meeting. So  
11 this is an additional change we're recommending, I  
12 believe.

13 MS. BATTLE: Priority setting is not a long-  
14 term reg, though, is it?

15 MS. PERLE: Yes, it is, but this section is  
16 new.

17 MS. BATTLE: Okay. So we don't have a history  
18 of this.

19 MS. PERLE: We don't have a long history on  
20 this, no.

21 MS. BATTLE: Okay. And I also see that you  
22 struck all of the language on the factors that may be

1 considered as opposed to the factors that shall be  
2 considered. Can you explain to us why that entire  
3 section has been stricken?

4 MS. GLASOW: There again was a concern on the  
5 Hill that this paragraph B was giving an executive  
6 director too much discretion, and that any factors  
7 considered whatever should always be determined by the  
8 governing body.

9 When we looked back at this paragraph to  
10 respond to that comment, we realized that, A, we didn't  
11 feel that this provision was necessary, that maybe we  
12 were going too far in micro-managing.

13 And the other was that we also saw that some  
14 of the factors were almost redundant of factors  
15 mentioned or could be included in those in paragraph A  
16 above.

17 So our recommendation at this point is to just  
18 strike paragraph B as unnecessary and somewhat  
19 redundant.

20 MS. BATTLE: Is the point by this to assure  
21 that it is the governing body that sets the priorities  
22 as to how the resources will be allocated as opposed to

1 the executive director having --

2 MS. GLASOW: That is correct.

3 MS. BATTLE: -- some final say in that? All  
4 right. Any other questions on 5 or the top of 6?  
5 Anything else on 6?

6 MS. GLASOW: It's just noted a change that was  
7 made by the committee at the last meeting in paragraph  
8 A of Section 5. That's it.

9 MS. BATTLE: Okay.

10 MR. McCALPIN: Let me raise a question.

11 MS. BATTLE: Bill.

12 MR. McCALPIN: On page 7, 1620.7, both A and B  
13 talk about emergency cases or matters not within the  
14 priorities. And it seems to me that in 1620.4, we have  
15 now defined emergency cases as not within the priority,  
16 so that -- you know, an emergency case by definition is  
17 one that was not within the priorities.

18 MS. BATTLE: Well, but it says, emergencies  
19 include. When you say, "include," is it all-inclusive,  
20 or does it mean all emergencies must be outside of your  
21 priorities?

22 MR. McCALPIN: I think when we say that we're

1 undertaking emergency cases that are not within the  
2 priorities, emergencies include non-priority cases or  
3 matters that require legal action.

4 And I would think that that defines an  
5 emergency action as not being within the priority.

6 MS. PERLE: But there may be things that  
7 someone would consider an emergency. For instance,  
8 housing is a priority in the program. And there's  
9 emergency housing cases. We don't -- we want to just  
10 make clear that they don't have to report that, because  
11 it's within the priorities.

12 MS. BATTLE: They only report -- emergencies  
13 is actually a broader sphere than the priorities issue.  
14 You have some emergencies that fall within the  
15 priorities. And, because they're emergencies, maybe  
16 you don't get your client identification together  
17 quickly, because it's an emergency situation and you  
18 don't have time to. But it may be within your  
19 priorities.

20 There are some emergencies that fall outside  
21 of the priorities. And, as it relates to those  
22 emergencies that fall outside of the priorities, you've

1 got some requirements in this regulation as to what you  
2 must do.

3 But I think that there are emergencies based  
4 on what we have in 1620.4 and the way that it's  
5 structured that might be within and outside of the  
6 priorities. For that purpose, I think it's appropriate  
7 to specify in 1620.5 just those emergency cases that  
8 fall outside of the priorities and what we must do to  
9 them.

10 MR. TULL: This is an issue that we spent a  
11 fair amount of time on, wrestling with precisely the  
12 issue that you raise, Bill. And I think what we  
13 struggled with is there's a philosophical kind of  
14 logical problem in what we define has to be reported.

15 But what we ended up in terms of the proposed  
16 solution was based on two practical considerations.  
17 One is the assumption that the intent of Congress  
18 requiring the reporting of cases was to make certain  
19 that if a program took cases outside of its priorities,  
20 that that matter was brought to the attention of this  
21 Board and to the corporation for the purposes of the  
22 Board correcting what Congress wants to be corrected,

1 which is to make certain that cases are taken within  
2 the priorities which are defined by the Board.

3 This comes in the context of other changes,  
4 which include staff of the program certifying they will  
5 take no cases outside of priorities.

6 We also in drafting the reg recognized that we  
7 gave guidance as to emergency cases, and felt it is  
8 also important for cases which are taken within the  
9 definition of emergencies adopted by the Board, which  
10 some argued those are then within the priorities, so  
11 they shouldn't be reported. But the notion -- one of  
12 the concepts that is woven into the regulation is that  
13 cases which are taken as emergencies, particularly  
14 those which relate to unforeseen circumstances, that  
15 those should be brought to the attention of the Board,  
16 even though technically they're within the priorities,  
17 because they're within the definition of emergency.

18 That the Board should know that suddenly we're  
19 taking a whole bunch of housing cases, which were not  
20 specifically defined in the priorities, but because of  
21 some change, because of a hurricane, because of a  
22 change in an ordinance by the city government, we

1 suddenly have a whole number of persons coming in with  
2 new kinds of housing cases.

3 The Board should know that in order to either  
4 ratify that those cases are coming in under the  
5 emergency policy, or to say, no, we don't think this is  
6 appropriate.

7 So you point out a logical inconsistency, but  
8 the recommendation of the staff from a notion that we  
9 really -- that there is a reason to have both  
10 emergencies that are clearly within the priorities  
11 definition of emergencies, as well as all cases that  
12 are outside the priorities of both those need to be  
13 reported.

14 MR. McCALPIN: Well, it seems to me 7 only  
15 requires you to report emergencies which are outside  
16 the priorities. It does not require reporting  
17 emergencies that are within the priorities.

18 MS. GLASOW: That's right.

19 MS. BATTLE: And that's a little bit  
20 inconsistent with what you said, John.

21 MS. GLASOW: Yes.

22 MS. BATTLE: I think the reporting requirement

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1 is only for those that are outside of the priorities.  
2 And I think that emergencies is defined or utilized in  
3 4 in a way that includes those that are inside and out.  
4 But the reporting requirement only attaches to those  
5 that are outside.

6 MS. GLASOW: I think that's true. There is a  
7 logical redundancy there. And I think it was an  
8 effort. Sometimes redundancy is favored, I think. And  
9 this is a case where I think we made that choice.

10 Simply because we realize that, for instance,  
11 in -- there are requirements or restrictions in the  
12 alien regulation. Now, a recipient may have a priority  
13 to take alien cases with certain requirements. And,  
14 occasionally, you can deviate from those requirements  
15 if you have an emergency alien case; for instance,  
16 getting documentation.

17 So that's what we were trying to distinguish,  
18 with emergencies within cases that are within your  
19 priorities and emergencies that are cases that you  
20 shouldn't be taking because they're outside your  
21 priorities. And that's -- yes.

22 MS. BATTLE: And the issue here is the

1 corporation knowing when we've got meager resources and  
2 you have established priorities, cases that you decide  
3 to take that are outside of what you said you are going  
4 to do.

5 MS. GLASOW: Right. Right.

6 MS. BATTLE: And we need to know about those.

7 MS. GLASOW: This is just an effort to make it  
8 perfectly clear what we're talking about in the  
9 reporting requirement, although there is a bit of  
10 redundancy with the definition, I agree.

11 MS. WATLINGTON: LaVeeda, I do have a question  
12 here.

13 MS. BATTLE: Okay.

14 MS. WATLINGTON: Sometimes your emergency can  
15 determine your priorities, because it changes. The  
16 issues that can come up in the community have not been  
17 defined as priorities. But emergencies, like you say,  
18 a storm or something can turn your priorities around as  
19 to what the client community's needs are.

20 MS. BATTLE: And a board, a governing body can  
21 amend its priorities and make changes if that occurs,  
22 so that they don't have to report all of those cases as

1 emergencies, but revamp and reassess their allocation  
2 of resources to meet that.

3 MS. GLASOW: Right. And I think that's what  
4 John was trying to say.

5 MS. WATLINGTON: Is this disallowing that?  
6 That's what I want to make sure.

7 MS. GLASOW: Yes. In other words, if you're  
8 taking cases outside of your priorities, you would  
9 report on that and you report to the Board, because the  
10 Board needs to know that. So they either need to  
11 change their priorities or tell you to stop taking  
12 them, one or the other.

13 MS. FAIRBANKS-WILLIAMS: So what's the reason  
14 for the signed agreement from the staff?

15 MS. BATTLE: I really think that's to put  
16 everybody on notice as to what the priorities are, so  
17 that as people are doing intake, as people are doing  
18 various things throughout the recipient, they are aware  
19 of what the priorities are and they are aware that if  
20 they take cases outside of those priorities, they've  
21 got some reporting requirements.

22 MS. GLASOW: And that's required by 504.

1 That's a statutory requirement.

2 MS. BATTLE: Anything else in 1620.6, 7 at  
3 all?

4 MS. GLASOW: No.

5 MS. BATTLE: Any other concerns? I think this  
6 is one that I might be able to entertain a motion on.

7 M O T I O N

8 MR. ERLNBORN: So moved.

9 MS. WATLINGTON: Second.

10 MS. BATTLE: It's been moved and seconded that  
11 we report this out as a recommendation with the changes  
12 that we've made today to the Board. All in favor?

13 (Chorus of ayes.)

14 MS. BATTLE: All opposed?

15 (No response.)

16 MS. BATTLE: Motion carries. We will report  
17 1620 out with the technical changes that we've made  
18 today.

19 It's about 12:20. I was told that our lunch  
20 was going to be ready between 12:00 and 12:30. I don't  
21 know if that's accurate, or do we have more time to  
22 work?

1 (Discussion off the record.)

2 MS. BATTLE: All right.

3 MS. GLASOW: We could do 1627 very quickly.

4 MS. BATTLE: Okay. Let's do 1627.

5 MR. McCALPIN: 27?

6 MS. BATTLE: Yeah, let's skip 1626. We'll be  
7 here for quite some time on it, but let's try to do  
8 1627. This, John, I think gets to your concern about  
9 the membership dues.

10 1627 has been retitled to Subgrants and  
11 Membership Fees or Dues.

12 MS. GLASOW: Correct.

13 MS. BATTLE: And we initially took the word  
14 "fee" out, and it didn't really have, in our view, any  
15 impact. But, after some discussion, particularly with  
16 people on the Hill, to make sure that it's clear to  
17 everyone, we now have the term "membership fees" in the  
18 title for 1627.

19 Okay. Suzanne, can you give us the changes?

20 MS. GLASOW: Very few here. Let me just point  
21 out again that this rulemaking process has only revised  
22 the fees and dues sections of 1627 that we intend to

1 bring revisions to the subgrant section before this  
2 committee in the near future.

3 We used the term, "membership fees," because  
4 the old term in the old rule, "fees and dues,"  
5 basically the definition of that was a membership fee  
6 type of a definition and really was a definition of  
7 dues. So that's why we're using, membership fees and  
8 dues as the term, name of the rule and also as the term  
9 that is being defined.

10 MS. BATTLE: In 1627.3, I see a typographical  
11 error, "requirements for all subgrants."

12 MS. GLASOW: Yes, I just had that pointed out  
13 to me.

14 MS. BATTLE: All right. Anything else on page  
15 2? Any other concerns? Taking into account, of  
16 course, that this is only a part of 1627 that we're  
17 reviewing.

18 Now, why are we using the term, "corporation  
19 funds," instead of "LSC funds" here? We've used the  
20 funds, "LSC funds," "non-LSC funds."

21 MS. GLASOW: They've actually been used  
22 interchangeably. When I went back and looked at the

1 rules, in some places, we used one and some the other.  
2 It really -- we could change it here, but it would  
3 still be inconsistent with other rules elsewhere, so  
4 -- because some use some and some use the other.

5 MS. PERLE: It's up here when we talked about  
6 non-LSC funds, so it might make sense to say it.

7 MS. GLASOW: Would you like us to change it to  
8 LSC funds?

9 MS. BATTLE: Yes. Because -- yeah, we used  
10 the term non-LSC funds," and I think that's a better  
11 parallel use of the term.

12 MS. GLASOW: I agree.

13 MS. BATTLE: All right. Anything else on page  
14 2 or 3? Hearing none, then I will entertain a motion.

15 M O T I O N

16 MR. McCALPIN: So moved.

17 MS. WATLINGTON: Second.

18 MS. BATTLE: It's been properly moved and  
19 seconded that we recommend Part 1627, with the one  
20 technical change, to the Board tomorrow. All in favor?

21 (Chorus of ayes.)

22 MS. BATTLE: All opposed?

1 (No response.)

2 MS. BATTLE: The motion carries. Client  
3 Identity and Statements of Fact, is that going to take  
4 some time?

5 MS. GLASOW: No, that should go very quickly,  
6 too.

7 MS. BATTLE: All right. Why don't we go on to  
8 1636? Client Identity and Statement of Fact. We have  
9 some changes to this short rule. It's about three  
10 pages. Can you tell us about the changes?

11 MS. GLASOW: Okay. Page 2, on the Purpose  
12 section, the word "ensures" is a change made by the  
13 committee at the last meeting. And then in Section  
14 2(a)(1), these are changes made by the committee at the  
15 last meeting with the exception of -- you'll see the  
16 words "state" and "local" are struck out in the bolded  
17 language.

18 We suggest taking those words out, because  
19 there may be also federal law. And so we would just  
20 use the term "law."

21 MS. BATTLE: That makes sense.

22 MS. GLASOW: Or "court rules," right.

1 MS. BATTLE: Any -- Bill, any concerns about  
2 that?

3 MR. McCALPIN: No.

4 MS. BATTLE: All right. Any concerns at all  
5 on page 2, any other members? Page 3?

6 MS. GLASOW: The bolded language in paragraph  
7 2 at the top of the page is a change made by the  
8 committee at the last meeting.

9 And down at the bottom, we've added the word  
10 "person" or "to go before party," person or party, in  
11 paragraph B, because we feel there may be instances  
12 where it's some other person, other than opposing  
13 person, that may be implicated there.

14 MS. BATTLE: Bill.

15 MR. McCALPIN: I have two questions. The  
16 first is in subparagraph C, just ahead of 1636.3. It  
17 says that in the event of an emergency, the recipient  
18 may proceed without a signed statement of facts,  
19 provided that the statement is signed as soon as  
20 possible thereafter. That presumes that there must be  
21 a statement of -- without saying so.

22 I wonder if what you're saying, what you mean

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1 is that, provided that the statement is provided and  
2 signed as soon thereafter as possible.

3 In other words, I think that what you're  
4 intending is that they can proceed in an emergency even  
5 without the so-called statement of facts or and its  
6 being signed, provided that, as quickly as possible  
7 thereafter, there is such a statement of fact and it is  
8 signed.

9 But this implies the necessity of having the  
10 statement, but without the signature before you  
11 proceed.

12 MS. GLASOW: I see what you mean.

13 MR. McCALPIN: Right, is prepared or provided  
14 or whatever.

15 MS. FAIRBANKS-WILLIAMS: But on the front,  
16 doesn't it say, unless the court is ordered protecting  
17 the claim, such disclosure?

18 MR. McCALPIN: Well, this is a different  
19 situation. This is the emergency situation. And what  
20 you have to have to proceed in an emergency situation.  
21 I thought that the intent was to go ahead and get the  
22 statement and get it signed later. But the way this is

1 written, it presumes that you have to have the  
2 statement, though it's not signed.

3 MS. GLASOW: That's correct. And this is  
4 parallel to paragraph 2 up above, prepare a statement  
5 that is signed.

6 MR. McCALPIN: Right.

7 MS. GLASOW: And then we'll say -- correct.  
8 We can do that.

9 MR. McCALPIN: The other comment I have is in  
10 paragraph A of 1636.3. Why do we here say, recipient  
11 of the corporation? I don't recall that we use the  
12 word "recipient" frequently. And why do we specify  
13 recipient of the corporation?

14 MS. GLASOW: I'm not sure. Maybe it's in the  
15 statutory language and we just copied it. Where is it?

16 MS. PERLE: Here.

17 MS. GLASOW: We can take out, "of the  
18 corporation."

19 MR. McCALPIN: We use recipient all of the  
20 time.

21 MS. BATTLE: We do.

22 MR. McCALPIN: Without that qualification.

1 MS. GLASOW: Okay.

2 MS. BATTLE: Any other changes to 1636.3,  
3 Access to Written Statements? Then we can move on to  
4 page 4. Any observations or suggested language changes  
5 to page 4? Okay. Hearing none, then I will entertain  
6 a motion to recommend the Board adopt with changes Part  
7 1636, Client Identity and Statement of Facts.

8 M O T I O N

9 MS. WATLINGTON: I'll move this.

10 MR. McCALPIN: Second.

11 MS. BATTLE: It's been moved and seconded that  
12 we adopt -- that we recommend the Board adopt 1636.  
13 All in favor?

14 (Chorus of ayes.)

15 MS. BATTLE: All opposed?

16 (No response.)

17 MS. BATTLE: Motion shall carry.

18 MS. GLASOW: We got the go-ahead to go to  
19 1637?

20 MS. BATTLE: Yeah, let's go on to 1637. We  
21 will feel so accomplished this morning. Okay. 1637  
22 pertains to representation of prisoners. Do we have

1 any changes to this? We have some changes to this.

2 MS. GLASOW: Not really. I mean, most of  
3 regulatory changes are all ones adopted by the  
4 committee at the last meeting. The only thing we  
5 recommend is that the commentary clarify that the  
6 exception, which is reflected in Section 4, Change in  
7 Circumstances, that the commentary point out that this  
8 does not permit the recipient to take on any new issues  
9 or matters for the client.

10 MS. BATTLE: All right. Any other questions  
11 on 1637?

12 MR. ERLENBORN: Question about -- I guess it's  
13 the definition at the top of page 2, again referring to  
14 the commentaries that I read. There were quite a few  
15 that were directed at the question of one that might be  
16 incarcerated or held involuntarily in a mental  
17 institution, although the original acquisition of the  
18 body of the person was in relation to charge of a  
19 crime.

20 This would seem to include the incarceration  
21 in a mental institution, as well as a prison. Is that  
22 the intent?

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1 MS. GLASOW: No. We fixed that problem in  
2 paragraph B, federal, state or local prison means any  
3 penal facility, which would be a criminal facility.  
4 And we'll explain that thoroughly in the comments,  
5 because when you look at the prohibition, you have to  
6 meet both definitions. You have to be incarcerated in  
7 a federal, state or local prison, which means a penal  
8 facility.

9 MR. ERLENBORN: Okay.

10 MS. BATTLE: And those two words are going to  
11 be used in tandem. If you were to read them  
12 separately, I think John is absolutely right. After  
13 you've read the definition of incarcerated, it would be  
14 broad enough to include mental institutions. But, in  
15 this particular rule, the two, incarcerated, and  
16 federal, state or local prison, are used in tandem in  
17 all instances.

18 MR. ERLENBORN: Understood.

19 MS. BATTLE: So that clears it up.

20 MR. ERLENBORN: And agreed.

21 MS. BATTLE: All right. Any other concerns or  
22 questions about our rule on prisoners? Hearing none, I

1 will entertain a motion that we recommend to the Board  
2 with the commentary to reflect what Suzanne has pointed  
3 out, 1637, Representation of Prisoners.

4 M O T I O N

5 MR. ERLNBORN: So moved.

6 MS. BATTLE: It's been moved.

7 MS. FAIRBANKS-WILLIAMS: Second.

8 MS. BATTLE: Seconded. All in favor?

9 (Chorus of ayes.)

10 MS. BATTLE: All opposed?

11 (No response.)

12 MS. BATTLE: The motion carries. Let's see.

13 Solicitation. Why don't we -- Solicitation is so  
14 short, let's take one more. Let's take it up, because  
15 then we've got the two weighty ones for this afternoon.

16 1638, Restriction on Solicitation. Are there  
17 any questions about this one? Suzanne.

18 MS. GLASOW: This is basically the same as  
19 that agreed upon by the committee last time, except the  
20 committee asked us to come back with a better  
21 description of an ombudsman program. They agreed in  
22 principal to give an exception for ombudsman programs.

1 But we just used the term, and you were not comfortable  
2 with that.

3 So what we suggest is reflected in page  
4 -- starting at the bottom of page 2. This part does  
5 not prohibit representation or referral of clients by  
6 recipients pursuant to a statutory or private ombudsman  
7 program to provide investigatory and referral services  
8 and/or legal assistance on behalf of persons who are  
9 unable to seek assistance on their own, including those  
10 who are institutionalized or are physically or mentally  
11 disabled.

12 And the commentary will explain that more  
13 thoroughly and even cite some of the federal and state  
14 ombudsman programs that were cited in the comments that  
15 we received.

16 MR. ERLBORN: Question. What is the  
17 definition of "ombudsman"?

18 MS. GLASOW: It's basically everything that  
19 comes after "to provide," to include "to provide."

20 MS. BATTLE: In other words, they provide  
21 investigatory referral services or legal assistance for  
22 people who are not able to seek it on their own.

1 MS. PERLE: There's a definition of  
2 "ombudsman" in Black's Law Dictionary. I don't  
3 remember the exact details of it. It basically defines  
4 an ombudsman as a go-between; you know, it's someone  
5 who sort of -- who raises issues between those who  
6 affect it and those who have responsibility for dealing  
7 with it, which I thought -- which I think we felt  
8 really went beyond what was intended to be covered  
9 here.

10 So that's why we added the material, the bit  
11 about people being unable to seek assistance. And we  
12 were really talking about people who are  
13 institutionalized.

14 MR. ERLENBORN: Does the use of the word  
15 "ombudsman" either expand or restrict the language that  
16 follows?

17 MS. PERLE: I think the language that follows  
18 restricts the term "ombudsman."

19 MR. ERLENBORN: Would it be necessary to use  
20 "ombudsman?"

21 MS. PERLE: Well, it's become a term of -- it  
22 is a term of art in these variety of programs that are

1 funded through the protection and advocacy services  
2 programs, for example, and others.

3 MS. FAIRBANKS-WILLIAMS: We've got one on  
4 nursing homes.

5 MS. PERLE: Yeah, the nursing home programs  
6 and the hospital programs and the mental institution  
7 programs. I think that the statutory programs use the  
8 term "ombudsman."

9 MR. ERLENBORN: I guess what I'm asking is, if  
10 you didn't have ombudsman in there, would the language,  
11 "to provide investigatory referral," et cetera, extend  
12 beyond an ombudsman program? Does ombudsman limit  
13 that?

14 MS. PERLE: I see what you mean.

15 MS. GLASOW: Maybe we should say, "ombudsman  
16 program that provides." Would that help?

17 MS. PERLE: No. I think what Mr. Erlenborn is  
18 suggesting is if you take out ombudsman, then you're  
19 not concerned about whether the program uses the  
20 term --

21 MR. ERLENBORN: Is called "ombudsman."

22 MS. PERLE: Right.

1 MR. ERLNBORN: Exactly. If it does these  
2 other things that are really the core of your  
3 definition.

4 MS. PERLE: And then what we can do is, in the  
5 commentary, we can say this -- these programs would  
6 include the ombudsman programs established under a  
7 protection and advocacy, but it could also include  
8 other programs that are established to provide these  
9 services, but may not be called ombudsman.

10 MR. ERLNBORN: In looking at this, I would  
11 think that ombudsman was meant to be a limitation, to  
12 restrict what otherwise might be included in the  
13 language that follows. If that's not the intent, then  
14 I don't think it should be there.

15 MS. GLASOW: I think it is the intent.

16 MR. ERLNBORN: It is the intent.

17 MS. GLASOW: This is an exception to a pretty  
18 strong restriction, and we're trying to limit it.

19 MS. BATTLE: I want Bill to help me with this,  
20 because he's made an observation in another instance.  
21 Why not say, pursuant to a program to provide. And  
22 then at the end, say, such as a private ombudsman

1 program. That's using it as an example.

2 MS. GLASOW: That would really expand it  
3 beyond ombudsman programs. And we're really only  
4 trying to reach ombudsman programs as we define it.

5 MR. ERLENBORN: So it was meant to be a  
6 limitation.

7 MS. GLASOW: Right.

8 MR. TULL: I think the problem is that the  
9 term "ombudsman" in the dictionary is broad as Linda  
10 described it. But the term in a number of federal  
11 statutes, where they're set up and are funded is, in  
12 fact, a restriction, and there for a very narrow  
13 purpose. And we were -- the comments to the original  
14 interim rule spoke to those circumstances. And this is  
15 an effort to address that fairly narrow one.

16 Just the definition that persons who are  
17 unable to seek assistance on their own, including  
18 those, is very broad, because that would include, among  
19 others, the very group that Congress totally intended  
20 not to be able to be solicited by a program for  
21 representation.

22 MS. GLASOW: If we said a private ombudsman

1 program that provides --

2 MS. BATTLE: Designed to provide  
3 investigatory.

4 MS. GLASOW: That would make it sound more  
5 like a definition, I think. And in the comments, we  
6 can clarify by citing the types of programs we mean,  
7 clarify what we mean by this.

8 MS. BATTLE: Anything else? We have before us  
9 then 1638, Restriction on Solicitation. I will  
10 entertain a motion that we recommend that the Board  
11 adopt with the changes recommended by this rule.

12 M O T I O N

13 MS. WATLINGTON: So moved.

14 MS. BATTLE: It's been moved.

15 MR. ERLENBORN: Second.

16 MS. BATTLE: Seconded. All in favor, raise  
17 your hand.

18 (Show of hands.)

19 MS. BATTLE: All opposed?

20 (No response.)

21 MS. BATTLE: Motion carries.

22 MR. ERLENBORN: Just checking to see if we're

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1 listening?

2 MS. BATTLE: That's right. Okay. We're at a  
3 point now that I think we might want to break for  
4 lunch. We have this afternoon before us Welfare  
5 Reform. We've got the federal law reg. We've got  
6 attorneys' fees.

7 MS. GLASOW: And aliens.

8 MS. BATTLE: And aliens. So we've got a  
9 weighty afternoon. And, also, attorneys' fees, and, as  
10 well, fee-generated cases. So we've got a full plate  
11 for this afternoon. We have another Board member who  
12 has joined us. I see Maria Luisa Mercado in the  
13 audience. Thanks for coming to join us.

14 Why don't we take a 45-minute lunch break.  
15 That should give everyone time to take lunch.

16 (Whereupon, at 12:40 p.m., a lunch recess was  
17 taken.)

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

2 MS. BATTLE: We're back on the record for a  
3 continuation of the Operations and Regulations  
4 Committee meeting on January 5, 1997. And this  
5 afternoon, though we have on our agenda some five regs  
6 for consideration, we really will take up two. We will  
7 take up, this afternoon, 1626, which pertains to the  
8 restricting legal assistance to aliens, and also 1640,  
9 which pertains to the application of federal law on  
10 waste, fraud and abuse to LSC funds.

11 The other three regulations that we have up --

12 MS. GLASOW: And 1609, have we done that, yet?

13 MS. BATTLE: Oh, 1609, I'm sorry. Three. So  
14 we have three that we'll take up this afternoon. And  
15 1609, which pertains to fee-generating cases.

16 The other two that we will not take up are the  
17 1639 regulation, which pertains to welfare reform, and  
18 1642, which pertains to the regulation on attorneys'  
19 fees.

20 As it relates to those two interim  
21 regulations, it's my understanding that our staff has  
22 had an opportunity to speak with members of the staff

1 of the committees that have oversight on 504. And  
2 there have been some concerns raised that we need to  
3 give careful attention to, and we just, based on the  
4 time frame, have not had an opportunity to do that to  
5 make recommendations to this committee.

6 So we will defer those two regulations until  
7 the staff has had an opportunity to fully look into  
8 those issues and make a recommendation to us.

9 With respect to the three that we do have  
10 before us, I think that in the interest of time, why  
11 don't we get started with 1640 now.

12 MR. McCALPIN: Are we going back to 1612?

13 MS. BATTLE: No.

14 MS. GLASOW: You didn't make a recommendation  
15 to adopt that. That's the only difference between that  
16 one and the other ones. I mean, not adopt, but take to  
17 the Board.

18 MS. BATTLE: I think Bill is right. This  
19 morning, I said we made several changes to 1612 that we  
20 would revisit this afternoon to make sure that we're  
21 all on the same sheet of music as to what it is we're  
22 going to recommend to the Board. So we can do that,

1 but we don't have to do that now. We'll do that this  
2 afternoon.

3 MR. HOUSEMAN: I don't think we had a -- did  
4 we make those changes yet?

5 MS. GLASOW: No, we haven't worked on that.

6 MR. ERLNBORN: I thought you promised you'd  
7 have them here when we meet.

8 MR. McCALPIN: We were told we would have them  
9 this afternoon.

10 MS. GLASOW: I want to see the transcript.

11 MS. BATTLE: Yeah, we initially talked about  
12 getting back on 1612. We did make one decision about  
13 1612 as it related to the use of the term "employee."  
14 But there were several other changes that were made,  
15 and I wanted to make sure that we were on the same  
16 point with regard to those other changes. Why don't we  
17 take that up at the end of today.

18 MS. GLASOW: Okay. And we may need a brief  
19 break to do that, but we can do that.

20 MS. BATTLE: All right. So, with that  
21 background and housekeeping behind us, let's now  
22 undertake 1640, the Corporation's interim reg on the

1 Application of Federal Law on Waste, Fraud and Abuse to  
2 LSC Funds.

3 MS. GLASOW: Okay. There are two points to  
4 make on this rule. One is that I have provided you  
5 with a document. The heading is, Federal Law Cited in  
6 45 C.F.R. Part 1640. And it's the text of the law that  
7 is cited in this rule.

8 And, at the end of the text of the law, I have  
9 attached a summary discussion by the GAO of the civil  
10 claims that are cited. It does not include the  
11 criminal claims.

12 And we provided this to you to give you an  
13 idea of what this law encompasses. There was some  
14 discussion at the last committee meeting that we need  
15 to give some more guidance to the field on the  
16 implications and the meaning of this law. Much of this  
17 law is determined through litigation and case law, the  
18 meaning. But we are going to continue our efforts to  
19 try to find if there are other guidances provided by  
20 federal agencies, such as this one provided by GAO in  
21 the civil false claims act.

22 In other words, we will continue our effort to

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1 find guidances and provide that to the field to give  
2 them as much guidance as we had, that we can do for  
3 them, but not to include that in the rule itself. But  
4 we will do that as a programmatic matter if that's the  
5 will of the committee.

6 MS. BATTLE: One thing, I did talk with  
7 Suzanne about this, because I raised the concern at our  
8 last meeting that we are now requiring Board members,  
9 and as well recipient staff, to sign off on an  
10 understanding of the application of these laws and the  
11 penalties that attach thereto in their administration  
12 of the grant funds that they receive. And I had some  
13 concern about us dropping a list this long and this in  
14 depth on people without giving them some explanation as  
15 to what they're being bound to.

16 As I understand it, Suzanne, you found that  
17 it's not an easy task to, for example, include in the  
18 commentary some mention of what all of these laws mean,  
19 because the meanings are interpretations given by  
20 cases. Those cases mean changeover time. And what we  
21 can do, though, is to provide technical assistance in  
22 other ways to keep people up to date as to how these

1 various laws apply and have interpretation in the use  
2 of funds that come through LSC.

3 MS. GLASOW: Right.

4 MS. BATTLE: Okay. Are there any questions  
5 about -- let's look at page 2, the specifics, the  
6 definition section.

7 MS. GLASOW: There's no changes to that.

8 MS. BATTLE: Okay. Page 3.

9 MS. GLASOW: No changes there.

10 MS. BATTLE: Page 4.

11 MS. GLASOW: There is a change. Section 5, we  
12 recommend deleting -- the footnote explains on the  
13 bottom of page 5. The OIG even asked to see what other  
14 agencies did in terms of reporting requirements and  
15 what standard was required. And, due to the holidays,  
16 they were not able to do that. Also, in their view,  
17 virtually all agencies have always been subject to the  
18 laws.

19 These laws by their terms refer to agencies  
20 who receive federal funds. The only reason they're  
21 applicable to our recipients is because of Section 504  
22 in our appropriations act.

1           So, agencies are used to dealing with this.  
2           And, as I said, was why we were going to continue our  
3           search to see if there are guidances provided by other  
4           agencies that we can -- so that we can provide some  
5           technical assistance. But, in terms of the reporting  
6           requirement, we at this point have nothing to shed  
7           further light on this issue. And we're all in  
8           agreement that just deleting the reporting requirement,  
9           we're in agreement to do that.

10           MR. McCALPIN: I'm sorry. What did you say,  
11           Suzanne? What was that last statement?

12           MS. GLASOW: The last statement, we are in  
13           agreement to deleting the reporting requirement in  
14           1640, the OIG and management.

15           MS. BATTLE: Okay. We had significant  
16           discussion around how reporting should be done. It's  
17           my understanding -- and, Laurie, you can bring us up to  
18           date so that we'll understand the Inspector General's  
19           position on this. That there are reporting  
20           requirements already in place that are -- that  
21           establish, based on, is it the grant itself that has a  
22           provision in it that says, if there's any misuse, abuse

1 or fraud or anything, that you must report this?

2 Where is the existing reporting requirement  
3 and why are you satisfied with this, Laurie? Can you  
4 tell us?

5 MS. TARANTOWICZ: There is an existing  
6 reporting requirement --

7 MR. McCALPIN: I can't hear you, Laurie.  
8 Please get a mike.

9 MS. BATTLE: This is Laurie Tarantowicz, from  
10 the Inspector General's Office.

11 MS. TARANTOWICZ: There is an existing  
12 reporting requirement in the grant assurances that we  
13 mentioned at last meeting. I'm not sure it goes quite  
14 as far as the suggested reporting requirement we had in  
15 the reg.

16 But we were more comfortable with taking it  
17 out at this point, because it seemed to raise a lot of  
18 questions and a lot of confusion. And we're satisfied  
19 to rely so far on the grant assurance, which may be  
20 modified in the future. And just good faith efforts of  
21 grantees to report to us violations.

22 MR. McCALPIN: I have some trouble in 1640.4.

1 We have the sanctions for violation and ordinary due  
2 process, which seem to require some notice before you  
3 would invoke the kind of activities which are  
4 contemplated in 1640.4. And it seemed to me at a bare  
5 minimum, if you take this out, there ought to be  
6 something in the commentary referring to the  
7 responsibility of programs, at least, to adhere to the  
8 grant conditions.

9 I'm concerned about the lack of notice to the  
10 grantees that they have to do this, otherwise we may  
11 invoke procedures to cancel the grant.

12 MS. BATTLE: The notice went the other way.  
13 The notice was of instances where --

14 MR. McCALPIN: I know.

15 MS. BATTLE: -- there had been fraud and  
16 abuse. And your concern is about notice to the  
17 grantees --

18 MR. McCALPIN: That if they don't do that.

19 MS. BATTLE: That if they don't tell us that  
20 they've been convicted --

21 MR. McCALPIN: Or that there is a charge or  
22 whatever.

1 MS. BATTLE: And I'd like to see the grant  
2 assurances language. I think that Bill is right. That  
3 we can cover this issue in our commentary appropriately  
4 to say, you already are bound to provide us with notice  
5 of these things under your grant assurances, because  
6 it's my understanding the grant assurances are much  
7 broader. In other words, you're giving notice not of a  
8 conviction, but notice of potential fraud in the use of  
9 the funds.

10 So you're actually giving notice on the front  
11 end, which is a much more strict standard.

12 MR. McCALPIN: What we had before was not  
13 necessarily of a conviction, but of a charge.

14 MS. BATTLE: I know.

15 MR. McCALPIN: Information that may have taken  
16 any actions which may violate.

17 MS. BATTLE: What does the grant assurance  
18 language say? Does anybody have that?

19 MS. GLASOW: I don't have it. I believe it  
20 was our understanding last time the language of the  
21 current grant assurance would not cover this law. It's  
22 much more specific in terms of theft of property.

1 MS. BATTLE: All right.

2 MR. ERLENBORN: Bill, in reference to your  
3 observation a moment ago, I'm not sure I understood  
4 your correctly. But, 1640.4 talks about the taking  
5 action if there's been a violation of the agreement.

6 MR. McCALPIN: Right.

7 MR. ERLENBORN: Without a hearing and so  
8 forth. On page 3 at the top of the page, subparagraph  
9 B defines what a violation of agreement is. And it  
10 appears -- and I've only read it very quickly -- to  
11 involve convictions, not just allegations.

12 MR. McCALPIN: Where are you reading?

13 MR. ERLENBORN: Page 3, top of the page,  
14 subparagraph B and there's one in 2.

15 MR. McCALPIN: A violations means, okay.

16 MR. ERLENBORN: Yeah. And both 1 and 2 start  
17 out with, "recipient has been convicted," and 1 and 2,  
18 "employer board member has been convicted."

19 MR. McCALPIN: Right.

20 MR. ERLENBORN: So it is limited to  
21 convictions, I believe.

22 MR. McCALPIN: Well, what the point -- 1640.5,

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1 which we are eliminating was broader than that.

2 MR. ERLNBORN: Was broader, yes.

3 MR. McCALPIN: And required notice not only of  
4 a conviction, but of a charge.

5 MS. BATTLE: But that was very front end wise  
6 and different from secondary issue which you were  
7 raising, which had to do with notice and an opportunity  
8 for something. Once there is a conviction, I think  
9 that due process has worked its way through the process  
10 of misuse of federal funds. And I don't know that you  
11 need any further due process on the issue as to whether  
12 you ought to continue to receive federal funds.  
13 Because, all of these -- as I understand it, all of  
14 these laws pertain to fraud as it relates to the use or  
15 misuse of federal funds that have been received.

16 MR. McCALPIN: Well, are we content to have no  
17 knowledge of an accusation, a charge, indictment,  
18 whatever of the misuse of funds until after there is a  
19 conviction?

20 MS. GLASOW: No, we're not saying by deleting  
21 this provision, that we don't want to know early on.  
22 It's just the OIG -- it says, it will rely on the good

1 faith of the grantees for obtaining notice of the  
2 existence of a potential problem.

3 MS. GLASOW: There is a current grant  
4 condition that requires programs to notify you within  
5 two days if there's been a theft or embezzlement.

6 MS. GLASOW: But it doesn't include all of  
7 this.

8 MR. HOUSEMAN: It doesn't include all of this.  
9 The only thing it does include, frankly, is the false  
10 claims act.

11 MS. SZYBALA: Those are theft crimes against  
12 the grantee that the grant assurance deals with. These  
13 are basically crimes against the government in a  
14 grantee situation. As a practical matter, though, the  
15 reason the OIG thought it was fine to do away with the  
16 notice provision here is that there will never be a  
17 prosecution of a grantee for the misuse of LSC funds  
18 without LSC knowing about it.

19 I mean, we're talking here about false claims  
20 made to LSC. It can't happen without LSC knowing about  
21 it.

22 So it's kind of unnecessary to ask them to

1 separately notify us. We will find out.

2 As a real practical matter, no assistant U.S.  
3 attorney is going to start one of these cases without a  
4 referral from the OIG. They're not out there looking  
5 to convict LSC grantees under these particular kinds of  
6 statutes.

7 So, as a practical matter, the notice doesn't  
8 really provide it.

9 MS. BATTLE: All right. So what we're saying  
10 is that there is no need for any additional notice  
11 because the process itself requires notice with these  
12 statutes. And, with that explanation, are all of the  
13 other members of this committee satisfied that the  
14 deletion of this section does not mean that LSC will  
15 not get notice? It will get notice because, in fact,  
16 no prosecution will begin without some notice.

17 MR. ERLENBORN: I do have a question. When  
18 you look at .5, subparagraph A-1, it says, recipient or  
19 any of the recipient's employees has been charged with  
20 a violation. No, paragraph 2, it has -- and that's the  
21 recipient -- has any information that indicates the  
22 recipient or any of its employees or board members have

1 taken actions which may violate federal laws.

2 That does not -- that's not based upon a  
3 charge by the corporation or a prosecution. This would  
4 be knowledge that very likely is not available to the  
5 corporation.

6 MS. BATTLE: Is that so preliminary that there  
7 is not a need for --

8 MS. SZYBALA: The point of that was to allow  
9 the OIG to investigate, if it looks like there might be  
10 a problem out there. The bottom line is, you're asking  
11 programs to kind of report on themselves as opposed to  
12 what's currently in the grant -- the grant condition is  
13 instances where the recipient has been a victim. It  
14 has lost funds and it's been robbed basically. That's  
15 not a problem.

16 This is kind of asking us to let us know if we  
17 need to come and investigate you. That problematic.  
18 It's probably difficult, that's all.

19 I mean, that provision, I would like it to be  
20 in there, but we can live without it because we'll have  
21 to. These kinds of problems we would have to find on  
22 our own. We can't expect the grantee to come up and

1 say, hey, our entire bid application was a lie, it's  
2 really a sham. I mean, it's not going to happen.

3 MS. GLASOW: And this was the provision we had  
4 problems with last time, because what is the standard  
5 we want to give a recipient for reporting. Sufficient  
6 knowledge, do we give them time to investigate, or do  
7 they just on a rumor have to report. That's where the  
8 committee asked us to come back with a better standard,  
9 and we decided to just redo the whole provision.

10 MS. BATTLE: I guess my final question is that  
11 the footnote basically says there was no time to do any  
12 kind of real look at this. And I'm sensing that the  
13 Inspector General's Office is satisfied with the  
14 removal of this section because of the problems that we  
15 have identified.

16 Are you satisfied that the removal of this  
17 will make it consistent with the way it's implemented  
18 in other agencies where you have funds bound by the  
19 same laws, essentially? I mean, is it operating  
20 basically in the same format in other places?

21 MS. SZYBALA: The OIG recommended removal of  
22 the notice section. So we're more than comfortable

1 with it. But you can't look at other agencies and say  
2 this is consistent. This is sui generis. There is no  
3 other place where an agency has become federal all at  
4 once. In DOD, for example, contractors know they're  
5 subject to false claims liability when they submit  
6 bills. And there is nothing in DOD regs to inform  
7 contractors of that. It's just the law out there, and  
8 people are subject to the law. It's not up to the  
9 agency to implement the criminal laws.

10 Here, we needed to do a reg, because, all of a  
11 sudden, Congress made our grantees subject to these  
12 laws.

13 MS. BATTLE: You're saying a lot of the other  
14 agencies don't have regs, because it's just a matter of  
15 being subject to federal law.

16 MS. SZYBALA: They don't.

17 MS. BATTLE: Okay. I got it. I think that  
18 makes sense. Now I understand where the Inspector  
19 General's position is. And since what we're simply  
20 doing here is taking a federal law that will be  
21 applicable to federal funds if you got it from the  
22 Department of Defense and saying, these laws now apply

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1 as it relates to getting funds from LSC, then that's  
2 it. And the law itself and the implementation as to  
3 what people have responsibility for oversight for those  
4 laws will take effect from there. Okay. That makes  
5 sense.

6 Any other questions as it relates to the  
7 application of these laws to LSC funds?

8 Alan.

9 MR. HOUSEMAN: We're not going to propose a  
10 change, but I did want to point out that, at the last  
11 committee meeting, in subsection B of 1640.4, there was  
12 a discussion which started, based on a recommendation  
13 we had made, about whether the hearing that's held by  
14 LSC to determine whether the recipient knowingly or  
15 through gross negligence allowed the employee to engage  
16 in the activities, whether that hearing would be  
17 conducted by an independent hearing officer or by LSC  
18 staff.

19 And the recommendation here obviously is to  
20 stick with the language that was in effect at the time  
21 that we discussed that regulation.

22 I think we're comfortable with that. We

1 wanted to raise the issue just -- and I raise it only  
2 to say that I don't think this regulation resolves that  
3 question as to who is going to conduct the hearing.  
4 And I would strongly urge the staff to give careful  
5 consideration to a process that they can work out,  
6 which does provide some independence by whoever is  
7 going to hear the question of when an employee commits  
8 a crime, whether the recipient is going to lose its  
9 grant because of the actions of the employee. That's a  
10 fairly significant problem.

11           And if the corporation is proposing that  
12 recipient loses a grant because of the actions of the  
13 employee, there needs to be some way to make sure that  
14 the person who resolves that issue has some  
15 independence from the person that brought the charges  
16 that led to us getting in that situation in the first  
17 place.

18           So while I'm not proposing here that we  
19 revisit that issue, I do think it's important that when  
20 we think about this down the road and we have to deal  
21 with processes that implement this, that some serious  
22 consideration be given to making the person independent

1 of at least the people that initiated the decision.

2 And, with that, we -- speaking for NLAD and  
3 PAG at least, are comfortable with this resolution.

4 MS. BATTLE: All right. Any other --

5 MR. McCALPIN: Alan, the problem is that there  
6 may or may not be institutional memory of what you have  
7 just said. Ten years from now when this arises, none  
8 of the people in this room may be around. I think what  
9 you're saying makes sense, but the question is whether,  
10 somehow or other, it ought to be preserved in the  
11 memory of the corporation.

12 MR. ERLBORN: A footnote explanation,  
13 commentary?

14 MS. GLASOW: I think we indicated at the last  
15 committee meeting that we are going to be revising our  
16 defunding regulations. And we do intend to do some  
17 regulations on a hearing -- that would include some  
18 hearings for this part. And we're just not ready at  
19 this point to decide the independent hearing examiner  
20 issue. And we just need time to consider that in terms  
21 of the fact that Congress uses some very strong  
22 language, null and void, if there is a finding of a

1 violation.

2 So this provision does not preclude having an  
3 independent hearing examiner. But we just need more  
4 time to deal with the regulations as a whole, that  
5 would deal with the hearing procedures for this part.

6 MS. BATTLE: All right. So I'm hearing the  
7 concern that Bill has raised. And what Suzanne is  
8 saying is that at some point we're going to be revising  
9 the defunding regulation, which has in it a hearing  
10 procedure. And there we may be able to address this so  
11 that it is not just a matter of relying on  
12 institutional memory, but having a regulation which  
13 will set out what the hearing procedure should be for  
14 defunding under 1640. Okay. All right.

15 Anything else on 1640? Hearing none, I will  
16 entertain a motion that we recommend adoption of this  
17 regulation as a final reg by the Board.

18 M O T I O N

19 MS. WATLINGTON: So moved.

20 MR. McCALPIN: Second.

21 MS. BATTLE: It's been properly moved and  
22 seconded. All in favor, raise your hand.

1 (Show of hands.)

2 MS. BATTLE: All opposed?

3 (No response.)

4 MS. BATTLE: Motion carries. We now can  
5 undertake 1626, which pertains to the interim  
6 regulation restricting legal assistance to aliens.

7 MS. GLASOW: The committee asked us to make  
8 changes to this rule that would make it user friendly  
9 and more easily understood by the common reader. It  
10 was a very complicated rule. And you'll see that some  
11 of the changes we recommended for that took that  
12 request in consideration.

13 On page 2 in the purpose section, the  
14 committee -- the bolded language is something the  
15 committee requested, that they asked us to make an  
16 affirmative statement of what this part is designed to  
17 ensure that recipients provide legal assistance only to  
18 citizens of the United States and eligible aliens.

19 In the definition section, the committee asked  
20 us to define several terms. We did check out the  
21 definitions with the Immigration Law Center in  
22 California to get the technical assistance because the

1 INA has a very technical set of statutes.

2 The definition of citizen you see here in  
3 paragraph A also includes nationals, which for the  
4 purposes of this part are treated the same. So we  
5 include them the same. And those terms are defined in  
6 Section 101.22 and Title III of the Immigration and  
7 Nationality Act.

8 Chapters 1 and 2 basically set up situations  
9 under which a person would be determined to be a  
10 citizen. So it's not an easy definition. It's  
11 basically you have to go through chapters 1 and 2 and  
12 figure out whether someone was a citizen of the United  
13 States.

14 MS. BATTLE: Bill.

15 MR. McCALPIN: In the interest of being user  
16 friendly, may I suggest a USC citation? I assume this  
17 is 8 U.S.C. I wouldn't ordinarily know where to find  
18 the Immigration and Nationality Act.

19 MS. GLASOW: We do in some parts of this.  
20 Yes, I can substitute U.S.C.

21 MR. McCALPIN: Well, you don't have to -- I  
22 assume that it's 8 U.S.C. Section 101.22. But that may

1 not be right.

2 MS. GLASOW: Somehow it just got deleted. We  
3 had it in there.

4 MS. PERLE: Yeah. I mean, we have it later  
5 on, 8 U.S.C., under the definition of permanent  
6 residence, we have the definition in terms of the  
7 U.S.C. cite. So we'll substitute that in there.

8 MR. McCALPIN: Well, it just seemed to me that  
9 I wouldn't -- I would have trouble finding this if I  
10 went looking for it.

11 MS. PERLE: You're right.

12 MS. BATTLE: Anything else on page 2, the  
13 definition and purpose sections? Page 3?

14 MS. GLASOW: We defined United States, and,  
15 again, by citing to the INA. And I again will put in  
16 the U.S. Code cite.

17 MR. McCALPIN: Yeah.

18 MS. BATTLE: Okay. And the definition of the  
19 United States that you have in the footnote, is that  
20 something that might work in the commentary?

21 MS. GLASOW: Yes, it's a paraphrase of the  
22 definition, but it's generally that.

1 MS. BATTLE: All right. Anything else on page  
2 3? Page 4? Page 4 has the Kennedy amendment language  
3 in it.

4 MR. McCALPIN: I had a question as I read  
5 through this, whether at the bottom of page 4, the  
6 1626.4, is that the proper reference?

7 MS. GLASOW: Yes, because Section 4 of the  
8 Kennedy amendment clients, who are accepted from the  
9 general restrictions on provision of legal assistance  
10 to ineligible aliens.

11 MS. BATTLE: Okay. Anything on --

12 MS. GLASOW: And we added a bolded language to  
13 the prohibition section. For the purposes of this  
14 part, legal assistance does not include normal intake  
15 and referral services.

16 As you see, paragraph A that is crossed out,  
17 just below that in Section 4, we had that provision  
18 there, but we moved it up to the prohibition section to  
19 clarify that the reason it's not included is because  
20 intake and referral does not include legal assistance.  
21 And if you read the prohibition, it said recipients may  
22 not provide legal assistance for or on behalf.

1           So, basically, we're saying intake and  
2 referral is not included, because you have to get  
3 -- through intake, you find out whether someone is  
4 eligible or not. And if they're not, then you don't  
5 take them on as a client, or you refer them out.

6           Then you go to the applicability section and  
7 now this only includes reference to the Kennedy  
8 amendment clients.

9           And we suggest several changes to what you  
10 have before you. We've been negotiating with the OIG  
11 on how to deal with record keeping for Kennedy  
12 amendment clients.

13           MR. McCALPIN: You're on 1626.4?

14           MS. GLASOW: Yes. In the new paragraph A,  
15 where it says, the requirements of this part do not  
16 apply?

17           MR. McCALPIN: Yeah.

18           MS. GLASOW: We would like to revise that to  
19 say, except for 1626.12, comma, the requirements of  
20 this part do not apply, et cetera.

21           Section 12 is the section that requires  
22 policies, procedures and record keeping.

1           And then paragraph B, which doesn't exist  
2 right now -- you have only -- you shouldn't have had a  
3 paragraph A. Okay. Paragraph B to this section will  
4 be as follows:

5           Recipients are not required by Section 1626.12  
6 to maintain records regarding the immigration status of  
7 clients represented pursuant to paragraph A of this  
8 part, of this section -- of this section.

9           MS. BATTLE: Okay.

10          MS. GLASOW: And this is the issue that you  
11 asked us to come back to you on. Is we wanted to  
12 protect the records on immigration status of these  
13 clients. Our last recommendation last meeting was to  
14 deal with it in the commentary. We weren't comfortable  
15 with that.

16          But we also wanted to indicate that some  
17 record-keeping will be required to just show that a  
18 client does fit within the Kennedy amendment exception.  
19 And so minimal record keeping will be necessary to show  
20 an auditor that, yes, indeed this client was a Kennedy  
21 amendment client, and, therefore, isn't subject to the  
22 rest of the requirements of this part.

1           But that will not include the immigration  
2 status of the clients.

3           MS. BATTLE: Linda.

4           MS. PERLE: I don't have a problem with this  
5 resolution with respect to the Kennedy amendment  
6 clients. However, this whole discussion was  
7 precipitated by comments that were made concerning the  
8 confidentiality issues for people who come seeking  
9 legal services, who may be -- who may not be either  
10 eligible for our services or not here legally.

11           And the concern that I have is that it doesn't  
12 address the issue with respect to people who may come  
13 seeking legal services and for whom there's a  
14 determination that they are ineligible.

15           And then the recipient may keep records of  
16 that person's alien status, which, if someone -- if  
17 INS got a hold of them or employers got a hold of those  
18 records or others, might subject them to substantial  
19 detriment.

20           So we had originally talked about putting in  
21 something that indicated that recipients are not  
22 required to maintain records relating to alien status

1 for anybody that they don't serve or anybody for whom  
2 all they do is intake and referral. That was a  
3 suggestion we had before and I would be much more  
4 comfortable if there was something in either rule, or  
5 at least in the commentary that suggested recipients  
6 should not maintain those records.

7 I mean, I think this deals with the issue with  
8 respect to the people who were served under the Kennedy  
9 amendment, the suggestions that were made. But for  
10 those people for whom all you do is intake and referral  
11 or intake only and then say, no, we can't help you,  
12 then I'm concerned that there are records being  
13 maintained by the recipients which the IG has access to  
14 and the corporation has access to, and others, through  
15 that, may have access to.

16 MS. BATTLE: Now, there is -- let me just as a  
17 preliminary matter see if I understand how this rule  
18 will operate. There is a provision that says, legal  
19 assistance does not include -- for purposes of this  
20 part -- normal intake and referral services. So that  
21 means if a person is not eligible and therefore we  
22 refer them and say, we can't take your case, go down to

1 the local referral or go there or go here, none of this  
2 applies to them.

3 MS. PERLE: No, none of it -- well --

4 MS. BATTLE: Even the record keeping.

5 MS. PERLE: -- it's not legal assistance. But  
6 if there are still records, eligibility records.

7 MS. BATTLE: They're not required to keep  
8 them, because this section doesn't apply. So you don't  
9 have a record keeping requirement.

10 MS. GLASOW: I think we can deal with that in  
11 the comments.

12 MS. PERLE: If you deal with that in the  
13 commentary and you say that specifically, then that  
14 will take account of my concerns. But I think that is  
15 a concern that was voiced repeated in the committee.

16 MR. TULL: And it was the flip side of that  
17 argument which led to us specifically citing the  
18 requirement to keep some records regarding Batista  
19 clients; that is, records relating to the service  
20 provider to show that they did comply.

21 But the view of the Inspector General's Office  
22 is that where we have stated that it does not apply,

1 that the explicit implication -- if an implication can  
2 be explicit -- is that the records are not required.  
3 So that's --

4 MS. BATTLE: Okay.

5 MR. McCALPIN: Could I go back a minute to  
6 page 4, paragraph A-1? I wonder if the comma after  
7 "alien" in the last line is appropriate. It seems to  
8 me that what follows is applicable only to the clause  
9 following "or." But if you put the comma in, then what  
10 follows may apply to both the first and second clauses.

11 So you say, "who has been battered or  
12 subjected to cruelty by a spouse or parent, and the  
13 spouse or parent consented or acquiesced," doesn't make  
14 a lot of sense.

15 The last clause I suggest applies only to what  
16 follows here.

17 MS. BATTLE: Yeah, I see your point. So that  
18 comma should come out.

19 MR. McCALPIN: I think that the comma should  
20 come out after "alien."

21 MS. BATTLE: I think Bill is right.

22 MR. ERLNBORN: After "alien"?

1 MS. BATTLE: Yes, after "alien," that comma  
2 comes out. Thank you, Bill. Anything else on 4? We  
3 can move on to 5.

4 MR. McCALPIN: That's just a punctuation  
5 matter.

6 MS. BATTLE: No, it's not. It's a substantive  
7 matter. We couldn't make it without those technical,  
8 careful observations. Page 5.

9 MR. McCALPIN: Looking down in C -- and this  
10 happens in other places. Do you appropriately cite  
11 U.S.C. as 8 U.S.C. 1157 or 8 U.S.C. Section 1157?

12 MS. GLASOW: The Federal Register will not let  
13 us user a section.

14 MR. McCALPIN: What?

15 MS. GLASOW: Federal Register will not let us  
16 use a section sign or word for the U.S. Code.

17 MS. BATTLE: But you have it here.

18 MS. GLASOW: That's where Joanne Gretch cleans  
19 this up for me before it goes into the Federal  
20 Register.

21 MS. BATTLE: So all of them have to come out.

22 MS. GLASOW: Yeah.

1 MS. BATTLE: Do you have to use the word;  
2 "section," or do you just say, "207 of the"? Do you  
3 have to write the word out, "section"?

4 MS. GLASOW: They don't care about that. But  
5 if I use a U.S. Code cite, like 8 U.S.C. Section  
6 something or other, they will not let use the section  
7 symbol or word.

8 But if I say Section 203(a)(7) of the  
9 Immigration and Nationality Act, then I can use either  
10 the word or the symbol, however we choose.

11 MS. BATTLE: So it's just for citation  
12 purposes to the U.S. Code.

13 MS. GLASOW: To the U.S. Code, right.

14 MS. BATTLE: All right.

15 MS. GLASOW: And it's only the U.S. Code they  
16 do that with.

17 MR. ERLBORN: They didn't follow the Harvard  
18 use.

19 MS. GLASOW: No.

20 MS. BATTLE: They don't follow the Harvard  
21 style.

22 MS. GLASOW: Joanne has got her GAO book, her

1 Federal Register book and --

2 MS. BATTLE: All right.

3 MR. ERLNBORN: They probably had a meeting  
4 like this where they discussed it for an hour and then  
5 decided.

6 MS. BATTLE: Anything else on 5? Let's move  
7 on to 6. We're making progress.

8 MS. GLASOW: Well, 5, let me explain that  
9 change. We just divided C up into two paragraphs,  
10 because it was two different categories of aliens and  
11 that was causing some confusion. So we just divided  
12 them up. So the new D is what before was the second  
13 half of C.

14 MS. BATTLE: Okay. Does everybody see that?  
15 And you have stricken --

16 MS. PERLE: Top of 5, beginning of 6 -- bottom  
17 of 5, sorry, and top of 6.

18 MS. BATTLE: And 1626.6, you've stricken what  
19 was your paragraph A.

20 MS. GLASOW: Basically, we just reworded it to  
21 be more user friendly. There is no substantive -- real  
22 substantive change. Let me first explain that we

1 divided Section 6 into three sections for clarity,  
2 because some of the provisions deal with verification  
3 of citizenship. Other ones deal with verification of  
4 alien status.

5 And the third deals with emergency situations.

6 So we found that even we got bogged down  
7 trying to figure out what we were talking about in the  
8 rule. So we thought to make it more user friendly, we  
9 would have three different sections, so you knew  
10 exactly what you were looking at. So that's a  
11 structural change we made.

12 MS. BATTLE: There is no substantive change.

13 MS. GLASOW: Right, intended. Paragraph A on  
14 page 7 at the top is just -- is basically a rewording  
15 of the old paragraph A. And what we're trying to do  
16 here is just state more directly exactly what we're  
17 trying to do. The other -- the old rule stated it more  
18 indirectly. And there wasn't a real clarification  
19 about when we're talking about a testing versus  
20 verifying citizenship.

21 So now paragraph A will read, a recipient  
22 shall require all applicants for legal assistance who

1 claim to be citizens to attest in writing in a standard  
2 form provided by the corporation, that they are  
3 citizens of the United States. And here we moved this  
4 last clause from another section, again, no substantive  
5 change intended. We're just making it structurally  
6 different. Unless the only service provided for a  
7 citizen is brief advice and consultation by telephone,  
8 which does not include continuous representation.

9 And then B deals with verification. When a  
10 recipient has reason to doubt that an applicant is a  
11 citizen of the United States, the recipient shall  
12 require verification of citizenship.

13 And then the next sentence is what the  
14 committee adopted last time, which says, a recipient  
15 shall not consider factors such as a person's accent,  
16 limited English speaking ability, appearance, race or  
17 national origin, as a reason to doubt that the person  
18 is a citizen.

19 MS. BATTLE: Do you think it would be helpful  
20 to outline in the commentary creditable reasons for  
21 raising an issue regarding citizenship, which would  
22 require verification?

1 I think that when you look at what we've set  
2 out as reasons and factors that cannot be considered,  
3 they are the very factors that people use basically to  
4 make that kind of an assessment, though they are  
5 illegal factors. And that's one of the reasons why  
6 we've identified them here.

7 I think it would be helpful and instructive  
8 for people to know what factors can be considered.  
9 Voracity, credibility issues that will raise a question  
10 about citizenship.

11 MS. GLASOW: John is going to have to leave to  
12 give a presentation to the Revisions Committee, unless  
13 there are any questions for him.

14 MS. BATTLE: Were there any other issues,  
15 John, before you go, that you felt in particular you  
16 needed to discuss with the committee?

17 MR. TULL: No, I have none. Thank you.

18 MS. BATTLE: All right.

19 MS. GLASOW: I will point out in paragraph A,  
20 in the second line, it says, in a standard form  
21 provided by the corporation. The wording used to be,  
22 in a form approved by the corporation. Recipients were

1 doing their own form and sending them all in piecemeal  
2 to us for approval. And now we want to provide a  
3 standard form since we have a standardized way of  
4 checking that.

5 MR. McCALPIN: Where are you?

6 MS. GLASOW: Paragraph A.

7 MR. ERLNBORN: Page 7.

8 MS. GLASOW: Top of A. Second line says, in a  
9 standard form provided by the corporation. So, before,  
10 we would just approve forms the recipient sent us.  
11 Now, we're going to give them a standardized form.

12 On page 8, the first change up in paragraph 2.  
13 We're recommending adding some language, such as a  
14 document. We have been educated again that there are  
15 other types of documents that would prove citizenship.  
16 And one type is in the footnote 17 down below.

17 For example, if an individual is born abroad  
18 to U.S. citizen parents, may show that they were  
19 citizens from birth by presenting evidence that the  
20 parent resided for the required period of time in U.S.  
21 prior to their birth, in addition to showing birth  
22 certificates.

1 MS. PERLE: I think, Bill, was that the  
2 situation that you mentioned early on in the  
3 discussions about your wife having been born overseas  
4 to American parents, and that she didn't -- that her  
5 birth certificate wouldn't provide the required  
6 documentation because it was a birth certificate from a  
7 different country? I seem to recall that discussion at  
8 an early meeting.

9 MR. ERLNBORN: I think he was busy reading.

10 MS. PERLE: When he's finished.

11 MR. McCALPIN: I'm having trouble following  
12 all of this from what we had before last time to last  
13 time to this. Did you ask me something?

14 MS. PERLE: I did, but I want to resolve your  
15 issues first.

16 MR. McCALPIN: Go ahead.

17 MS. PERLE: What Suzanne was talking about was  
18 adding, on page 8 in paragraph 2, it says, the  
19 recipient may also accept any other authoritative  
20 document.

21 And then the language that was added was, such  
22 as a document issued by the INS.

1           In the last version, it was that it had to be  
2           an INS or other government document. But the people  
3           from the National Immigration Law Center pointed out  
4           that there were other documents which might not be --

5           MS. GLASOW: Issued by the government, but  
6           would be sufficient for a government agency to accept.

7           MR. McCALPIN: A baptismal certificate.

8           MS. PERLE: Right. Right, for example.

9           MR. McCALPIN: My mother had to do that.

10          MS. PERLE: Right, that was your mother. I  
11          thought you said it was your wife. This is -- we're  
12          trying to address that kind of a situation.

13          MR. McCALPIN: My wife is a counselor  
14          certificate. That would be governmental. But my  
15          mother's was not.

16          MS. GLASOW: Okay.

17          MS. PERLE: So that's why this was stated the  
18          way it is. So most situations, it would be a  
19          government certificate -- a governmental document, but  
20          there might be some situations where it would not be.

21          MR. ERLNBORN: Just an observation,  
22          governmental agency document might be interpreted to be

1 a voter's registration. And after Bob Doran's  
2 revelation that out in California they were giving  
3 voter registration documents to non-citizens, and maybe  
4 from a more practical standpoint with motor-voter  
5 registration -- or voter-motor, whichever it is  
6 -- there has been a concern about people who are not  
7 citizens being able to register as voters.

8 MS. PERLE: In Maryland, they apparently check  
9 the motor-voter pools very carefully. My daughter, who  
10 is about to be 16, got her permit.

11 MR. ERLBORN: This has application around  
12 the country, not just Maryland.

13 MS. PERLE: I'm just saying that I think in  
14 certain states, that they're quite careful about who  
15 they actually register. She was asked when she got her  
16 permit whether she wanted to register to vote. And she  
17 said, fine, but I'm not old enough. And they said,  
18 don't worry about, do it. But then she subsequently  
19 got a letter that said that she could not use motor-  
20 voter to register, because she would not be 18 by the  
21 time of the next general election. So she has to re-  
22 register at that time.

1           So at least certain places, they're quite  
2 careful about checking those.

3           MR. ERLNBORN: Immigration and Naturalization  
4 has, under the immigration laws, an obligation -- or I  
5 should say employers have an obligation to get  
6 documents to prove the eligibility of a person to work  
7 here in the United States, either because they are a  
8 citizen or because they have a green card.

9           Is there anything there that could be used as  
10 a reference to the type of documentation that would  
11 be --

12           MS. PERLE: We have a whole appendix. We will  
13 have an appendix to this rule, with respect to  
14 verifying eligibility for aliens, which will list a  
15 whole variety of documents, those that we know of  
16 specifically. But there may be others, as well.

17           MS. BATTLE: And I guess part of what John is  
18 raising is whether that list of documents that are  
19 appropriate for a person's ability to work, it would be  
20 sufficient documentation for services, as well, of  
21 citizenship or the fact that they are a legal alien.

22           MS. PERLE: I think the answer is probably in

1 most situations, but my guess is that there are certain  
2 people who would not be eligible under these categories  
3 who do have authority to work in the United States. So  
4 I don't think it's 100 percent --

5 MS. GLASOW: Match. Cross-over, right.  
6 Right. And this does say authoritative document. So I  
7 think in the comments we need to point out they do  
8 indeed have to be a citizen and it has to be an  
9 authoritative document. It can't be just something  
10 somebody dreams up and thinks is okay.

11 MS. SZYBALA: I just wanted to make sure that  
12 you're aware. I think at the last committee meeting,  
13 you got a memo from the IG that said the OIG believes  
14 that citizenship should be verified through documents  
15 in all circumstances. And we continue to believe that.  
16 So we'll be providing that memo to the Board tomorrow,  
17 just so they know.

18 MS. BATTLE: I recall our discussion about  
19 that. John, you may not have been here.

20 MR. ERLNBORN: No, I wasn't here.

21 MS. BATTLE: We listened to the Inspector  
22 General's position, which is that each person applying

1 for services across the country would be required to  
2 verify their citizenship, not simply to attest to it.

3 And we had a long discussion about where this  
4 might be an issue and the fact that, for some time,  
5 attesting to citizenship has been part of the process  
6 of showing eligibility for services because we've had a  
7 reg in place which deals in part with some of the same  
8 issues that we have before us now.

9 And after looking at that and the fact that we  
10 have had an attestation requirement, which requires  
11 people to sign something saying, I am a citizen of the  
12 United States, it was at least this committee's view  
13 that that's sufficient, unless there is an issue about  
14 citizenship, which would require additional  
15 documentation. Because what we try to do is to balance  
16 the need for us to make sure that we have complied with  
17 this with how much compliance is necessary to get the  
18 job done, and the burden on clients who are applying  
19 for services.

20 And for some people, coming up with a birth  
21 certificate -- I live a long way from Illinois, where I  
22 was born. And I made the point on the record that it

1 was real difficult for me to get a birth certificate,  
2 because when I called up to Illinois, nobody answered  
3 the phone. Finally, I got my sister to go get it.

4 MR. ERLENBORN: It must have been Cook County.

5 MS. BATTLE: It was Cook County.

6 MR. ERLENBORN: Downstate is where you should  
7 have been born.

8 MS. BATTLE: But the point being that that's  
9 not as easy as it sounds. Some people don't drive, so  
10 they may not have a driver's license. And so for our  
11 client population, verification in all instances,  
12 particularly when there is absolutely no question, was  
13 in our view burdensome. But we do have a requirement  
14 of attestation. We do have a requirement of each  
15 person coming in.

16 And I think that in the commentary, if we  
17 address issues where there is a real issue of whether  
18 or not a person is a citizen for some legitimate  
19 reason, that requiring verification and providing the  
20 appendix with the ways which you can accept appropriate  
21 documentation would meet all of the requirements in our  
22 view of this regulation.

1 MR. ERLÉNORN: Let me just say that when I  
2 first read this -- and I guess with some of the  
3 commentaries referring to this, I was again reminded of  
4 the immigration law that was passed that required  
5 documentation for everyone who is employed, even if you  
6 knew them personally. You had to have the I-7 form and  
7 they had to come up with proof of citizenship.

8 One of the reasons that that was done was that  
9 there wouldn't be discrimination based on accent, et  
10 cetera, et cetera.

11 This way you're not discriminating against  
12 anyone. You say if you want services, you have to be a  
13 citizen, you must have some proof of citizenship. And  
14 they lay it out with particularity in the immigration  
15 law.

16 That's another way that we could go and it  
17 would avoid the problems of discrimination. It would  
18 also avoid the problems of someone saying, here, sign  
19 this attestation and they don't even know what it is.

20 MS. BATTLE: Well, we talked about that, too.  
21 Some of the program directors who were at our last  
22 meeting, who said, in some regions of the country, it

1 is absolutely not even an issue. In other regions of  
2 the country, it is an issue.

3 And we did have this provision that we wanted  
4 to make part of the regulation, which addresses the  
5 discrimination issue. And that's one of the reasons  
6 why I suggested that we also come up with some language  
7 to address those instances that are appropriate for  
8 determining whether someone maybe has falsified their  
9 attestation.

10 MR. ERLNBORN: Are we going to provide that  
11 the attestation form must be in the language that is  
12 the principal language, the one who is signing the  
13 attestation? What does it mean if they can't even read  
14 it?

15 MS. BATTLE: How can we handle all of these  
16 requirements? I mean, I think that's a legitimate  
17 point to raise, but how do we handle all of the  
18 requirements for the provision of services?

19 It seems to me that, in order to --

20 MS. GLASOW: I think it might be a local  
21 issue, because a lot of our recipients have retainer  
22 agreements where they have that attestation clause in

1 Spanish or whatever language they feel they have a  
2 large population.

3 MS. BATTLE: But we're going to be providing  
4 the form from now on.

5 MS. GLASOW: Excuse me?

6 MS. BATTLE: Our aid provision says we will be  
7 providing a standard form. So I think that John's  
8 point is well taken. Are we going to do this form in  
9 various languages?

10 MS. PERLE: We could provide the form in  
11 English and require that it be translated, either read  
12 to the person or translated by the local recipients. I  
13 think they do -- you know, they have access to  
14 interpreters.

15 MS. BATTLE: Why don't we cover this in the  
16 commentary to make sure we've got a provision in here,  
17 so that we cannot look at limited English speaking  
18 ability as grounds for saying, because you don't speak  
19 this language, then we're going to check to see if  
20 you're really a U.S. citizen.

21 But we do want to be assured that they  
22 understand that this is a requirement for services,

1 that they must attest to their citizenship status.

2 So I think in the commentary, we probably need  
3 to address this issue because it cuts across that  
4 discrimination issue and the issue of a person's  
5 ability to really attest to something if they don't  
6 understand it.

7 Are there any --

8 MR. ERLENBORN: Just a question. Is an  
9 attestation subject to penalty if a false attestation  
10 is given?

11 MS. GLASOW: It's not taken under oath, but  
12 it's a strong statement. They're certifying the truth  
13 of the statement.

14 MR. ERLENBORN: But is there any penalty?

15 MS. GLASOW: For our purposes, if we found out  
16 that they had given us a false attestation, they were  
17 not eligible, we would have to begin the process of  
18 withdrawing from representing the client. In terms of  
19 other legal implications, that would probably be dealt  
20 with by local law.

21 MS. BATTLE: An intentionally fraudulent  
22 statement under whatever state law there is for gaining

1 services, I think is what we --

2 MR. ERLNBORN: Obtaining property under false  
3 pretenses.

4 MS. BATTLE: Yeah, false pretenses. Yeah,  
5 there would be state laws that would cover that.

6 MR. ERLNBORN: There would never be a  
7 prosecution.

8 MS. BATTLE: Anything else on page 7? Page 8?

9 MS. GLASOW: Page 8, about mid-page starts a  
10 new section 7, which is verification of eligible alien  
11 status.

12 And the bolded language in paragraph A again  
13 is that clause that says, unless the only service  
14 provided is brief advice and consultation, that was the  
15 same as it was for verification of citizenship status.

16 So this basically is the same as it was  
17 before. It was just restructured to be put into a  
18 separate section.

19 MS. BATTLE: Okay.

20 MR. ERLNBORN: So here, an attestation is not  
21 sufficient. This will require documents.

22 MS. BATTLE: Yes, because you've got an alien

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1 seeking representation and they've got to verify  
2 eligibility by providing some things that -- documents  
3 to us.

4 MS. GLASOW: Now, if you're an alien, you do  
5 have to provide documents, yeah. You attest to being a  
6 citizen, but if you are not a citizen, then you have to  
7 show that you fall within one of the alien categories  
8 of people that we can represent. And then you do have  
9 to give verification by documents. And that's what  
10 this says.

11 And the appendix will list the types -- the  
12 documents or the types of documents required for that.

13 MR. ERLBORN: Is there -- and I don't want  
14 to be argumentative. Is there a rationale for treating  
15 aliens different than citizens?

16 MS. GLASOW: Yes, because Congress says we can  
17 only represent certain categories of aliens. And so we  
18 have to check --

19 MR. ERLBORN: It also says you can only  
20 represent citizens, unless they fall into that other  
21 category.

22 MS. GLASOW: We can represent any citizen of

1/ the United States if they're otherwise eligible and we  
2 have that language in here somewhere.

3 MR. ERLNBORN: I think you missed the point.  
4 And I promised I wasn't going to be argumentative and  
5 here I am. To get qualified as a citizen, all you have  
6 to do is sign an attestation. And that proves your  
7 eligibility.

8 To get representation as an alien, I know  
9 there are categories. But it's still proving that  
10 you're an alien that falls into that -- one of those  
11 categories. It must be done by documentation, rather  
12 than just by attestation.

13 And the question is, is there a valid reason  
14 for treating aliens who fall into those categories and  
15 citizens in a different way.

16 MS. GLASOW: I think so, because we have to be  
17 able to show to the auditors some documentary proof  
18 that persons fall in certain categories. And most  
19 aliens, who fall in those categories have the correct  
20 documentation and paperwork, because they have to have  
21 it to be here to be in those categories. And so it's  
22 easily provided. There is not a tremendous

1 administrative burden like there would be for every  
2 applicant who comes into any grantee in the entire  
3 United States to try to provide proof of citizenship,  
4 because most of us don't carry around citizenship  
5 documentation.

6 MR. McCALPIN: Yeah, I'm inclined to think,  
7 John, that you can make a rational distinction between  
8 citizens and aliens in this context and require greater  
9 proof of eligibility on the part of an alien and on the  
10 part of a citizen. I think that's a rational  
11 categorization.

12 MS. BATTLE: Any other questions about that  
13 distinction in the requirements for proof of  
14 eligibility based on your citizenship status? If there  
15 are none, let's move on to page 9. There are no  
16 changes to 9, is that correct?

17 MS. GLASOW: Except that it is a new section  
18 8. This was the third part of the old section 6  
19 dealing with emergencies. And we just structurally put  
20 it into a new section, so it was easily found and read.

21 MS. BATTLE: Bill.

22 MR. McCALPIN: Let me suggest that

1 subparagraph 2 might read more consistently if it  
2 reads, if an alien is physically, but cannot require  
3 -- produce the required documentation and he or she  
4 makes a written statement identifying the category  
5 under 1626.4, under which he claims the eligibility  
6 -- I'm reading from the old one.

7 MS. GLASOW: You think it should be, "and he"?

8 MR. McCALPIN: And the document will be  
9 produced to verify, and this document is submitted as  
10 soon as possible.

11 In other words, you shifted tenses in there.

12 MS. GLASOW: Okay.

13 MR. McCALPIN: And I would think it's better  
14 read if they're all present tense.

15 MS. GLASOW: Yeah, this is an old provision.  
16 Okay.

17 MS. BATTLE: So you're really into making it  
18 an A, B, C, D and making them all "and."

19 MR. McCALPIN: Well, I don't know whether you  
20 have to further subdivide them. But if an alien is  
21 physically present, cannot require documentation and he  
22 or she makes a written statement identifying the

1 category and the documents that will be produced or  
2 verified and the document is submitted -- documentation  
3 is submitted as soon as possible. I just think it was  
4 a mistake to mix the tenses. The "shall be's." I was  
5 changing the "shall be's" to "is."

6 MS. GLASOW: Any problem?

7 MS. PERLE: I'm just having trouble reading  
8 the whole phrase.

9 MS. GLASOW: Can you provide me with your  
10 notes afterwards and I can fix it, or is it something  
11 that needs --

12 MR. McCALPIN: Sure, it's very simple.

13 MS. GLASOW: Okay.

14 MS. PERLE: I'm having trouble with the last  
15 phrase after the semicolon.

16 MR. McCALPIN: Well, I agree with you.

17 MS. BATTLE: I'm having trouble with the one  
18 before that.

19 MR. McCALPIN: I would put, "and this  
20 documentation is submitted as soon as possible."

21 MS. BATTLE: Well, I'm having trouble with the  
22 statement, "and the documents that will be produced to

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1 verify that -- " Okay. It's, "that status."

2 MS. PERLE: This documentation.

3 MR. McCALPIN: Yeah. In other words, he makes  
4 a written statement identifying the category and the  
5 documents that will be produced to identify that. In  
6 other words, he says, I'm eligible under A. And, to  
7 prove that, I'll give you document X.

8 MS. BATTLE: Well, can't you take the "the"  
9 and the "that" out of that? And have it read, "the  
10 documents will be produced to verify that status."

11 MS. PERLE: Could we say just something much  
12 simpler? Say, an alien is present but cannot produce  
13 required documentation. And the documents are  
14 submitted as soon as possible. I mean, it's a very  
15 simple thought. I mean, this is so unnecessarily  
16 complicated, like the rest of the rule.

17 MR. McCALPIN: I think you can do that.

18 MR. ERLBORN: You're assuming, and I think  
19 correctly, that in making a decision that this person  
20 is eligible, they do know the categories, that that's  
21 already been determined.

22 MS. PERLE: Well, we can have them state what

1 the category is, if that is important. But I think --

2 MS. BATTLE: It says, "make written  
3 statement." "If an alien is physically present and can  
4 attest in writing to the categories and will provide  
5 the documentation as soon as possible to verify it,"  
6 something to that effect.

7 MS. PERLE: Basically, yes.

8 MS. BATTLE: Okay. Why don't we do it that  
9 way?

10 MS. GLASOW: Simplify.

11 MS. BATTLE: Simplify. Okay. Anything else  
12 in 1626 on emergencies? We're on to Changed  
13 Circumstances, page 10. There's a language change in  
14 Section 9, Change in Circumstances. And it kind of  
15 raises some of the same issues, I think, here that we  
16 had when we dealt with the prison regulation in that  
17 you're talking about a situation where a person is  
18 initially eligible. And then they become ineligible.  
19 And we've already taken the case based on their  
20 eligibility.

21 We've got a provision here that we cannot  
22 continue to represent that person once they are

1 ineligible.

2 MR. McCALPIN: We have not said that in the  
3 case of the prisoners.

4 MS. BATTLE: What we have said, we've had a  
5 provision that says, you make a decision, a judgment.  
6 If the ineligibility is to be brief and the case is  
7 going to extend beyond that, so that you could actually  
8 pick it up on the back end, maybe you don't need to  
9 drop out of that case.

10 If it appears that that person's imprisonment  
11 is going to extend far beyond the litigation, then  
12 you've got to drop it. Somebody else has to do it.

13 MS. TARANTOWICZ: This change is responsive to  
14 a suggestion that we heard on the Hill or a comment  
15 that we heard on the Hill that had to do with the fact  
16 that our old 1626.7 covering Change in Circumstances  
17 was a much longer, more involved thing. It talked --  
18 there were three subcategories of type of change in  
19 circumstances and then some nuance about what you had  
20 to do in each one.

21 And there was a concern that there was at  
22 least the perception in having simplified this

1 provision that we were somehow easing up on the  
2 restriction against keeping these cases.

3           So, in fact, the old rule made a distinction.  
4 It said that you had to get out consistent with  
5 professional responsibilities. But then it treated one  
6 subcategory of this, and that is, if the person had  
7 provided -- if it's discovered that the person had  
8 provided false information, then you had to take steps  
9 to get out immediately.

10           Well, it's our view that you have to take  
11 steps to get out immediately anyway. You've got to do  
12 it consistent with professional responsibility, but --  
13 and that seemed to be satisfactory to Hill staff in  
14 terms of making the case that they wanted. There was  
15 some perception that we had gone from about 25 lines to  
16 about 5 lines, and perhaps that meant it was less  
17 restrictive.

18           But I think we were able to say and I think  
19 this language will be satisfactory, continued  
20 representation is prohibited. You know, we expect  
21 programs to take appropriate steps to get out  
22 regardless of how -- you know, what has come to light

1 in terms of either an actual change in circumstance or  
2 a discovery of -- you know, that someone was really  
3 ineligible who thought they might be eligible, or false  
4 information. Any of those circumstances requires an  
5 immediate effort to discontinue representation.

6 MS. BATTLE: And this proposed language is  
7 consistent with what at least the staff members that  
8 you spoke with on the Hill were concerned about in this  
9 rule?

10 MS. TARANTOWICZ: I believe it is. We did not  
11 go back with this language.

12 MS. BATTLE: Sure.

13 MS. TARANTOWICZ: We had a conversation about  
14 the concern that I believe this language will address.

15 MS. BATTLE: All right. Are there any other  
16 questions about this language?

17 (No response.)

18 MS. BATTLE: All right. 1626.10, Special  
19 Eligibility Questions.

20 MS. GLASOW: On page 11, paragraph E provides  
21 a special eligibility reference to foreign nationals  
22 who fit the requirements of the Haig Convention on the

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1 Civil Aspects of International Child Abduction and  
2 Federal Implementing Statutes. We have allowed  
3 representation of people who fall under this Act in the  
4 past, but through Office of General Counsel opinions  
5 when we were asked if such people could be served. And  
6 by looking at those statutes in the LSC Act and the  
7 appropriations act, we found that they could indeed be  
8 represented.

9 At the last meeting, we recommended to deal  
10 with this in the comments, but the committee asked that  
11 we actually put it in the rule itself, and this  
12 reflects that request.

13 MS. BATTLE: Okay. This was not in the  
14 previous rule, was it?

15 MR. McCALPIN: No.

16 MS. GLASOW: No.

17 MR. McCALPIN: It wasn't before.

18 MS. BATTLE: Bill.

19 MR. McCALPIN: Go back. I've got a few things  
20 here. But go back to 1626.10(b) and (c). I appreciate  
21 that what I'm about to say is reflected in the current  
22 regulation. But the first question I want to raise is

1 whether the reference to American Indians is  
2 politically correct.

3 MS. GLASOW: Yes, because we actually had --

4 MR. McCALPIN: I thought they were Native  
5 Americans at this point.

6 MR. ERLBORN: I think you're right.

7 MS. GLASOW: I'm not positive. I know Native  
8 American is okay because we had an exception for  
9 another rule -- I can't remember which one at the  
10 moment -- where the term "Native Americans" was used.  
11 And that question was raised for that. And I found out  
12 that it was the Native Americans who went to the Hill  
13 and lobbied for that exception. And they gave them the  
14 terminology for it. So I know that was okay.

15 This has just been in here for years, so I'm  
16 not sure.

17 MS. BATTLE: When you say Canadian-born --

18 MR. McCALPIN: Canadian-born Native American.

19 MS. BATTLE: Native American.

20 MR. ERLBORN: Well, wouldn't anybody born in  
21 Canada be a native of America? America is Central,  
22 South, North. It's not a very tight description.

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1 MS. PERLE: I think Native American has become  
2 a term of art.

3 MS. GLASOW: For LSC purposes.

4 MR. ERLENBORN: Well, what about Canadian-born  
5 American Indians? You can be an American Indian if you  
6 were born to a tribe in Canada. It had nothing to do  
7 with the United States.

8 My point is, American is not descriptive of  
9 United States.

10 MS. GLASOW: Right, it's broader than that.

11 MR. ERLENBORN: And I think it's being used in  
12 that fashion here.

13 MS. GLASOW: I would hesitate to change this  
14 without checking. I can tell you I will go back and  
15 check the accuracy of this. But I know there's a lot  
16 of politics involved in the use of Native American,  
17 what's a tribe, what's not a tribe. This may be a very  
18 technical term that is supposed to be that way, so I  
19 hesitate to change it without going and checking  
20 exactly who they meant by this.

21 MS. BATTLE: Particularly as it relates to the  
22 INA.

1 MS. GLASOW: Yes.

2 MS. BATTLE: Because that's the context in  
3 which this arises.

4 MS. GLASOW: Yeah.

5 MR. ERLBORN: Well, it also arises with the  
6 State Department in recognizing the foreign nations.

7 MR. McCALPIN: My other question is, why do we  
8 handle this this way? Why don't we simply say that the  
9 persons or groups identified in B and C either are not  
10 aliens or are no ineligible aliens? Basically, what  
11 we're saying is we can provide them service. If they  
12 are not ineligible, why don't we simply say, Canadian-  
13 born American Indians, Texas band Chickapoo are not  
14 ineligible aliens.

15 MS. GLASOW: Because I'm not absolutely sure  
16 that's correct, because that's why we say special  
17 eligibility. It's just some of the groups fall in here  
18 because of treaties or covenants with the United  
19 States, so they -- I'm not sure to tell you the truth.

20 This is language that's pretty much been in  
21 the rule for years and I'm concerned about starting to  
22 tinker with it, because I know this is all based on so

1 many different types of laws.

2 MS. PERLE: But this was in a different format  
3 in the old rule. I don't have it.

4 MS. BATTLE: I've got it and it says, cross  
5 border Indian tribes, under B. All Canadian born  
6 American Indians, at least 50 percent Indian by blood,  
7 are eligible to receive legal assistance provided they  
8 are otherwise eligible under the Act.

9 So it's a restatement of what was B before.

10 MS. GLASOW: Yeah.

11 MS. BATTLE: And then you've got members of  
12 the Texas band of Chickapoo are eligible to receive  
13 legal assistance provided they are otherwise eligible  
14 under the Act.

15 MR. ERLNBORN: Regardless of where they're  
16 born.

17 MS. BATTLE: Yes.

18 MS. GLASOW: This provision doesn't exactly  
19 say why they're eligible. It just says they are.

20 MS. BATTLE: They are eligible.

21 MS. GLASOW: So there are different reasons  
22 why they're eligible versus why the groups in paragraph

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1 A are eligible.

2 MS. BATTLE: In the original commentary to  
3 this section, does it shed any light on where these  
4 special eligibility questions arose or how they arose?

5 MS. GLASOW: It might. It might. I mean,  
6 this rule -- these came in the rule a long time ago, so  
7 they've been -- it's been this way for a long time.

8 MS. BATTLE: 1983, probably.

9 MR. McCALPIN: In 1989, it was amended.

10 MS. PERLE: Right, but this wasn't changed.

11 MR. HOUSEMAN: This wasn't changed in '89.

12 MR. McCALPIN: Excuse me?

13 MS. GLASOW: This wasn't changed in '89.

14 MR. McCALPIN: Well, it says, as amended,

15 54 --

16 MS. PERLE: Right, but this part was not  
17 amended in '89. This was from the original.

18 MS. GLASOW: The special agricultural workers  
19 in paragraph D were the ones that were put in here in  
20 '89. But the others were already there.

21 MS. BATTLE: Okay.

22 MR. McCALPIN: Apparently, 1626.10 was, in

1 fact, amended in '89.

2 MS. GLASOW: But paragraph D was added.

3 MS. PERLE: Will we have a paragraph D now  
4 with respect to --

5 MR. McCALPIN: There is no D in here.

6 MS. PERLE: No, but the language on special  
7 agricultural workers.

8 MS. GLASOW: Look at your new rule. What is  
9 now in paragraph D in the proposed new rule is what was  
10 put in in '89. The whole section wasn't revised in  
11 '89, only we added special agricultural workers in '89.

12 MS. PERLE: Because of the change in the  
13 Immigration and Naturalization laws.

14 MR. McCALPIN: What you're saying is that sub-  
15 C was added in '89.

16 MS. GLASOW: Whatever. Is that the paragraph  
17 it was before? Okay.

18 MS. BATTLE: C is now D. Now, anything else  
19 on 10? I think you just described for us E on 11.

20 MS. GLASOW: Yes.

21 MS. BATTLE: Okay.

22 MS. GLASOW: The only change to section 11(h)

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1 to agricultural workers is just to strike out what we  
2 feel is unnecessary language. It's okay to leave it  
3 in. It's okay to take it out. We were just trying to  
4 simplify the rule.

5 MR. McCALPIN: Are we on 10?

6 MS. BATTLE: We're on page 11.

7 MS. GLASOW: Section 11, page 11.

8 MR. McCALPIN: Look at the last line on page  
9 10. These workers are ineligible for legal assistance  
10 in order to obtain the adjustment of status.

11 And I suggest you add, "to that of temporary  
12 resident."

13 MS. GLASOW: Okay.

14 MR. McCALPIN: Then I suggest to you that the  
15 reference at the end of that paragraph at the top of 11  
16 is wrong. It should not be 1626.4(b), which is a  
17 record keeping requirement now.

18 MS. GLASOW: That's probably correct. I'll  
19 fix that.

20 MS. BATTLE: Anything else on 11? And 12?

21 MS. GLASOW: That's it.

22 MS. BATTLE: Okay. I will entertain at this

1 juncture a motion that we submit this for adoption to  
2 the Board tomorrow, with the changes that have been  
3 identified and the changes that will be checked.

4 M O T I O N

5 MR. ERLNBORN: So moved.

6 MS. WATLINGTON: Second.

7 MS. BATTLE: It's been properly moved and  
8 seconded. All in favor?

9 (Chorus of ayes.)

10 MS. BATTLE: All opposed?

11 (No response.)

12 MS. BATTLE: Motion carries. Okay. We may  
13 now move on to --

14 MS. GLASOW: 1609.

15 MS. BATTLE: -- 1609, Fee-Generating Cases.  
16 Essentially, just to give a little bit of a history of  
17 how we've come to where we are on this particular  
18 regulation, we decided not to publish an interim reg  
19 which pertains to fee-generating cases, but to publish  
20 a proposed reg and to strike from this regulation any  
21 reference to attorneys' fees and to embody all issues  
22 pertaining to attorneys' fees in a separate regulation,

1 1642.

2           So at this point, what we have is a proposed  
3 reg on fee-generating cases, which was sent out for  
4 comment. We got comments in and we're about to  
5 finalize that proposed reg, which means that,  
6 technically, the former reg, 1609, is still in effect  
7 while we're considering this proposed reg.

8           However, in the interim reg that we sent out  
9 for comment on attorneys' fees, we there mentioned that  
10 the new interim reg would cover the issue of attorneys'  
11 fees.

12           So the proposed reg states and strikes,  
13 consideration of attorneys' fees from it. The new reg,  
14 interim reg on attorneys' fees in 1642 now addresses  
15 fully that issue.

16           What I'd like for us to do since we're going  
17 to defer the issue of attorneys' fees until our staff  
18 has had an opportunity to look at some of the issues  
19 that have been raised by staffers to some of the  
20 committees is to consider fee-generating cases for  
21 proposal to the Board tomorrow, so that we will have a  
22 final reg which embodies our position that the fee-

1 generating cases reg does not address at all the issue  
2 of attorneys' fees, but just the issue of what is a  
3 fee-generating case and what is not.

4 So that is to give us all background on how we  
5 come to our consideration of this reg. It is actually  
6 a short reg. It's three pages.

7 MS. GLASOW: And this is what the committee  
8 adopted at the last meeting. And we haven't -- we  
9 don't have any additional changes to this.

10 MS. BATTLE: Okay.

11 MR. McCALPIN: May I suggest a couple of minor  
12 changes.

13 MS. GLASOW: Is that the comment?

14 MS. BATTLE: Right. We've got a couple of  
15 minor changes that Bill would like to suggest and I see  
16 Martha Bergmark coming to the table, as well. Bill,  
17 we'll take yours up first.

18 MR. McCALPIN: Suzanne, I'd like you to  
19 consider at the top of page 2 in A whether in the third  
20 line, the 1 in parenthesis --

21 MS. GLASOW: Page what?

22 MS. BATTLE: Page 2.

1 MR. McCALPIN: Page 2, third line. The 1 in  
2 parenthesis.

3 MS. GLASOW: Yes.

4 MR. McCALPIN: Whether that ought to move to  
5 the left two words, so it may read, may -- reasonably  
6 may be expected to result in a fee for legal services  
7 from, 1, an award to a client; 2, from public funds;  
8 or, 3, from the opposing party.

9 I don't think that in every case there is an  
10 award from public funds or an award from the opposing  
11 party. I've wrestled back and forth with that and I'd  
12 just like you to think about whether the word "award"  
13 appropriately goes with 2 and 3. And I just offer that  
14 to you as a suggestion.

15 I have a more serious comment in 1609.3(a). I  
16 think we would be better served if that were stated the  
17 other way around. Except as provided in B of this  
18 section, a recipient may not provide legal assistance  
19 in a fee-generating case unless, 1 and 2.

20 MS. BATTLE: Any other discussion about the  
21 proposal for a change in the language in 1609.3(a) as  
22 proposed by Bill?

1 MS. PERLE: I'd like to go back to what Bill  
2 was saying with respect to section A. We struggled  
3 with this with where -- in the original rule, there  
4 were no numbers, and it was very confusing as to what  
5 was referenced -- you know, what the references were  
6 to. And I think I do agree with you that when we're  
7 talking about fee-generating cases, we're not talking  
8 about attorneys' fees. We're talking about fee-  
9 generating cases that it's not always necessarily an  
10 award.

11 But I have a problem with it from public  
12 funds, because that -- now, maybe the next section  
13 deals with it.

14 MR. McCALPIN: Well, why don't we simply say,  
15 may be expected to result in a fee for legal services  
16 from a client, public funds or the opposing party? Why  
17 do we need the word "award"?

18 And, remember that we have a very complicated  
19 consideration of the word "award" in 1642.

20 MS. BATTLE: Well, I think you've got  
21 contracts as another way that fees are obtained from  
22 public funds. And you might not want that to be termed

1 a fee-generating case in this context.

2 The fact that a program might have a contract.

3 MR. McCALPIN: I think we say that.

4 MS. PERLE: And, also, if you say, it might be  
5 expected to result in a fee for legal services from a  
6 client, does that mean, if the client had money to pay  
7 for it?

8 MS. GLASOW: No, we didn't want it to be that  
9 broad.

10 MS. GLASOW: I mean, that's -- that's the  
11 problem.

12 MR. ERLBORN: It's not a proper expectation  
13 if the client doesn't have the money.

14 MR. McCALPIN: Well, I wrestled with this, and  
15 I'm not sure what's the proper way to handle it. But  
16 I'm not at all sure that this is the best way.

17 MS. PERLE: I don't think it's appropriate to  
18 say, fee for legal services from a client, because  
19 that's -- because any service just about that our  
20 programs provide to a client, if the client had money,  
21 they could get the private attorney. And that's  
22 really -- we really don't want to suggest that.

1 MS. BATTLE: That's the wonderful thing about  
2 debate. I was solidly with you, Bill, until I heard  
3 from Linda. So, I mean, I just leaped right over this  
4 one. I thought it was -- it made good sense what you  
5 were suggesting.

6 But I think now that I've heard from Linda,  
7 that she makes a good point about --

8 MS. PERLE: I wouldn't have any trouble  
9 saying, an award to a client or from the opposing  
10 party. And take out the public funds. Because in  
11 situations where there are going to be -- I think. I  
12 may be wrong about this. But there are situations  
13 where there might be fees from public funds would be  
14 court appointments or contracts, which was taken care  
15 of in B.

16 And I can't think of other situations where  
17 there would be --

18 MS. BATTLE: A Social Security award could be  
19 a public fund award.

20 MS. GLASOW: I would --

21 MS. PERLE: It's not an award. We've already  
22 discussed the fact that it --

1 MS. GLASOW: I would suggest that changing  
2 this too drastically is going to raise a lot of  
3 questions. One fix may be to just drop the numbers and  
4 go back to the definition we had basically the same  
5 before, and handle it interpretatively as we did  
6 before.

7 MS. BATTLE: How did it read before? Let's  
8 look at 1609.

9 MS. GLASOW: There were no numbers. It said,  
10 expected to result in a fee for legal services from an  
11 award to a client, comma, from public funds, comma, or  
12 from the opposing party. So it was unclear whether  
13 award applied to these other two.

14 MS. PERLE: Right, and then we leave in B. We  
15 could actually put a reference in A to --

16 MS. BATTLE: Just take the numbers out. I  
17 think that makes good sense. Bill, does that make you  
18 feel better?

19 MR. McCALPIN: Yeah.

20 MS. BATTLE: Okay. Let's take the numbers  
21 out.

22 MR. ERLBORN: Let me ask a question that

1 will expose my ignorance. What about contingent fee  
2 cases? Do they not belong in here at all?

3 MS. PERLE: They do. That's a fee for legal  
4 services from an award to a client.

5 MR. ERLBORN: Well, a contingent fee is not  
6 an award to -- well, I suppose --

7 MS. GLASOW: Well, if a client got damages,  
8 you'd get a percentage that's been awarded to the  
9 client.

10 MR. ERLBORN: All right. I was thinking of  
11 the distinction between contingent fee, which comes out  
12 of the client's recovery and fees that are imposed  
13 under law by the court on the losing party.

14 MS. PERLE: That's an award from the opposing  
15 party.

16 MS. BATTLE: Although I don't know that that's  
17 a precise way to say it, because it's an award by a  
18 court imposed on the opposing party. But, you know,  
19 let's not get super-technical.

20 MS. PERLE: I think that we should leave it  
21 the way it was under the old rule. I'm the one that  
22 originally proposed putting these numbers in. And I

1 struggled in terms of what I was recommending as to  
2 where they should go. But I felt there needed some  
3 clarification.

4 But I think Suzanne is right. That we can  
5 continue to deal with that through interpreting what it  
6 means.

7 MS. BATTLE: So all of the committee members  
8 agree the numbers come out. It goes back to the way it  
9 read originally. And we're fine.

10 Moving down to 1609.3, Bill has made a  
11 recommendation that we restate A to read, except as  
12 provided in paragraph B of this section, a recipient  
13 may not provide legal assistance in a fee-generating  
14 case unless --

15 MS. TARANTOWICZ: That is the way it used to  
16 be, also.

17 MS. BATTLE: Okay. We're going back. See,  
18 sometimes, old is better.

19 MS. PERLE: There was a reason for doing it  
20 this way, which no longer exists. I won't go into a  
21 lot of history on it, but it no longer exists.

22 MS. BATTLE: We're back to the way we were on

1 that. Anything else on 2? We can move on to 3.

2 At the top of 3 and the bottom of 2, I do  
3 understand that we had previously a statutory benefits  
4 citation in this regulation that was exclusive of the  
5 Social Security act in D. And now we've got a B-1 that  
6 actually goes beyond that. Is that correct?

7 MS. PERLE: Mm-hmm.

8 MS. BATTLE: Okay.

9 MS. GLASOW: That's because the statute says  
10 that.

11 MS. PERLE: The statute says, statutory  
12 benefits. And in the original rule, the corporation  
13 interpreted that to mean only Social Security fees.  
14 And when this was put together, there was a recognition  
15 that there were other statutory benefits, schemes which  
16 provided for attorneys' fees.

17 MS. BATTLE: Can we take out the "but not  
18 limited to" language, so it says, including. And then  
19 list these lists?

20 MS. GLASOW: I think Martha has some comments  
21 on that issue.

22 MS. BERGMARK: That would be my proposal to

1 you. That we stick with the -- we now take our third  
2 opportunity to go with the old rule, rather than the  
3 proposed rule. That is to say, to remove the words,  
4 "including, but not limited to" -- yeah. Actually, all  
5 you have to do is say, "an eligible client is seeking  
6 benefits under subchapter 2 of the Social Security  
7 act," et cetera, et cetera, to the end. So as not to  
8 reach those other statutory benefits that might now be  
9 included.

10 MS. PERLE: I think the partnering area --  
11 there may be others, as well. The primary program that  
12 we would now be excluding from this would be veterans  
13 benefits, which when the rule was originally written,  
14 the attorneys' fees that were available for veteran's  
15 benefits were limited to \$10 an hour or something.

16 MR. McCALPIN: It was \$10.

17 MS. PERLE: Ten dollars, period, okay.

18 MR. McCALPIN: I believe they raised it to 25.

19 MS. PERLE: Okay. But now they're --

20 MS. GLASOW: Now it's a percentage.

21 MS. PERLE: A percentage.

22 MS. GLASOW: Yeah.

1 MS. PERLE: Similar to the situation for  
2 Social Security. So what this would require -- this  
3 would take out of this sort of automatic situation  
4 where you could provide services.

5 MS. BATTLE: I bet if you shopped a \$25 case  
6 to lawyers in the area, you wouldn't have much  
7 difficulty with them.

8 MS. PERLE: You know, it may be in fact a  
9 situation where you can use the next part, the  
10 consultation with appropriate representative of the  
11 private bar to exclude those cases. But I don't know  
12 how much of an issue this is out in the field. But I  
13 asked Rick and Mike who, I think, do handle these cases  
14 if they had anything to share with the committee about  
15 how important it would be to leave the ability for  
16 programs to handle these cases without jumping through  
17 hoops.

18 I don't know if they have anything -- if they  
19 have any particular views on that.

20 MR. TEITELMAN: I would just go back to the  
21 old system. I'd go back to the way it was. Veteran's  
22 cases are rarely handled. I think going back to the

1 way it was would be fine.

2 MS. BATTLE: Okay. So we've got from the  
3 field, from our stakeholders and from our staff, let's  
4 go back, and from the members.

5 MR. ERLENBORN: Let me ask a question if I  
6 might. I think we're referring now to the bottom of  
7 page 2, B-1. And it says, an eligible client is  
8 seeking only statutory benefits. Are those defined  
9 somewhere?

10 MS. BATTLE: That's what these are.

11 MS. PERLE: Well, they're benefits under  
12 the --

13 MR. ERLENBORN: Well, it says, including, but  
14 not limited to. Here's the question I pose to you.  
15 There are statutory benefits under what is called the  
16 Coalworkers' Pneumoconiosis on this. It's a  
17 pneumoconiosis benefit, in fact. It's commonly known  
18 as black lung benefits. Those are statutory benefits.  
19 Would they be included as statutory benefits? Because  
20 it's not limited to the ones that you enumerate. Those  
21 are very lucrative cases.

22 MS. GLASOW: Well, then private representation

1 would be available, because there is two prongs one has  
2 to meet under the statute. It has to be a statutory  
3 benefit and private representation is unavailable. And  
4 so --

5 MR. ERLBORN: I thought this said, without  
6 first attempting to refer the case.

7 MS. GLASOW: Well, that's in this rule. But  
8 I'm talking about the statute that allows Social  
9 Security benefits to come. The statute says,  
10 recipients can't take fee-generating cases, except  
11 under guidelines by the corporation.

12 And the corporation has always said, you can't  
13 take fee-generating cases unless you make sure private  
14 representation is unavailable.

15 Then, in 1977, Congress amended the act by  
16 saying, the corporation's guidelines shall not preclude  
17 recipients from taking cases where only statutory  
18 benefits are provided and other representation is  
19 unavailable.

20 So there's two programs there. So, the Black  
21 Lung cases, if private representation is generally  
22 available, then most likely, our recipients are not

1 going to take these cases.

2 I will point out that in the proposed rule, we  
3 specifically asked for comments on whether we should  
4 include other types of comments under this provision.

5 And I don't recollect any comment coming back  
6 and saying, oh, yes, you should include this type of  
7 case. So there apparently is not a big demand. So, I  
8 agree that we can go back to the prior language.

9 MR. TEITELMAN: The 1977 findings by the  
10 Congress only refer to Title II and Title XVI. I think  
11 the rule would be safer in sticking with that and  
12 expanding to veteran's benefits, especially since the  
13 intent was very well -- it was a good intent to look at  
14 other statutory benefits when we first started the 1609  
15 process almost two years ago. We haven't gotten --  
16 there is also studies that may need to be done before  
17 starting to change this.

18 So I think the '77 finding by Congress on  
19 Title II and Title XVI would kind of guide the going  
20 back to the old system.

21 MS. PERLE: And we're not really going quite  
22 as far back to the old system, because we still do have

1 the provision that says if you consult with  
2 representatives of the private bar and they say that  
3 there aren't private attorneys in the area willing to  
4 handle those cases, then you can take them without --  
5 once you've made that determination. So I think this  
6 is sort of a middle ground.

7 MS. BATTLE: Okay. So, going back to the way  
8 the language was originally crafted means that we  
9 essentially have put out for comment 1609 and at least  
10 in this review have made no changes, have gone back to  
11 the language that we have prior to putting it out as a  
12 proposed rule.

13 MR. McCALPIN: Tell me how B-1 will now read.

14 MS. GLASOW: An eligible client is seeking  
15 statutory benefits under subchapter 2 of the Social  
16 Security Act.

17 MR. McCALPIN: You're taking the word "only"  
18 out?

19 MS. BATTLE: Yeah. It used to read, "An  
20 eligible client is seeking benefits under subchapter 2  
21 of the Social Security Act," da, da, da.

22 MS. GLASOW: Take out "only." "Is seeking

1 benefits under subchapter 2 of the Social Security  
2 Act," et cetera.

3 MS. BATTLE: Yeah.

4 MR. McCALPIN: Wait a minute. Are you taking  
5 out, "statutory," too?

6 MS. GLASOW: Yes. The reason we put that in  
7 was because that's a statutory language. But the old -  
8 - if we say, "is seeking benefits under subchapter 2,"  
9 that meets that seeking only statutory benefits  
10 requirement. So we would be redundant if we included  
11 that in there.

12 MS. PERLE: In other words, what we're saying  
13 is that the Social Security Act cases meet the standard  
14 of statutory benefits where other private  
15 representation is not available.

16 MS. GLASOW: Right.

17 MS. BATTLE: All right. Anything else in  
18 1609? Hearing nothing, I will entertain a motion that  
19 we recommend to the Board.

20 MR. McCALPIN: I had underlined the word  
21 "staff" in 1609.4. And I just wanted to stop and think  
22 how that squares with the conversation we had earlier.

1 I guess it does.

2 MS. PERLE: That's the same language that's in  
3 virtually every reg that we have dealt with.

4 MR. McCALPIN: Yeah, but I was thinking back  
5 to the conversation we had earlier in the day about  
6 potential recipients. I think it's all right.

7 MS. BATTLE: All right. I will now then  
8 entertain a motion to recommend to the Board the  
9 adoption as a final reg of 1609 as amended in our  
10 discussion today.

11 M O T I O N

12 MR. ERLENBORN: So moved.

13 MS. BATTLE: It's been properly moved and?

14 MR. McCALPIN: Second.

15 MS. BATTLE: Seconded. That we will recommend  
16 to the Board the adoption of 1609. All in favor,  
17 please stand.

18 (Members stand.)

19 MR. ERLENBORN: Seventh inning stretch.

20 MS. BATTLE: All opposed?

21 (No response.)

22 MS. BATTLE: All abstentions?

1 (No response.)

2 MS. BATTLE: The motion then carries. I  
3 believe this is the last reg.

4 MS. GLASOW: 1612.

5 MR. McCALPIN: 1612.

6 MS. BATTLE: 1612, did I miss one?

7 MS. GLASOW: We need to take a brief break and  
8 then come back to you with some idea of where we are.

9 MS. BATTLE: Let's take a break. Then we'll  
10 come back, resume and consider the editing to be done  
11 to 1612.

12 In that motion that passed, Edna made a  
13 suggestion to me before she left. She said in 1609, we  
14 had language a private attorney. And she said she felt  
15 it should say, not just to private attorneys, but to  
16 private local attorneys, because the language would  
17 allow you in 1609.3(a)(1) to get one attorney that's  
18 far beyond the reach of a client in some part of the  
19 state who is practicing law.

20 And that she thought it needed to say "local  
21 attorney," as opposed to just "attorney."

22 And "local," I think she's presuming, means

1 you are serving that particular client population.

2 MS. WATLINGTON: She said that in some of the  
3 areas, those rule areas, some of them attorneys will  
4 take it, but then their client has to go so far. So I  
5 don't know how that works.

6 MS. GLASOW: Are we talking about local  
7 meaning service area?

8 MS. WATLINGTON: Yeah.

9 MS. GLASOW: We can thread in local under the  
10 comments and clarify that's a recipient service area.

11 MS. BATTLE: Yeah.

12 MS. PERLE: This again is one of those  
13 situations where this has been the language for a long  
14 time. And I don't know -- Martha is gone. I'm just  
15 wondering whether someone will attribute some  
16 diabolical plot to making that change.

17 MS. GLASOW: Maybe we could take care of the  
18 whole issue by the commentary.

19 MS. BATTLE: Yeah, that's what I would  
20 suggest. Let's speak to that in the commentary. When  
21 we talk about private attorneys, we're talking about  
22 people who could take the case because it's close

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1 enough for them to take it. Okay.

2 MR. McCALPIN: What you're saying is trust is  
3 in short supply.

4 MS. GLASOW: It's really within the meaning --  
5 they can only provide service in their local area  
6 anyway.

7 MS. BATTLE: Okay. Now we are on break.

8 (A brief recess was taken.)

9 MS. BATTLE: Let's go back on the record. And  
10 we have before us a clean copy with changes to it of  
11 Part 1612, Restrictions on Lobbying and Certain Other  
12 Activities.

13 MS. GLASOW: Okay. Please go to page 3.

14 MS. BATTLE: Okay.

15 MS. GLASOW: In paragraph A(a)(2), Grass roots  
16 lobbying does not include --

17 MS. BATTLE: Okay.

18 MS. GLASOW: We revised the language, the thin  
19 bold, to, reporting on the content or status of, comma,  
20 or explaining, comma, pending a proposed legislation or  
21 regulation.

22 MS. BATTLE: Okay. And we struck the "or the

1 effect" language.

2 MS. GLASOW: Yes.

3 MS. BATTLE: Okay. All right.

4 MS. GLASOW: Then go to page --

5 MR. McCALPIN: Well, you don't need the comma  
6 after "explain."

7 MS. BATTLE: I think he's right.

8 MS. GLASOW: Okay.

9 MS. BATTLE: That final comma. The comma  
10 exterminator has spoken on that.

11 MR. McCALPIN: I have a whole pocketful of  
12 commas that I've accumulated by removing.

13 MS. GLASOW: As the person who writes these  
14 and sends them through several different offices, I get  
15 one office saying put them in, and the next office says  
16 take them out.

17 MR. McCALPIN: Send them the bill.

18 MS. BATTLE: Send them the bill. Okay.

19 Anything else, page 4? Page 5?

20 MS. GLASOW: Next is page 7.

21 MS. BATTLE: Six and seven. Okay.

22 MS. GLASOW: All we did here was take out

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1 commas.

2 MR. McCALPIN: Where are we now?

3 MS. BATTLE: That's number 5 on page 7.

4 MS. GLASOW: It's very minor. We took out  
5 commas that you requested.

6 Then on page 8 --

7 MR. McCALPIN: We decided not to put a comma  
8 after "with" in the last full line? "Provided the  
9 resources are not used to support the recipient."

10 MS. GLASOW: Yes. You asked us to take those  
11 out.

12 MR. McCALPIN: Okay.

13 MS. GLASOW: Then on page 8 --

14 MR. McCALPIN: What change did we make in 5?

15 MS. GLASOW: That's it.

16 MR. McCALPIN: Just taking out the commas?

17 MS. BATTLE: The commas, that's right.

18 MS. GLASOW: We talked about the use of the  
19 word "employees," but we resolved that elsewhere or  
20 another way.

21 Then on page 8, you'll see the strike-out. We  
22 deleted 3, because we decided it was already in 1. And

1 we renumbered 4 to 3 and moved the "or."

2 MS. BATTLE: Okay.

3 MS. GLASOW: Then on page --

4 MS. BATTLE: So should we have a 3(a)(b) -- or  
5 that B is like the big A. Okay.

6 MS. GLASOW: Right. Page 9.

7 MS. BATTLE: Okay.

8 MS. GLASOW: That's where we used "person"  
9 instead of "employee" or "recipient" down at the  
10 bottom, section 7(a).

11 MR. McCALPIN: Right.

12 MS. GLASOW: And on page 11, up at the top in  
13 the bolded language, we took out the word "federal."

14 MS. BATTLE: Right.

15 MR. McCALPIN: Right.

16 MS. GLASOW: And that's it.

17 MS. BATTLE: And that's it. Okay. I'm  
18 willing now to entertain a motion that we recommend to  
19 the Board Part 1612 with the changes that have been  
20 provided to us this afternoon.

21 MR. ERLNBORN: Just a question before we move  
22 on that. There were several places in here where we

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1 questioned the use of "employee," and they have not  
2 been changed except for that one place where we said,  
3 "person"?

4 MS. GLASOW: That's correct. What we decided  
5 to do was in the comments to this rule, explain that  
6 the meaning of employee may be broader for the purposes  
7 of this part, because of --

8 MR. ERLENBORN: Just in the comments.

9 MS. GLASOW: Right. Right.

10 MR. ERLENBORN: Okay.

11 MS. BATTLE: With a note to ourselves that  
12 we're going to take up this whole issue in 1600.

13 MR. ERLENBORN: Right.

14 MS. BATTLE: All right. Anything else on 1612  
15 before I hear my motion?

16 M O T I O N

17 MS. WATLINGTON: So moved.

18 MR. ERLENBORN: Second.

19 MS. BATTLE: Moved and seconded that we  
20 recommend to the Board the adoption as a final  
21 regulation, 1612, as presented to us this afternoon.  
22 All in favor?

1 (Chorus of ayes.)

2 MS. BATTLE: All opposed?

3 (No response.)

4 MS. BATTLE: The motion carries. I believe  
5 this is the last bit of business that we've got for  
6 this committee. As always, I thank Suzanne for her  
7 hard work, even in spite of the holidays, getting this  
8 to us in due time so that we can present it to the  
9 Board on tomorrow. I thank Alan and Linda for working  
10 along with her through the holidays, as well, and  
11 getting those to us.

12 I think we're ready now and prepared to  
13 present to the Board those regs that will become final.  
14 This has been a long trek for us, and I'm just thrilled  
15 that we've made it.

16 I also thank the members of the community that  
17 have been with us, like Rick, all the way through down  
18 to the final straw. We certainly do appreciate it.

19 If there is no other business to come before  
20 this committee, I will entertain a motion that we  
21 adjourn.

22