

ORIGINAL



LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS And REGULATIONS
COMMITTEE MEETING

OPEN SESSION

October 28, 1994

9:00 a.m.

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

BOARD MEMBERS PRESENT:

Edna Fairbanks-Williams

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
John Brooks
F. William McCalpin
Maria L. Mercado
Ernestine P. Watlington
Thomas Smegal, Jr.

STAFF PRESENT:

Martha Bergmark, Executive Vice President
Patricia D. Batie, Secretary
Victor M. Fortano, General Counsel
Suzanne Glasow
~~STAFF LIST~~
Karen M. Voellm
Renee L. Szybala

OTHER

Linda Perle

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P R O C E E D I N G S

CHAIR BATTLE: Good morning to everyone. We're going to go ahead and get started. We have at least one housekeeping matter that we need to take care of before moving on to what we have identified as our agenda for today.

Bill mentioned to me that after we had given consideration to 1604 yesterday, that we did not make an on record determination as to precisely what we needed to do with it. So at this point, I would be willing to entertain a motion which establishes where we are with regard to 1604 and what the next step is.

M O T I O N

MR. McCALPIN: Madam Chair, I move that this committee approve for publication Part 1604 as revised yesterday subject to a final edit by you and the usual circulation to the Board, giving them an opportunity to interdict publication if there is any serious problem with it.

CHAIR BATTLE: Is there a second?

MR. BROOKS: Second.

CHAIR BATTLE: Okay. It has been properly moved and seconded that we go forward with 1604 for publication,

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1 subject to a final edit and review by the Chair and
2 circulation to all the Board members prior to publication to
3 determine whether or not they have any strong objection to
4 it.

5 All in favor?

6 (Chorus of ayes.)

7 CHAIR BATTLE: Any opposition?

8 (No response.)

9 CHAIR BATTLE: Motion carries.

10 MR. MCCALPIN: Madam Chair, may I as a matter of
11 personal privilege make a statement which I indicated to you
12 yesterday may be forthcoming? I'm not sure that anybody --
13 but I and Laurie Tarantowicz, with whom I have dragooned
14 into it, is interested in the fate of the bylaws of this
15 organization.

16 But I should report to you that she did incorporate
17 into an integrated document those numerous changes which were
18 before this Board, I think, in July and caused the
19 consideration to be passed on to September and indefinitely
20 apparently thereafter. And as a result of that integration
21 of those amendments, a couple of other changes have occurred
22 to us.

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1 I think that a draft of the bylaws have passed from
2 this committee to the Board and that the matter is before the
3 Board for its consideration. And I suppose that any changes
4 that have come about would be offered at the Board level.
5 But I thought that as a matter of courtesy and because of
6 this committee's initial interest in the matter, I ought to
7 report to you what's being done along those lines.

8 CHAIR BATTLE: Thank you for that report, Bill. I
9 did get a chance yesterday to look at some of those changes.
10 And the question, I guess, raised by not only just the
11 editing changes, but also their work, as Bill mentioned, a
12 couple of editing changes, is whether that's a substantial
13 departure from our recommendation to merit our review or
14 whether, at this point, any recommendation that might depart
15 is something that the Board can at this point take up.

16 And I guess since it's now in Never-Never Land
17 between our committee and the Board, that's a determination
18 that maybe we can jointly make and decide how to resolve it
19 and get a final look at it by, at some point, the Board.

20 MR. McCALPIN: I will be glad to make those
21 additional changes which were beyond what was approved by
22 this committee in its transmission to the Board. I will be

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1 glad to make those changes available to this committee when
2 it meets next week in Boston for your information, and you
3 can decide whether to take any action on them at that time or
4 not.

5 CHAIR BATTLE: Okay.

6 MR. BROOKS: Are they now available so that we
7 could have them today?

8 MR. MCCALPIN: Not in any way that I can hand them
9 to you.

10 CHAIR BATTLE: The only concern -- we had to
11 publish an agenda for that meeting. I don't know that for
12 the meeting next week, we would actually be able to take any
13 action on bylaws, because it has not been "noticed" or
14 anything. But certainly, I think the committee members ought
15 to individually get copies of it and if there is any concern
16 about it, just bring it to my attention. And then I'll talk
17 with Bill, and we'll decide when and how we need to take it
18 up.

19 MR. MCCALPIN: I'll be glad to get those to you at
20 or before Boston.

21 CHAIR BATTLE: Okay. I think that's fine.

22 Are there any other housekeeping matters that we

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1 need to address at this time?

2 (No response.)

3 CHAIR BATTLE: If not, then today, we have on our
4 agenda taking up first in a joint review Part 1610 and Part
5 1609 and then, in addition to that review, 1611. I suppose
6 we could take up 1609 and 1610 first and address any concerns
7 that we have about both of those regulations. Let's start
8 with 1609.

9 1609 is contained under the Tab 4 in the meeting
10 book that we received prior to this meeting. And it pertains
11 to fee-generating cases. We should have in principal part
12 the language bolded that we changed in the last go-around. I
13 don't see much that has been bolded.

14 But in addition to that, if there are any editing
15 changes, I think we can present those at this time. Are
16 there any changes on page 1 of the comments?

17 MR. McCALPIN: Yes. The very last line says, "The
18 entire rule as revised is published for clarity and ease of
19 use." And, in fact, 1609.7 is not included in what is before
20 us. I don't know whether the intention was that that would
21 be unamended, or it was inadvertently omitted.

22 MS. GLASOW: We have merged several sections and

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1 deleted Section 8, so I don't believe there is a Section 7
2 anymore.

3 MS. PERLE: There is no Section 1609.7. Maybe we
4 need to make that clear.

5 MR. McCALPIN: There's no indication in here that
6 1609.7 is being deleted. Then, there is also that paragraph
7 about Congress's consideration that we referred to.

8 MS. GLASOW: Yes.

9 CHAIR BATTLE: Perhaps in the supplemental
10 information, we can explain the reorganization of this
11 section and how that has affected the number of sections and
12 the identity of sections.

13 MS. GLASOW: Okay.

14 CHAIR BATTLE: Anything else on page 1?

15 (No response.)

16 CHAIR BATTLE: Page 2?

17 (No response.)

18 CHAIR BATTLE: I just in purpose thought that we
19 needed to either add -- the revision in this section was made
20 in response to concerns -- or the revisions in this section
21 were made --

22 MS. PERLE: Yes. And the last word, I think,

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1 should be "unavailable" instead of "available."

2 CHAIR BATTLE: Okay. Yes. I had that checked off,
3 too. Anything else on page 2?

4 (No response.)

5 CHAIR BATTLE: Page 3?

6 MR. McCALPIN: Yes. About the middle of the page,
7 "In considering these revisions," the third line says, "would
8 track the statutory language and include any other similar
9 statutory benefits." And I don't think the body of the
10 regulation really purports to include -- or it doesn't do it
11 in a very explicit way. Let me get to .2(b).

12 MS. PERLE: I think that it was changed to say --
13 the current rule just says the SSI and SSA cases. And I
14 think now, it says --

15 MR. McCALPIN: Hold the mike to you. Will you,
16 Linda?

17 MS. PERLE: Now, it says, "An eligible client is
18 seeking only statutory benefits, such as subsistence benefits
19 under" -- so it does leave some room to include some other
20 things.

21 MS. MERCADO: Where are you at?

22 MS. PERLE: I was looking at page 11.

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1 MR. McCALPIN: It seems to me that the "such as" --
2 it doesn't seem to me it goes as far as the language on page
3 3, talking about "any other similar statutory benefits
4 cases." I would think that either you modify page 3, or
5 somehow or other, you do maybe an "including but not limited
6 to" or something of that sort to make it more expressive.

7 MS. GLASOW: Okay.

8 MR. McCALPIN: Also, I think that if you turn to
9 page 11 and that definition, it does not pick up the
10 statutory language "and appropriate private representation is
11 not available." The statute says, "only statutory benefits,
12 such as subsistence under subchapter 2" and so on, "and
13 appropriate private representation is not available" is a
14 part of the statute which has to do with fee-generating
15 cases. And that clause is not contained in (b).

16 MS. PERLE: I think that the intention of this was
17 to sort of deem appropriate private attorney representation
18 was not available in those kinds of cases, but we'll
19 certainly look at that.

20 MR. McCALPIN: 1007(b)(i) --

21 CHAIR BATTLE: I've just got a question about that,
22 Bill, before we move on. Isn't that part of the overall rule

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1 with regard to accepting cases in any event, so that you
2 wouldn't necessarily have to be included in each
3 determination? In other words --

4 MS. MERCADO: It's in the definition part.

5 CHAIR BATTLE: Yes.

6 MS. MERCADO: That's the end of the paragraph in
7 1609.2 definition, the fourth or maybe fifth line, "or for an
8 opposing party that is sufficiently large to attract private
9 counsel."

10 Then, you've got all these different categories
11 underneath it which deals with that whole issue of not being
12 able to find counsel for these kinds of cases. It would seem
13 that that would cover the point in the statute, the private
14 counsel.

15 CHAIR BATTLE: That's what I'm saying. Yes.

16 MS. MERCADO: Because it covers all of those
17 categories, not just the Social Security case.

18 MR. MCCALPIN: The "private representation not
19 available" is not limited to Social Security cases in the
20 statute. I'm looking at Section 1007(b)(1) of the statute.

21 MS. MERCADO: I don't have the statute.

22 CHAIR BATTLE: I guess what I'm saying is, if you

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1 look at 1609.2 in the definition and where you're defining
2 "fee-generating cases," part of it says, "undertaken on
3 behalf of an eligible client by an attorney in private
4 practice or from public funds or from opposing party that is
5 sufficiently large enough to attract private counsel."

6 All of that, in my view, inherently indicates that
7 private counsel would be unavailable for this kind of
8 representation.

9 MR. McCALPIN: I have trouble reading that into it.

10 MS. GLASOW: We had that language in here earlier
11 on, but we took it out when we restructured it. And we felt
12 putting it this way made it more clear, whereas before, the
13 way it was worded, we were also having to define when
14 appropriate representation wasn't available.

15 And it became almost a two-step affair in trying to
16 decide whether something was, indeed, a fee-generating case
17 or whether representation was available. And we have
18 restructured the whole rule. We felt this made the whole
19 situation more clear by putting that idea in the definition
20 and then listing those cases that could or could not be
21 undertaken.

22 MR. McCALPIN: It seems to me that the regulation

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1 ought to mirror the statute.

2 MS. MERCADO: I just had an additional question on
3 when you're defining the statutory benefits, the way it
4 reads, it seems almost limited to only the Social Security
5 cases.

6 MS. PERLE: The current rule does limit it to only
7 the Social Security cases. This language was put in at the
8 behest of the LSC staff to broaden it. The working group
9 proposal continued to limit it only to the Social Security
10 cases.

11 And the staff put in the "such as" language. And
12 the purpose of that, as I understand it, was to provide for
13 those instances where there might be some other similar
14 statutory benefits cases --

15 MS. MERCADO: That would be my preference, because
16 then that would actually mirror the statute. Because the
17 statute doesn't define the statutory benefits solely as
18 Social Security.

19 MS. PERLE: No, I understand that. If you look at
20 the legislative history and the regulatory history of this
21 rule, I think it's quite clear that Congress intended those
22 to be covered.

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1 And the original Board that looked at this didn't
2 know of any other -- and I don't know that we still know of
3 any other specific benefits programs that are set up the way
4 this is, where there are attorney's fees provided. But I
5 think that the staff just simply wanted to have a little bit
6 more leeway so added the "such as."

7 And I don't know that in reality, it's going to
8 make a lot of difference, because I don't know that there are
9 other programs.

10 CHAIR BATTLE: Programs that are such as the
11 existing program?

12 MS. PERLE: Right. I mean, clearly, there are
13 other benefit programs. The question is whether there are
14 other benefit programs which provide for attorney's fees.

15 MS. GLASOW: And we thought it was worthwhile to
16 put it out for comment and find out if anybody knew of any
17 other cases.

18 MS. PERLE: That we might want to include
19 explicitly or that would come in under this language.

20 MS. MERCADO: Doesn't ABA litigation provide for
21 attorney's fees?

22 MS. PERLE: But it's not a situation where it comes

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1 out --

2 MS. MERCADO: It's not a retroactive benefit.

3 Okay.

4 MS. PERLE: It's not a retroactive benefit, and it
5 doesn't come out necessarily from the client's --

6 CHAIR BATTLE: Why don't we do two things? One,
7 the concern that Bill has raised about that same section in
8 mirroring the statute is one thing I hope we can address.
9 And then secondly, the concern that Maria is raising about
10 whether the language by its terms is limited to Social
11 Security or more expansive -- does what you've gotten address
12 that?

13 MS. MERCADO: I mean, she has addressed it, but I
14 don't know that even -- maybe there's another little phrase
15 that needs to go in that. I know it says "such as" and
16 then --

17 CHAIR BATTLE: It gives specific examples.

18 MS. PERLE: Instead of "such as," we could say,
19 "including but not limited to," if you think that makes it
20 clearer.

21 MS. MERCADO: That would make it clearer for me.

22 MS. GLASOW: Okay. That's fine.

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1 MR. McCALPIN: That was the thrust of my first
2 comment.

3 MS. GLASOW: That's right.

4 CHAIR BATTLE: "Including but not limited to" is
5 more precise.

6 MR. McCALPIN: Yes. And that is closer to what we
7 say on page 3 in the middle, I think.

8 MS. GLASOW: That's correct.

9 CHAIR BATTLE: All right. Anything else?

10 (No response.)

11 MS. MERCADO: So we're going back and forth? Is
12 that what we're doing? I'm just trying to figure out where
13 we are.

14 CHAIR BATTLE: It sometimes works if we do, because
15 the comments are really pertaining to the statute.

16 Edna?

17 MS. FAIRBANKS-WILLIAMS: One of the other things --
18 if you've got somebody that's applying for veteran's
19 benefits, veteran's benefits can be retroactive.

20 CHAIR BATTLE: Okay. And do the attorney's fees
21 come out of in veteran's benefits -- the retroactive amount?

22 MR. McCALPIN: Yes.

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1 CHAIR BATTLE: If they do, than that is a good
2 point.

3 MR. MCCALPIN: Yes. Although --

4 MS. GLASOW: The veteran's cases are now getting
5 EGES fees, too.

6 MR. MCCALPIN: Although the fee in veteran's binet
7 cases is almost minute. I think it's limited to \$25 or
8 something.

9 MS. MERCADO: That has been changed.

10 MS. GLASOW: They changed that, but I'm not sure
11 exactly what the change is. But they are now getting EGES
12 fees, too. So --

13 MS. BERGMARK: Now, it's 25 percent. It used to be
14 \$10.

15 MS. PERLE: So now, it's the same as the Social
16 Security? Well, then, we really should make it clearer that
17 they're -- no, I think it's probably true that a number of
18 veteran's benefit cases won't be covered in this. The cases
19 would be, but the clients wouldn't be eligible.

20 MS. BERGMARK: And in Social Security cases.

21 MS. PERLE: Right.

22 MS. FAIRBANKS-WILLIAMS: But the problem is, some

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1 of them are eligible, because some of them are so sick
2 they're not working at all and have no money coming in.

3 MS. PERLE: But I think that what we're suggesting
4 is the language that we're suggesting would permit those
5 cases to be taken.

6 CHAIR BATTLE: Right. Thank you, Edna. That helps
7 to clarify why it's significant to have "including but not
8 limited to" in how we construct Subsection (b).

9 MR. MCCALPIN: You know, (b) also has the, I
10 suppose, contested provision at the end of it about "the
11 recipient does not seek the fee." Is that appropriately in
12 the definition, or is that more appropriately in the body of
13 the regulation when you talk about taking fee generation
14 cases?

15 I'm not contesting at this point the question of
16 whether the recipient should take a fee or not, only the
17 question of whether that provision, which we'll come to later
18 on in the body of the regulation, belongs in the definition
19 or whether it belongs more properly in the regulatory part of
20 the regulation, rather than the definition.

21 MS. PERLE: But it is in the regulatory part. And
22 so it may be just redundant.

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1 MR. McCALPIN: That's my point. It is in the
2 regulatory part. That's exactly right. And that, I think,
3 is where it belongs.

4 CHAIR BATTLE: So are you suggesting that we delete
5 the last portion of that sentence which begins --

6 MR. McCALPIN: As part of the definition, yes.

7 CHAIR BATTLE: "And the recipient does not seek or
8 accept any fee," the effect of which is to reduce the
9 client's recovery below what the client already --

10 MR. McCALPIN: Yes.

11 CHAIR BATTLE: Okay.

12 MR. McCALPIN: And instead, I would substitute the
13 statutory language which I have suggested before to mirror,
14 so that our definition mirrors the statute, 1007(b)(i).

15 CHAIR BATTLE: Okay. Anything else on that?

16 (No response.)

17 CHAIR BATTLE: We can move on to page 4, which goes
18 on to really address the public comment issue that we
19 received some information on where you have some programs
20 that have contracted with the state to receive from the state
21 some portion of the benefits and how that ought to be
22 handled.

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1 MS. PERLE: I would like to suggest in the third
2 full paragraph that starts, "A substantial number of
3 recipient project directors" --

4 MR. McCALPIN: Where?

5 MS. PERLE: On page 4, the third full paragraph
6 that starts, "A substantial number of recipient project
7 directors" in the fifth line -- it says, "Despite the
8 legislative history." I think we should say "legislative and
9 regulatory history," which we gave to you the last time we
10 considered this. And I think it makes quite clear the
11 position of the original Board.

12 MR. McCALPIN: I think the regulatory history is
13 directly -- the present regulation is directly contrary to
14 general counsel's interpretation of the statute and the
15 regulatory history.

16 1609.5 expressly allows a recipient to accept a
17 fee. "A recipient may seek and accept a fee awarded or
18 approved by a court or administration if the requirements of
19 1609.4 are met." And they are met if it is a Social Security
20 case under 1609.4(d).

21 MS. PERLE: I think that -- go ahead, Suzanne.

22 MS. GLASOW: I was going what say, that's in

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1 essence what we have been saying all along. Somehow, there
2 was an interpretation of this rule that precluded the taking
3 of attorney's fees from statutory benefits. It isn't clear
4 exactly how they got that. They got it mostly from the
5 history.

6 They meant to revise the rule to say that, but they
7 just didn't do a good job in the language of the rule. And
8 we have really admitted that from day one, that the rule did
9 not clearly say what they intended to say. So I can't argue
10 with you on the fact. Section 5 did, indeed, appear to be
11 saying one thing, and it's not surprise that many of our
12 recipients --

13 MR. McCALPIN: I don't think there's any question
14 about it.

15 MS. PERLE: But did you read in the September
16 27th --

17 MR. McCALPIN: Yes.

18 MS. PERLE: And if you look at the regulatory
19 history that's included under Tab 4 there --

20 MR. McCALPIN: Yes. I have read it.

21 MS. PERLE: I think it is so clear what the Board
22 intended to do with this rule.

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1 MR. MCCALPIN: But the plain fact of the matter is,
2 the plain language of the rule permits the program to accept
3 the fee.

4 MS. BERGMARK: You know, it seems to me that we're
5 at the merits.

6 MR. MCCALPIN: Yes. That's right.

7 MS. BERGMARK: So that however we argue the past
8 history, we perhaps should just debate that.

9 MS. PERLE: Well, I think that's right, but I think
10 it's --

11 MR. MCCALPIN: I think the problem is in referring
12 to the regulatory history, which is the way this question
13 arose, when you pointed to the language on page 4. And I
14 suggest to you that you don't really want to say that the
15 regulatory history prohibits the receipt of a fee.

16 MS. PERLE: Maybe what we want to do is refer
17 specifically to this regulatory history, rather than
18 generically. Because I think that the discussion in the
19 Federal Register on Tuesday, August 1, 1978, clearly and
20 unequivocally states what was the intention of the Board,
21 whether the language that they included did or not. I mean
22 it does so much more directly and clearly, I think, than the

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1 legislative history. That's my point.

2 MR. McCALPIN: Well, I hate to ally myself with
3 those people that say that legislative history doesn't mean
4 anything. But when you have a provision which is directly
5 contrary to an alleged statement of intent, it seems to me
6 it's the language of the regulation or the statute which
7 controls and not some amorphous statement about what they
8 were talking about.

9 MS. PERLE: I don't think this is amorphous. I
10 guess that's the difference in our view.

11 MR. McCALPIN: I agree with Martha, that at this
12 stage of the game, there isn't any question. We're going to
13 make it clear what the statement of policy is. And I just
14 suggest to you that it's a mistake to say that the regulatory
15 history is clearly in support of what we're about to do.

16 CHAIR BATTLE: A couple of things. I think when
17 Roger McCallister was the project director who appeared
18 before us, he had also gone through very carefully and read
19 the statute and read the regulation and in part in his
20 presentation indicated his plain meaning reading of the
21 statute and the reg and on that basis proceeded in his own
22 program to take cases.

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1 However, as I understood his program's approach, it
2 is in instances where the state has contracted with them to
3 obtain those benefits.

4 MS. PERLE: No. He has several aspects to his
5 program. Part of it is under state contract. And I think we
6 have said quite clearly and general counsel's opinions have
7 stated that those are unaffected by this rule, because those
8 are not benefits that the client would receive, in any event.

9 CHAIR BATTLE: But the other piece that I recall
10 about that discussion was my raising the question, because we
11 had Roger before us telling us about the various programs
12 that he had, and he indicated maybe a half a million dollars'
13 worth of income to his program.

14 MS. PERLE: Which would be affected by this change.
15 Yes.

16 CHAIR BATTLE: It would be affected by this change.
17 He was trying to -- you say here, "A substantial number of
18 recipient project directors oppose this provision," trying to
19 determine and get some sort of feel as to where other
20 programs are, as well, so that we can in constructing our
21 policy be able to take into account the implications for the
22 effect that it might have on existing programs who have

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1 likewise looked at the statute and looked at the reg and
2 taken the plain meaning of the two and implemented them in
3 how they have gone forward with accepting cases and taking
4 fees.

5 Do we have anything that gives us some guidance
6 with regard to whether or not there are any other programs
7 that are similarly situated?

8 MR. McCALPIN: Clearly, Linda Bernard's program
9 does -- Detroit.

10 MS. GLASOW: Yes, there is a handful of programs.

11 MS. PERLE: There are a handful that LSC knows
12 about over the years. But I don't think it's more than a
13 handful.

14 MR. McCALPIN: You're probably right. I think
15 there are some others besides Kansas and Detroit.

16 MS. PERLE: Yes. There may be a couple of others.
17 But as I said, out of 325 programs, it's 1 percent to 1 and-
18 a-half percent, 2 percent.

19 MS. WATLINGTON: And after checking, we take it
20 from that but not from the clients.

21 MS. PERLE: You take it from the state?

22 MS. WATLINGTON: Right, but not the clients.

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1 CHAIR BATTLE: Pennsylvania takes it from the
2 state.

3 MS. WATLINGTON: I was not clear. When he was
4 saying, I thought it was -- but that's the difference between
5 Pennsylvania and the gentleman that was here. They take from
6 the clients, but we don't take.

7 CHAIR BATTLE: Let me just kind of follow up. Part
8 of what in structuring this was of concern, at least to me,
9 is to the extent that we may have five or six programs out
10 there, when we heard from Roger, his concern about us reading
11 1609 and 1610 in tandem was because we could cover in how we
12 structure the regulations structuring what we propose in such
13 a way that it wouldn't have the adverse impact of him losing
14 that half million dollars.

15 MS. PERLE: By changing 1610 in a way that people
16 have been encouraging it be changed for a long time anyway.

17 CHAIR BATTLE: Right. Now, what about the other
18 programs, is my question. Are they also likewise, like
19 Roger, going to not have the financial impact if we take
20 those two regulations in tandem and structure them, or has
21 anyone looked at that? That's just my concern.

22 MS. PERLE: I think the answer is that probably,

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1 nobody has looked at it directly. I would suspect that those
2 programs that are sophisticated enough to sort of set up
3 these kinds of systems would have outside resources that they
4 could use to fund it.

5 But I don't know that for sure. And the only way
6 we can really find out is to put this out for notice and
7 comment and ask for comments from those programs that do the
8 cases in this way.

9 MS. MERCADO: The other thing, too, Linda, is that
10 while programs may not have done some of the things that
11 Roger's programs have done because of the contracts he has
12 with the state, does that mean that given the opportunity to
13 go ahead and take attorney's fees, would they, in fact, do
14 that?

15 MS. PERLE: Yes, they would.

16 MS. MERCADO: Because it does give them the ability
17 to service a greater number of clients, especially in rural
18 areas or smaller communities where there aren't as many
19 attorneys to take these kinds of cases, or they don't want to
20 learn the whole process, you know, of federal litigation or
21 anything like that in Social Security cases, that they would
22 take it, but it would create some addition monies for Legal

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1 Services to do additional work.

2 MS. PERLE: I think, clearly, that there are -- in
3 the regs working group, there was a long discussion about
4 this. And this was again one of those issues which there was
5 not unanimity.

6 But the overwhelming majority of project directors
7 felt that as a matter of principle -- whether or not it would
8 benefit their programs financially, that as a matter of
9 principle, the Corporation should not adopt a rule that
10 permitted them to take fees out of their client's recovery of
11 subsistence benefits, that while they realized that was sort
12 of an admission against interest, they felt that it was not
13 the sort of appropriate moral -- whatever -- I don't know how
14 you want to characterize it -- thing for Legal Services'
15 programs to do with Legal Services' Corporation money.

16 I think there was a general consensus that if they
17 did it with money from some other source that permitted it,
18 we're not going to impose those values on other sources of
19 funding. But I will tell you that there were those who
20 didn't feel that way, who felt, as you indicated, that it
21 wouldn't enable them to serve other people.

22 And while the particular individuals who were

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1 served and who had fees taken out of them would be less well
2 off, that they could use the money to serve other folks. So,
3 I mean, I think it's clear that there is no total consensus
4 in this area. And even though there may be only a handful of
5 programs that are, in fact, taking the fees now, there are
6 others that would take the fees, were they allowed to take
7 the fees.

8 CHAIR BATTLE: Two things. One, I'm going to let
9 Edna speak. And then, I really think that the comment ought
10 to be structured in such a way that we really make it clear
11 that we want to elicit some feedback on this particular issue
12 and particularly those programs that may be impacted.

13 We need to hear and know from them whether or not
14 -- you know, I would hate at this point for any regulation
15 that we have to result in some program out there losing a
16 half a million dollars' worth of income. If we can at this
17 point on the front end look at it and figure out a way to
18 structure, keeping our overriding determination with regard
19 to policy in place but in such a way that you don't have that
20 impact.

21 MS. PERLE: And I think that's what we do with the
22 revision to 1610. But I think the only way to test it is

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1 long as three years to establish.

2 MS. PERLE: Right. So we have changed that. And
3 there is nothing -- and this rule specifically says that
4 Legal Services' programs may take these cases, including the
5 veteran's benefits cases. What it says is that you may take
6 them, but you may not take out attorney's fees from the
7 recoveries. It does now say, at least in this proposed rule,
8 that you may accept reimbursement for your out-of-pocket
9 expenses.

10 CHAIR BATTLE: Okay. Martha?

11 MS. BERGMARK: I attended a meeting of the
12 Northwest project directors a couple of weeks ago and was
13 privy to a very lively, even heated discussion among the
14 project directors there about this issue. And they were
15 dealing with it prospectively.

16 None of them was in a posture where it was about,
17 you know, would this change something that they were already
18 doing. But they were aware that the Board was considering
19 this issue.

20 And the interests that were expressed were
21 expressed very strongly, on the one hand, that -- a concern
22 that the real sort of fundamental mission of the use of Legal

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1 Services Corporation resources was at stake here, that the
2 notion of somehow collecting money from clients as that was,
3 for some folks in the room, a serious inroad against sort of
4 a fundamental value about what this funding was to be used
5 for.

6 On the other hand, there was clearly strong
7 pressure in a prospective way about, "Well, we're out there
8 looking" -- in fact, this discussion came up in a
9 conversation about fund raising. And so that was the -- you
10 know, this key pressure to say, "We are looking for every
11 possible source of money we can get. Are there any limits on
12 that?" And for some, it was, "Well, maybe not. Maybe in
13 this instance, it's okay to collect money from clients."

14 So I think it's fine to say, "Well, we want to put
15 this out for comment," but I think the Board should recognize
16 that the signal that it sends on this is going to be
17 important, even at this stage. I personally come out on the
18 former end of that, that this is -- the notion of looking to
19 collect money from our clients is not the place we should be
20 looking.

21 And I know there are strong feelings against it.
22 People raised the issue of, "Well, are we going to lay off

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1 people, in terms of employees of Legal Services' programs and
2 their opportunities to continue to work?" Project directors
3 are rightly concerned about that, as well.

4 So I would urge -- yes, we do need to get further
5 information about this end. I think much more important than
6 the perhaps program or two that may be financially affected
7 already is the issue -- the prospective issue of, is this a
8 place that we're signalling programs, "Sure, go ahead. This
9 is one of the array of things you can look to to raise
10 additional funds."

11 And certainly, we want to encourage programs to be
12 creative about that. But I think this is going to raise a
13 heated discussion. And I would encourage coming out on the
14 side of keeping the policy the way the Corporation has
15 interpreted it now. I know we have this in clarity, but I
16 would urge clarifying it on the side of this is not something
17 we want to authorize and see what comments come in. But I
18 realize you have a choice to make about that.

19 MS. MERCADO: You know, I have a very difficult
20 problem, because it concerned me that some of the folks had
21 said that, obviously, they didn't want to meet -- they were
22 living off charging clients for what they do. And what that

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1 says to the general cadre of lawyers out there in the ABA is
2 that we shouldn't be charging clients, either, in the private
3 sector. And so --

4 MS. BERGMARK: The poor clients.

5 MS. MERCADO: No. But we have a lot of poor
6 clients that we represent who can't be represented on cases
7 that Legal Services doesn't take because it's not in their
8 priority. And we represent them. And we have to charge them
9 something. And even though -- as painful as it may be, it's
10 just part of life, like they get a haircut or whatever it is,
11 they pay for a dress or whatever. That's just part of the
12 process.

13 I don't think that you can gauge it, because I see
14 it as putting a negative effect on the other side with a
15 private Bar, in saying that there's something fundamentally
16 wrong in charging people for doing some of the service.

17 In here, we're talking about the ability of
18 somebody to get lump sum payments and get lifelong benefits
19 that they wouldn't have had otherwise but for the fact that
20 that attorney, whether a Legal Services' attorney or private
21 attorney, did the case. And the reality is that most members
22 of the private Bar don't take Social Security cases.

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1 MS. FAIRBANKS-WILLIAMS: They won't do it.

2 MS. MERCADO: They can't afford it. It's a long-
3 term case. I mean, I still have cases that I started five
4 years ago that I haven't finished. So I think we have to be
5 very careful about what messages we're sending as a Board in
6 the Legal Services' community, because a lot of people who
7 are in Legal Services have never been in private practice,
8 have always been in a public sector mode.

9 And I can say that personally, have been a public
10 service attorney myself, both with Legal Services and the
11 Attorney General's Office, that it is a very difficult thing
12 to be talking to a client who has a serious problem and at
13 the same time having to deal with the fact that you're going
14 to have to charge him to do this.

15 And it is difficult. It is a difficult thing to
16 do. But that doesn't necessarily mean that fundamentally, in
17 the long run, if I am able to help a whole lot more clients
18 by bringing in some of those monies, to some extent -- it's
19 not a windfall or whatever -- but that you're able to service
20 more clients that Legal Services can't service, then we ought
21 to seriously look at that.

22 CHAIR BATTLE: Okay. I'm going to let Bill speak.

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1 MR. McCALPIN: As I, I'm sure, told the Board when
2 the matter was before us the last time, I had a personal
3 visit in my office from Roger McCallister and the man who
4 came with him. So I had the benefit of this presentation on
5 a private basis and in somewhat greater detail than the
6 committee had here.

7 And as a result, I was at least ambivalent when it
8 came to us the last time. And I would have to say, Martha,
9 that I probably don't feel the principle that you have
10 annunciated to the same degree that you do, perhaps in part
11 affected by my experience with Legal Aid in Canada, where it
12 is not unknown for a small fee to be charged to a client in
13 connection with a service, although it is waived frequently
14 and that sort of thing.

15 And I have looked into it since. And one of the
16 reasons that I've come about is that I have discussed this
17 with the director of the Legal Aid of Western Missouri, which
18 borders Kansas. And obviously, they have a critical view of
19 what's going on just across the street, because the line
20 between Kansas and Missouri there is just across the street.

21 And the perception there is that what's going on in
22 Kansas results in skewing the priority setting. And I think

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1 that that's a significant factor. And they say as a result,
2 that they believe in Western Missouri that some traditional
3 types of Legal Aid assistance are not being provided in order
4 to devote resources to this particular representation which
5 results in the generation of a fee.

6 Obviously, Roger McCallister says, "If you look at
7 it, we are able to provide a greater amount of total service
8 as a result of these fees than we would without them." So
9 it's not a completely clear issue. But let me finish with
10 one thing that troubles me.

11 And that is, when we talk about doing this in 1610
12 and not in 1609, it seems to me we are elevating form over
13 substance. Because the plain fact of the matter is, if
14 instead of using LSC grantee money to provide this kind of
15 representation, we permit a program to use other public
16 funds, IOLTA funds or whatever, to provide this kind of
17 services and take the fee, the fact of the matter is, the
18 client is paying the fee.

19 And it seems to me we're saying, "Well, you can't
20 do it with the right hand, but we'll let you do it with the
21 left hand." And it's kind of elevating form over substance
22 to say they can take a fee from a client under 1610 but not

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1 under 1609.

2 MS. PERLE: I will just say that there are lots of
3 situations where we do that. There are lots of places where
4 there are procedural things that programs need to go through
5 in order to take cases that don't apply to private funds.
6 None of the restrictions that we have apply to public funds.
7 And so I think that's something that we do all the time.

8 But I think there's a rationale for that, which is
9 that Congress determined that there's certain things that are
10 appropriate to be done with LSC funds which they get through
11 an appropriation from Congress, and there are other things
12 that, for a variety of reasons, are inappropriate to be done
13 with those funds. And I think this committee and the Board
14 has expressed a desire to not impose their views on other
15 funders.

16 MR. MCCALPIN: Let's don't congratulate ourselves
17 that we're saving the clients by doing this.

18 MS. PERLE: No, I understand. I understand that.
19 But I think that certainly, we can look at ourselves as being
20 -- you could view this issue as one in which we are trying to
21 be pure and let the other funders fund the dirty work. And I
22 guess we could look at it that way.

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1 But I, nevertheless, feel that it's better,
2 assuming that we all agree that this is the appropriate
3 policy. And I'm not sure that everybody necessarily agrees.
4 But assuming for the moment that we do, it is better that
5 Legal Services funds should not be used in this fashion than
6 that they are.

7 And don't forget, if we change this with respect to
8 LSC funds, we change this policy explicitly, it also affects
9 how private funds are used, so that the clients are not going
10 to be better off in any event, if we change this in the way
11 that Roger would have us change it.

12 So I think that there are different ways that you
13 can look at it. And maybe this is a naive position that
14 we're being so pure and principled and, in fact, it's not
15 really going to have any effect.

16 I wanted to just suggest that there is some middle
17 -- I think there is an opportunity for some middle ground. I
18 think that one of the things that Roger has said and a number
19 of other people have said is that sometimes these Social
20 Security cases provide retroactive benefits that reach
21 enormous proportions, that there are cases where these
22 benefits could be in the range of \$20 or \$30,000.

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1 So it is certainly something that this committee
2 could think about to say that you can't take fees unless the
3 back fees are above a certain level, in which case you will
4 permit programs to take some portion of those fees. I mean,
5 there are a number of situations where we could do that.

6 CHAIR BATTLE: Okay. I've got several people that
7 want to speak. I'm going to allow Rosie and then, I think,
8 John, and then Edna.

9 MS. NEWSOME: My name is Rosie Newsome. And I
10 would just like to say that that is why clients in so many
11 areas are suffering now. And so many are getting letters
12 being denied service, saying there's not enough attorneys,
13 because you could not see taking a client that needed help,
14 and they have no income, when there's a client sitting there
15 that has an appeal waiting for five years of back pay.

16 Naturally, they're going to take that back pay.
17 But how long has that client suffered? And who does that
18 client owe? And how much of that money has that client got
19 to pay out after they receive that back pay? They haven't
20 been living all that time free.

21 If they took money from trustees, the trustee
22 program is going to take their monies before they get it.

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1 They have got to sign a wavier saying that trustees can get
2 their money back for the medication, for the doctors, for
3 their rent, whatever they have been paying. Now, who's
4 benefiting? The attorney and the state, right back again.
5 That client is just like they were in the first place.

6 I realize and I feel deeply for all attorneys
7 that's working for Legal Services, because I realize they're
8 not getting all their money. And I've said this a thousand
9 times. They should be paid as well as a private attorney.
10 But if they are trying to get it from the clients, they're
11 not really there to support the clients, then they should get
12 out there with the public sector.

13 Because they are hindering the clients and not
14 doing them justification when they sit up and send out 15 and
15 20 letters every 3 or 4 weeks telling the client they cannot
16 help them because they don't have enough attorneys. But if
17 you go in there and pull their record, you will find that
18 they have got 30 and 40 clients on their books receiving
19 Social Security and SSI. And I just think there needs to be
20 something done from the top. Thank you very much.

21 CHAIR BATTLE: John?

22 MR. BROOKS: I think there's another cross current

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1 in here that we haven't addressed specifically, and that is
2 local option, local control, local decisions.

3 And it seems to me there are may situations -- and
4 I think Roger McCallister's Kansas City program is a prime
5 example of that program exercising its judgement in relation
6 to the entire client community and coming up with the
7 conclusion that it is better to, you might almost say,
8 "shortchange" a few clients for the benefit of the broader
9 client community so many more clients can be served with the
10 resources that are generated by these programs which may
11 impinge on some clients' recoveries.

12 So looking at it as a total community problem, they
13 have come up with this as a preferable result. And my own
14 feeling is that the local programs can make a better decision
15 on this issue than we can from our Mt. Olympus here.

16 And my inclination is to leave it to the local
17 programs, structure the regulation so that the McCallisters
18 can do what they are doing, but leave it open for the local
19 programs to make the decisions.

20 CHAIR BATTLE: Edna?

21 MS. FAIRBANKS-WILLIAMS: That's what I was going to
22 say to Linda, why wouldn't they be better off if more were

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1 served? Even though each one paid their fair share of the
2 filing fees or this or that or a small amount, you want to
3 remember that if you're working on a veteran's benefit, that
4 if it's service-connected, that the family comes up with
5 complete CHAMPUS insurance, it comes up with college money
6 for the kids to go to college.

7 And it sustains that family for the next maybe 15
8 or 20 years to get the kids grown up and keeps him in
9 veteran's benefits for the rest of his life. That seems to
10 me like that's a small amount of sharing to pay for to have
11 enough money left to do somebody else's case at the same
12 time.

13 CHAIR BATTLE: Renee, if you will come forward and
14 state your name for the record.

15 MS. SZYBALA: Renee Szybala. I just had to make a
16 few observations. One of the things that I think happens
17 here when you charge market rate is that you create the
18 appearance of competing with the private Bar. And I think
19 you need some private Bar input on how they feel.

20 I had the opportunity to be home sick on Tuesday
21 with the TV on. And long with the ads for "Have you been
22 injured?" were two ads for "Have you been denied Social

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1 Security benefits?" There are lawyers out there who want
2 these cases.

3 I mean, the fact that the programs believe it's in
4 that game, it's income generating, means that you can make
5 some money on these cases. And to the extent there are
6 private lawyers out there, there are private lawyers out
7 there who are going to want them.

8 I also think I don't know enough about this to
9 speak to it, but there are income tax ruling implications
10 here. I mean, when the programs get this money, they are not
11 taxed on it. When the private Bar gets this money, they are
12 taxed on it. To the extent the programs charge market rate
13 -- and McCallister said he didn't.

14 And there might be tax reasons that he didn't, that
15 he charged 5 percent less than the Social Security law
16 allows. Because when a not-for-profit law firm charges
17 market rates, that becomes potentially -- that becomes
18 taxable money, and different tax implications are involved.
19 And so local control of this issue may create other problems.

20 CHAIR BATTLE: Yes. I think that this discussion
21 is extremely healthy around this issue, because what we're
22 attempting to do now is really determine whether or not how

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1 we shape the policy which will be implemented in these
2 regulations is consistent with where we truly want to be on
3 this issue, and we're trying to determine precisely if we do
4 that what the implications are going to be -- for example, as
5 Renee has pointed out, for the private Bar, as has been
6 pointed out by Rosie and Edna from the clients' point of view
7 and as we heard from Roger from the standpoint of programs,
8 as well.

9 My own view at this point is that I think we really
10 -- rather than at this point stating a policy in how we
11 construct our comments ought to open it up for discussion.
12 And we ought to structure what we write here to present
13 equally both sides of the picture, so that we can get in our
14 comments response a pretty comprehensive view of how the
15 affected parties feel about that.

16 I think it is going to be important to hear from
17 the private Bar, as well as programs, as well as clients
18 about the implications of this.

19 Because certainly, as I step back from this
20 particular issue and look at where we are as a program and
21 look at where we before Congress in terms of getting
22 additional funds, we really do need to look at how we're

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1 going to structure the whole push that we have got in other
2 segments, which is part of what Martha raised about fund
3 raising for our programs and how that can be effectively
4 done, if it can be done, and whether or not if that runs
5 completely contrary to an overriding policy we have got about
6 not taking funds from clients or whether we want to open that
7 up and say, "\$1 per client when you come into the office," so
8 that you understand in our society, you pay for services.

9 That's just something I think right now that since
10 we as a committee have such diverse views, we're not at a
11 point where we have an overall policy position. And we may
12 need to make that clear in how we structure the comments, so
13 that we do get considerable feedback as to where we ought to
14 go on this.

15 MS. FAIRBANKS-WILLIAMS: Well, definitely, a
16 percentage of being able to get services at all would be
17 better to pay at least a percentage to Legal Services in
18 order to get services at all, rather than have none. So
19 maybe that would be the way to go, to think about just as a
20 percentage.

21 CHAIR BATTLE: And I think that's part of what
22 Renee was saying. Even if it's not the full market rate that

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1 the statute allows, if it's some lesser amount or if it's
2 some percentage that we establish or that we construct for
3 local priority setting or whether we look to see what the IRS
4 considers the differential between profit and not-for-profit
5 activities as it relates to this.

6 I just think that there are some other subsidiary
7 issues that we really have to take a look at as we structure
8 this, as well as we need to stand back and look at what the
9 overriding policy concerns are, as well.

10 MS. FAIRBANKS-WILLIAMS: If it was a percentage,
11 then you wouldn't be fighting any lawyers that wanted to do
12 it on a full fee contingency, if Legal Services --

13 CHAIR BATTLE: But then, arguably, the private Bar
14 could say, "You're undercutting our competition," because
15 clients would rather come to Legal Services and get less
16 money taken out.

17 MS. FAIRBANKS-WILLIAMS: If they were eligible to
18 come to Legal Services. There's a lot of them out there. We
19 have a lot of veterans in Vermont that have nothing.
20 Absolutely nothing.

21 CHAIR BATTLE: Suzanne?

22 MS. GLASOW: I just again want to kind of put it in

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1 the legal framework, and that the only reason Congress
2 articulated for putting this restriction in our Act was not
3 to compete with the private Bar. And I think in the
4 language, when they say, "Your guidelines shall not preclude
5 taking fee-generating cases when only statutory benefits are
6 sought and where appropriate private representation is
7 unavailable," that's a very strong message from Congress
8 that, "We don't want you competing with the private Bar."

9 So we're going to have to balance, if we do decide
10 to go into taking some kind of a fee. We're going to have to
11 make sure there's not getting into this competition --

12 CHAIR BATTLE: Specific guidelines to ensure that
13 this not a private Bar contingency out there interested in
14 doing that kind of work in that particular jurisdiction.

15 Bill?

16 MR. MCCALPIN: I was looking at the Senate's
17 report, Suzanne. And I think that what you said is amplified
18 there, where it says, "Generally, the current restriction on
19 fee-generating cases has been helpful to Legal Services'
20 programs, which were thereby able to assure the private Bar
21 in their communities that Legal Services' programs will not
22 be in unfair competition with private practitioners."

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1 That's basically what 1007(b)(i) is about. But to
2 pick up what you're saying, LaVeeda, if we get to that point,
3 I'm going to suggest when we get to 1609.3 on general
4 policies that we have an affirmative requirement and a policy
5 and procedure including a requirement that a recipient
6 attempt to refer a fee-generating case to the private Bar.

7 We do not have an affirmative requirement to that
8 effect in our policies now, although it's implicit, I think,
9 in both the statute and what we're talking about.

10 MS. MERCADO: But we do.

11 CHAIR BATTLE: "It would be rejected by a local
12 lawyer referral service or by two private attorneys" is part
13 of --

14 MS. MERCADO: That's a pro forma. You refer it
15 out, and if it's rejected by two or three lawyers, then it
16 comes back to you.

17 MR. McCALPIN: And what happens is, you pick two
18 patsies. That's what happens.

19 MS. MERCADO: You're supposed to have a rotating
20 list, which I know from our local program, all the Bar
21 members are in that list, and they get referred out. And
22 we're supposed to sign the list of the kinds of cases that

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1 you will or will not take on referral.

2 CHAIR BATTLE: What I hear Bill saying is, we may
3 need to consider how we structure a reg to give the full
4 impetus to the intent of that Congressional statement, so
5 that those referrals when they go out to two private
6 attorneys really meets the whole criteria of assuring that
7 we're not competing with the private Bar with respect to
8 statutory limits.

9 MR. McCALPIN: A legitimate reference.

10 CHAIR BATTLE: And we are just about on 1609.3.
11 That's actually the next one up. I want to make sure,
12 because I think this discussion is critical, that we have
13 fully aired our concerns. And we'll have a transcript of
14 this, so that as we construct the comments relating or
15 pertaining to this, it will illumine the concerns that have
16 been raised from the various points of view on this.

17 MS. MERCADO: But one of the things I keep hearing
18 people talk about, this 25 percent, you know, in Social
19 Security, it's either 25 percent or 4,000. In any event, it
20 cannot be more than \$4,000 that an attorney recovers, whether
21 they're in private practice or in Legal Services. So the
22 amount of money that would be taken from a client will never

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1 be more than \$4,000.

2 It's just that with the retroactive benefits,
3 you're not only \$1,500, then it will be 25 percent of
4 whatever that is. But if their retroactive benefits are
5 \$40,000, it's not going to be \$10,000. It's going to be
6 \$4,000, assuming Social Security approves it. Because they
7 may only give you two because they think that the work that
8 you as an attorney put into the case was not sufficient to
9 merit the \$4,000.

10 So I don't think that there should be a parade of
11 horror in people's minds that automatically goes, "25
12 percent. Gee, if somebody has a \$60,000 retroactive
13 benefits, that's \$20,000 to the program or to the attorney."
14 That isn't the case. And when I hear those comments, I think
15 that's part of the feeling, that it's 25 percent of the total
16 retroactive lump sum, and it's not.

17 CHAIR BATTLE: That point is well taken as to the
18 cap that statutorily applies to Social Security. And I
19 understand there is a cap that applies, as well, to veteran's
20 benefits.

21 Bill?

22 MR. McCALPIN: I'm not clear as you move on whether

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1 there is some sort of consensus or agreement that the concept
2 that John raised is to be included in a redraft of this
3 regulation for our further consideration.

4 CHAIR BATTLE: The local priority-setting?

5 MR. McCALPIN: No, the local option.

6 CHAIR BATTLE: The local option?

7 MR. McCALPIN: You were about to move on, and I
8 just wasn't quite sure where we were, in terms of moving on.

9 CHAIR BATTLE: Well, what I had suggested is that
10 in reviewing the transcript of what this discussion has been,
11 that the perspectives that have been discussed be illumined
12 when we talk about the background for what we have got to
13 consider, so that we elicit comments from the public with
14 regard to that. And John's comment about local priority-
15 setting as an option, I think, should be included.

16 MR. McCALPIN: In the comment or in the reg?

17 CHAIR BATTLE: No, in the comment, right now. What
18 we're suggesting is --

19 MS. MERCADO: We're not actually writing a reg per
20 se.

21 MR. McCALPIN: Well, but we're going to.

22 CHAIR BATTLE: Yes, we are. But what we're going

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1 to say is, there are two or three or four myriad sides to
2 this issue. And though we have this as a proposal on the
3 table, we have got to consider all these myriad views about
4 which way we ought to go. And we want to elicit some
5 comments from the public with regard to that.

6 This is a pretty important issue. I think that
7 since we have got between now and December, that when this is
8 redrafted in bold, so we know exactly where and how it falls,
9 that it's important to get it to the committee so we can take
10 a look at it.

11 MS. PERLE: I just want to be clear what you're
12 suggesting. And this is your suggestion, not necessarily the
13 view of the whole committee, but that we should leave the
14 language of the proposed rule as it is but expand the
15 commentary substantially to take into account all of these
16 different views and to say that the committee is anxious to
17 hear people's views on whether this is the right way to go
18 and, if not, how it would affect you and about all these
19 other issues that we have discussed.

20 In other words, put them in the commentary, leave
21 the rule basically as it is. Is that your proposal?

22 CHAIR BATTLE: That's what I'm proposing, yes.

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1 MS. GLASOW: And to indicate the committee has not
2 yet taken a position?

3 CHAIR BATTLE: Yes.

4 MR. McCALPIN: Does that satisfy you?

5 MR. BROOKS: I think so, as long as it's opened up
6 in the commentary as a serious question, and the local
7 control is put out there as something to be considered as a
8 major component of the decision making process.

9 CHAIR BATTLE: Okay. We can now move on to 1609.3,
10 "general policies." One point that Bill has already raised
11 under 1609.3 is the fact that we have always had the criteria
12 that a case has to first be rejected by the local private
13 Bar. And we have got a provision in (b)(1) which illumines
14 how that's supposed to happen.

15 And the comment that Bill just made is that this
16 rejection has become pro forma, because they have got two
17 people who have on their word processing equipment rejection
18 letters and with a telephone call quickly, those two
19 rejection letters are generated and gotten over to the
20 program, and the program is able to go forward.

21 MS. PERLE: I didn't realize you were so cynical.

22 MR. McCALPIN: They're not even letters. They're

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1 just verbal.

2 MS. GLASOW: The current language basically creates
3 an impossible task, because it says any attorney out there
4 won't take the case. And there is a problem for recipients
5 complying with this. Maybe there's a middle ground. Maybe
6 we could -- say they have to refer through a formal referral.

7 MR. McCALPIN: Well, they have to refer to a lawyer
8 referral service, if there is one.

9 MS. PERLE: If there is one.

10 MR. McCALPIN: This gives them an option. They can
11 either do a referral service or two lawyers. It doesn't
12 require them to go to the referral service.

13 MS. PERLE: Well, the problem with requiring them
14 to go to the referral service is if they get a case, and it's
15 a kind of a case that they know that there are private
16 attorneys out there who do handle those cases, but they're
17 required to go through the referral service, then those
18 private attorneys are not -- in other words --

19 CHAIR BATTLE: Part of referral service --

20 MS. PERLE: Right. In other words, if they get in
21 a civil rights case which the program maybe would like to
22 handle but realizes that there are civil rights attorneys out

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1 there who might handle these cases but then is required to go
2 through a referral service and those attorneys aren't on the
3 referral services, you're going to have a kind of a funny
4 situation.

5 You'll go to the referral service, it will be
6 rejected. I mean, I think that programs should have the
7 option to be able to send it to private attorneys who are out
8 there who they know will take it and will do a good job,
9 because they have the expertise.

10 CHAIR BATTLE: I know in Birmingham that there are
11 two firms -- in fact, the paralegal who worked for me at
12 Legal Services now works for that firm. And they do nothing
13 but Social Security work. I mean, they have developed it
14 over the years.

15 MS. PERLE: And they do it well.

16 CHAIR BATTLE: And they do it well, and they have
17 been doing it for years. And so I'm pretty sure, whether
18 they belong to the referral service or not, that the local
19 programs are fully aware of that and could make a direct
20 referral.

21 MR. MCCALPIN: On the other hand, do you want to
22 funnel all the Social Security cases to that firm?

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1 CHAIR BATTLE: If no one else in town is doing it,
2 and they do a good job of it and we can't do it, I don't see
3 the other options.

4 MS. FAIRBANKS-WILLIAMS: You said the magic word,
5 "in town." In our referral service -- we are a rural area.
6 and if you're going to give a case in Bridal Burroughs way
7 down next to the Massachusetts line way up next to Canada,
8 you're going to create one hell of a problem for that client.

9 MS. PERLE: Renee just wanted me to point out that
10 because of the definition, which takes Social Security cases
11 out of the fee-generating case definition, this doesn't apply
12 to Social Security cases. This applies to other cases where
13 they're fee-generating.

14 CHAIR BATTLE: That's right.

15 MS. PERLE: That's right.

16 MR. BROOKS: Would it help, Bill, if we just put in
17 "after a good faith effort"?

18 MR. McCALPIN: Yes, that would help.

19 MR. BROOKS: That's really the essence of your
20 suggestion.

21 CHAIR BATTLE: "A good faith effort not to compete
22 with the private Bar"?

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1 MR. McCALPIN: Well, I think the "not compete with
2 the private Bar" can be in the commentary. I don't think
3 that needs to be in the regulation itself. But the purpose
4 of this is to satisfy the statutory requirement or the
5 Congressional intent as expressed in the Senate report or
6 whatever you want.

7 But it does seem to me that there needs to be some
8 more clout to the referral process, because I can tell you, I
9 know of instances where it's a patsy. You call up two people
10 that you know are going to turn it down, then you go ahead
11 and take it.

12 MS. PERLE: Well, I think that that's certainly
13 fair. I think my suggestion would be in 1609.3(a) that we
14 add something to the effect that "These written policies
15 shall provide for some good faith process of referring to" --

16 MR. McCALPIN: That's where I think it ought to be,
17 in (a).

18 CHAIR BATTLE: Martha?

19 MS. BERGMARK: Right now, there is no incentive to
20 a program to be looking to keep a case or take a case for any
21 financial reasons at all. One thing we're possibly opening
22 the door to in our sort of consideration around Social

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1 Security cases and others is that. Right now, there is no
2 incentive to do that, because that simply doesn't exist.

3 In earlier discussions of this regulation when it
4 was last revised, there were sort of -- it was stated that
5 programs did actually have a financial incentive if they were
6 looking to collect attorney's fees, if they thought this was
7 an easy attorney fee winner on -- not that it was coming out
8 of the client's pocket, but that it was coming from
9 elsewhere.

10 And I think this factual record that got developed
11 there was otherwise, that that really was not -- you know,
12 that yes, there are some programs in the country who do
13 collect a fairly substantial amount of attorney fees, but
14 that that was really not the motivating force for them, nor
15 was it -- or that the prospect of an attorney fee was not the
16 motivating force.

17 It was much more about what were the kinds of cases
18 that were being done, was this a housing discrimination
19 matter, or something like that that brought that case into
20 the program's office and made it really make sense for the
21 program to handle it but that, in fact, programs do in those
22 instances often work with folks like the Lawyers' Committee

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1 or others.

2 And when there are other resources for lawyers to
3 handle it, the programs do use those, as well. In fact,
4 there's sort of a disincentive to keeping cases just because
5 there's such an overabundance of cases that come to programs,
6 so that actually this picture that attempted to be painted at
7 one time of programs sort of trying to capture those clients
8 that were somehow going to somehow make money for them was
9 really a false picture. I mean, the notion of a good faith
10 effort or whatever, I think, is fine.

11 I know, Bill, that there are instances where if a
12 program is looking at a case or a client and thinks this is a
13 case that fits with their priorities and they want to do,
14 they may make a lesser effort to really go out there and beat
15 the bushes to say, "Wouldn't MALDF like to handle this case,"
16 or, "Can't we get the Lawyers' Committee in here to do it or
17 the ACLU?" but that, in fact, that's a fairly limited sort of
18 situation.

19 MR. McCALPIN: I agree with you that programs don't
20 take on these cases primarily for the money. It's because of
21 the sexy issue that's involved. But if there is money
22 possible, then they ought to refer it out, even if it's an

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1 issue that they like.

2 MS. BERGMARK: Right. And I think programs do
3 that.

4 MS. PERLE: I think programs do it, as well.

5 MS. BERGMARK: But the balance you're looking to
6 achieve is not to put the program to some sort of absurd
7 effort, a mechanistic thing to have to call every lawyer in
8 town.

9 MS. PERLE: I don't think that we're suggesting
10 that.

11 CHAIR BATTLE: I think two things will accomplish
12 the limited goal that we have got here. One is to simply
13 somehow address the statutory language for the underlying
14 intent of this and to use only the term "good faith," which
15 means so long as the program director is satisfied that they
16 have made that good faith effort, then I think we are
17 comfortable with it.

18 MS. PERLE: I'm just curious about how the
19 committee would view a situation where a client or potential
20 client comes to a program and says, "You know, I've been to
21 every attorney in town, and nobody will take this case. And
22 I'm coming to you as a last resort." Do they have to go

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1 through that process again?

2 MR. McCALPIN: Yes, because --

3 MS. FAIRBANKS-WILLIAMS: Three times, my son did.
4 He was refused by Legal Aid. We worked on the case. He
5 applied for SSI. He was refused SSI. That's how come I
6 learned so much about veteran's benefits. It took six years
7 before he got his veteran's benefits.

8 In the meantime, he finally got his SSI, and he
9 finally got some help from Legal Aid. But he was refused
10 twice before they finally did help him.

11 MS. WATLINGTON: They won't help until -- you have
12 to have a letter where you've been refused.

13 MS. FAIRBANKS-WILLIAMS: You have to be refused
14 first. You have to go all the way through the process and
15 present your own case, present your doctor's stuff and
16 everything. And then, when you are refused, our Legal Aid
17 will take it after you've been refused once.

18 Well, you may have already been a year without
19 anything -- you can be on general assistance or whatever. If
20 you've got some help, fine; if you haven't got some help, too
21 bad. We bury some of them before they ever get any help.

22 MS. WATLINGTON: With welfare reform, you can't be

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1 on welfare anymore. So what's going to happen to those
2 people --

3 CHAIR BATTLE: It seems to me in an instance, as
4 you suggested, Linda, that if a person comes and says, "I've
5 already been to two lawyers, and they turned me down," that
6 just checking back with those lawyers would satisfy --

7 MS. PERLE: Would suffice the good faith effort?

8 CHAIR BATTLE: Yes, but that we ought not to bury
9 what our standard practice and procedure has been with regard
10 to having to have those two rejections before a determination
11 is made as to acceptability.

12 MS. PERLE: I still don't see that there's any
13 objection to adding that kind of affirmative duty, to have a
14 good faith referral process. I don't think that there's any
15 objection to that. I think it has always been implicit that
16 programs should have that anyway, and we're just stating what
17 should have been the understanding all along.

18 CHAIR BATTLE: And I think at this point, quite
19 honestly, since next year's reauthorization has to be
20 considered, that tracking the statutory language at this
21 point is probably gong to be beneficial in showing that we're
22 still understanding Congressional intent as it relates to our

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1 position as it relates to the private Bar and not competing
2 with it. It doesn't hurt.

3 MS. MERCADO: And I really think that you're
4 talking about almost two different types of categories of
5 attorney fee type cases. I mean, there's sort of the civil
6 rights poverty issue oriented type cases that will have
7 attorney's fees statutorily provided, wherein pretty much in
8 any jurisdiction that you're in, the majority of the Bar
9 isn't interested in doing those cases, nor do they have the
10 expertise to do those cases.

11 MS. FAIRBANKS-WILLIAMS: That's another point.

12 MS. PERLE: That's dealt with --

13 MS. MERCADO: If you're talking about a tort
14 personal injury, then that's a totally different subject of
15 which they're going to be very upset about. So I think that
16 there is a category of cases that we're talking about.

17 And generally, when he's talking about the sexy
18 case, it happens to be the civil rights case or the issues of
19 really fundamental denial of rights to poor people that most
20 private Bar attorneys are not interested in taking, nor do
21 they have the expertise in taking, with few exceptions.

22 And maybe a MALDF might or an Inc Fund might, but

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1 not in general by the Bar as we see it. I mean, I don't know
2 how you would put it in the --

3 MS. PERLE: Well, we did deal, I think, with those
4 kinds of situations in 3 and 4 of this -- under "general
5 policies," which talk about the kind of case that it is and
6 set up some criteria for when referral is not required.

7 CHAIR BATTLE: Right. Why don't we take a look at
8 that? I think that this has been fully discussed, and I
9 think we have kind of indicated as a committee what we want
10 done with regard to some amendments to the general policy
11 section. Are there any other concerns about the general
12 policy section in -- I guess we have got 3(b) and 4 and 5.

13 (No response.)

14 CHAIR BATTLE: Or the comments that pertain
15 thereto?

16 MS. MERCADO: I see a lot of your red writing,
17 Bill.

18 MR. McCALPIN: Let me say that on page 6 under
19 3(b)(4), the last sentence of the paragraph says, "This
20 subparagraph has been rearranged to make it clear that the
21 director has the express authority subject to policies
22 adopted by the recipient's governing body."

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1 And in the regulation itself, it doesn't say
2 anything about "subject to policies adopted by the governing
3 body," unless you transpose (a) into it.

4 MS. PERLE: That was what was intended.

5 MS. MERCADO: Yes, I would think so.

6 MR. McCALPIN: Well --

7 MS. MERCADO: Because the recipients are acting
8 with part and parcel of their governing bodies. That's part
9 of the process.

10 MR. McCALPIN: Then it seems to me that the
11 commentary ought to say, "subject to the policies adopted as
12 required in .3(a)."

13 CHAIR BATTLE: Anything else, Bill?

14 MR. McCALPIN: Yes. Just a minute. Let me read
15 something here.

16 CHAIR BATTLE: Okay.

17 MR. McCALPIN: No. Go ahead.

18 CHAIR BATTLE: Okay.

19 MR. McCALPIN: Well, at the top of 7 under
20 3(b)(4)(iii), I think that when you refer to "ancillary
21 relief and counterclaims as deleted" -- I really felt that
22 the commentary could include examples of circumstances in

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1 which the recipient director could determine the recovery of
2 damages was not the principle object of the case.

3 I think to mix relief and counterclaims and
4 principle object of damages is sort of mixing apples and
5 oranges. The ancillary relief and counterclaim doesn't
6 necessarily relate to damages. And the counterclaim may ask
7 for injunctive relief.

8 I'm not sure that there is a connection between
9 relief and counterclaims and the determination that the
10 recovery of damages is not the principal object. You
11 determine that from the petition or complaint, as well as
12 from counterclaims. It just seemed to me that you were
13 mixing two rather different concepts in that sentence.

14 MS. MERCADO: But it's deleted, though, right?

15 MS. PERLE: We deleted it from the rule, which did
16 include both of them.

17 MR. McCALPIN: Yes. "The commentary could examine
18 the kinds of circumstances -- for example, if the relief
19 sought was equitable" --

20 MS. PERLE: In other words, if I understand how the
21 previous rule was interpreted, if there was a possibility of
22 damages, no matter how slight -- a police brutality case,

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1 where a person got a tooth knocked out and had \$500 in
2 damages and dental bills but was suing for changes in policy.
3 They weren't suing for \$1 million in punitive damages or
4 anything.

5 They were suing to get back what it cost them to
6 get their tooth fixed, but what they really wanted to
7 accomplish was for the police department to put in place
8 training programs for their police officers and policies that
9 would restrict the use of force in arrest situations and
10 things like that, that what the client sought was not
11 substantial damages but really just wanted to be made whole,
12 and they wanted prospective equitable relief that would
13 change the policies under which the institution was
14 operating.

15 It could be in a school situation. It could be in
16 a lot of situations, where the person really wasn't seeking
17 to receive a lot of money but maybe was seeking a small
18 amount of damages to cover their expenses. And, in fact,
19 under the old rule, it permitted the programs to take that.
20 But it was so confusing, in terms of the kind of thought
21 processes that programs would have to go through.

22 But we wanted to make it clear that when that was

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1 not the principal object of the case, the object of the case
2 was to change the way an institution or a private individual
3 or whatever worked and operated and related to the client
4 community, that those kinds of cases clearly were
5 permissible. The fact that there was some small damage
6 provision included didn't change the basic nature of the
7 case.

8 CHAIR BATTLE: As I understand it, Bill, after you
9 read that provision, you don't have an objection to it?

10 MR. McCALPIN: Yes.

11 CHAIR BATTLE: Okay. All right.

12 MR. McCALPIN: But in the next paragraph, I do
13 suggest that it only relates to a national or state support
14 center -- "joins a case brought by a recipient," say would be
15 true in the case where the recipient is defending. It
16 seems to me, if a national or a state support center gets
17 into a case on the defendant's side, the same thing should
18 apply.

19 MS. MERCADO: That's right.

20 MR. McCALPIN: It should not apply only in a
21 plaintiff situation.

22 MS. PERLE: I think maybe we should say "brought to

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1 it." In other words, brought to the center by a local
2 program.

3 MR. McCALPIN: Okay. But I understood "brought by"
4 as being plaintiff.

5 MS. PERLE: I'm not sure what I intended when I
6 wrote that, but I think that --

7 CHAIR BATTLE: "Brought to" might be a better
8 phrase.

9 MS. PERLE: "Brought to it." In other words,
10 brought to the state or national support center by a local
11 recipient.

12 MR. McCALPIN: Okay.

13 MS. MERCADO: Okay.

14 CHAIR BATTLE: All right. John?

15 MR. BROOKS: I've got a question on page 6, the
16 first full paragraph next to the last line, "Policies adopted
17 by the recipient's governing body," which throws me back to
18 our discussion about "policy body" versus "governing body."
19 And I think the word "governing body" is not included in this
20 regulation.

21 As such, we refer to "the recipient" each time, so
22 that I haven't fine toothed it wholly, but I think the word

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1 "governing body" appears only in the commentary. And I just
2 caution the drafters here to have in mind that "governing
3 body" is a technical term, at least in 1607. So we should
4 not raise an ambiguity here or anywhere else.

5 MS. PERLE: So you're suggesting that we take out
6 the reference to "governing body" on page 6, correct?

7 MR. BROOKS: Just say "recipient," yes, here and
8 just have an eye out for that elsewhere.

9 MS. GLASOW: Okay.

10 CHAIR BATTLE: Good point. All these are good
11 suggestions. Are we all the way through with 1609.3? Is
12 there anything else?

13 (No response.)

14 CHAIR BATTLE: Why don't we take a brief 10-minute
15 break? It's about 10:30. That's mid-morning. So everybody
16 can stretch their eyes for just a moment and come back --
17 their legs.

18 (A brief recess was taken.)

19 CHAIR BATTLE: Just before our break, we completed
20 our discussion of 1609.3 on general policies. And we're
21 moving into 1609.4, "acceptance of fees." We're going to
22 take a look concomitantly at the regulation itself and the

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1 comments, starting on page 7 with the comments and moving to
2 page 8 on acceptance of fees.

3 Do we have any questions about 1609.4?

4 (No response.)

5 CHAIR BATTLE: If there are none, we can move on --

6 MR. MCCALPIN: Look at the regulation itself,
7 .4(a)(2). And you don't -- I just want to raise this
8 question and think about it out loud. You don't permit a
9 deduction of an award from compensatory damages. Pain and
10 suffering is frequently included in compensatory damages.
11 And it's a very flexible sort of concept.

12 And if there is a substantial verdict based on not
13 the recovery of out-of-pocket costs, like medical and lost
14 wages and that sort of thing, but a concept like pain and
15 suffering, do you still think it's inappropriate to take the
16 fee out of that?

17 MS. PERLE: Well, I guess it really depends on what
18 your theory of the purpose of pain and suffering damages is.
19 To the extent that money can be used to compensate a person
20 for something that is sort of not easily subject to
21 quantification, but -- and there's really nothing that you
22 can do other than pay money to a person to compensate them

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1 for that, then I guess the answer is yes and that we put it
2 in the same category as actual damages, and we allow a jury
3 to determine how much the person has, in fact, suffered --
4 how much loss the person has, in fact, suffered.

5 I don't think, in fact, that -- I wish Martha were
6 here. I don't have a real sense that there are very many
7 cases that Legal Services' programs handle where pain and
8 suffering are, in fact, awarded, because most of those -- the
9 personal injury type cases are cases that are handled by the
10 private Bar.

11 I mean, I think that there are exceptions, again.
12 The police brutality situation might be one in which pain and
13 suffering damages are awarded. But I think those are very
14 few. I think few Legal Services -- probably it's a bad
15 example, because I think very few of those cases are handled
16 by Legal Services' programs. They're more likely to be
17 handled by civil rights groups, specifically.

18 I don't know whether that's an adequate answer.
19 I've thought about that issue. I don't think that -- the
20 working group didn't discuss it specifically.

21 MR. McCALPIN: I don't know whether it's worth
22 having any consideration of the concept of compensatory

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1 damages in the commentary or not. I don't recall --

2 MS. PERLE: I think we could raise that as an issue
3 in the commentary.

4 MR. McCALPIN: What?

5 MS. PERLE: I think it would be perfectly
6 appropriate to raise that in the commentary, to say that this
7 doesn't distinguish between compensatory damages that are
8 intended to reimburse a person for their out-of-pocket
9 expenses and pain and suffering type damages, which are also
10 compensatory damages, and ask for comments. I think that we
11 ought to do that.

12 MR. BROOKS: I wonder if "actual damages" may not
13 be a more definitive criterion than "compensatory damages."

14 MS. PERLE: Well, I don't know. I mean, again, the
15 question is whether by putting a number on pain and suffering
16 it makes it an actual --

17 MR. BROOKS: "Punitive damages" would be a --
18 either way, I think --

19 MS. PERLE: "Punitive damages" is different,
20 clearly. And we didn't intend for that to be included.

21 MR. McCALPIN: It just seemed to me that it was
22 worth thinking about, if there's a big pain and suffering

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1 element. This is the area where there's a lot of criticism
2 about the judicial system and tort system and that sort of
3 thing and huge pain and suffering type awards.

4 And for us to say that the program couldn't take a
5 fee out of that kind of a damage seemed to me to work against
6 our best interests in several respects.

7 MS. PERLE: I think that we could easily put in a
8 reference to that and ask for comments in the commentary,
9 unless you're suggesting that we make a change in the
10 language of the rule itself at this time.

11 CHAIR BATTLE: Okay. Under 1609.4(3), we have a
12 new provision which -- or a newly-worded provision which
13 addresses the class action cases. And it provides that in
14 part (a), the recipient may accept attorney's fees if you
15 have a common fund or lump sum settlement or recovery that
16 was originally set out in the retainer agreement that was
17 entered into with the named plaintiff prior to the award
18 having been made.

19 Are there any questions about that provision?

20 (No response.)

21 CHAIR BATTLE: All right. And we can go on, then,
22 to (b).

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1 MR. McCALPIN: The next one, (b), how do you
2 propose to enforce (b)?

3 MS. PERLE: Well, the courts have enforced this
4 concept.

5 MR. McCALPIN: They have also enforced it the other
6 way around, too.

7 MS. PERLE: I think maybe in one situation, but I
8 think the overwhelming number of cases that we're aware of
9 have gone against the attorney, at least in those situations
10 where the attorney has suggested that there was some implied
11 contract.

12 CHAIR BATTLE: Go ahead.

13 MS. PERLE: This does not deal with the situation
14 -- make it clear that an attorney works for a Legal Services'
15 program, they leave the program, take the case with them,
16 they're awarded attorney's fees. This does not prohibit them
17 from keeping attorney's fees for work performed after they
18 left the program.

19 It's only when they attempt to reach back and say
20 that "The work I did while employed by the program, I also
21 should be personally compensated for." And that's what has
22 happened in a number of situations. I mean, basically,

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1 attorneys -- several situations. I don't want to overstate
2 it.

3 But attorneys working for Legal Services' programs
4 got involved as counsel in huge class action suits where they
5 knew there was going to be a lot of attorney's fees awarded
6 and then quit their jobs and said, "I'm going to take this
7 case," but they had been working on the case for two or three
8 years as an employee. And then, when the fees come due, they
9 say, "I'm entitled to all of it."

10 CHAIR BATTLE: Lawyers leaving one firm going to
11 another do the same thing. So that's not an unusual
12 circumstance.

13 MR. McCALPIN: Sure. I'm arbitrating in a case
14 like that right now.

15 CHAIR BATTLE: Are you? Yes.

16 MS. PERLE: I don't think any of us would disagree
17 that Legal Services' resources used to support a case like
18 that should when there are attorney's fees available be
19 reimbursed.

20 CHAIR BATTLE: Absolutely.

21 MS. MERCADO: I think that the thing that we need
22 to keep an eye out on -- and I'm not sure how it's going to

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1 affect it -- is that in some states like Texas, the
2 attorney's fees as to whom they would go or not go with
3 ultimately go with the client.

4 If the client decides that they're going to fire
5 Legal Services and retain this attorney who has now left
6 Legal Services, all the attorney's fees would go to the
7 attorney, because the client is the determiner of that
8 attorney-client relationship. And so nonprofit organizations
9 like Legal Services or the Inc Fund or whatever are out of
10 luck. I don't know that the case law is changing.

11 MR. McCALPIN: That's true in Missouri. The award
12 is to the client, not the attorney.

13 MS. MERCADO: So I guess my underlying question to
14 that is --

15 CHAIR BATTLE: We can contract with the client in
16 the retainer agreement to bind the client to pay us for work
17 done on our cap, it seems to me.

18 MR. McCALPIN: Right.

19 MS. PERLE: I think that retainer agreements do
20 state that.

21 CHAIR BATTLE: Okay.

22 MS. PERLE: Are you suggesting we need to change

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1 the language of the rule to deal with that?

2 MS. MERCADO: No, I'm not suggesting. I'm just
3 pointing out that there is going to be some difficulties in
4 some jurisdictions.

5 MS. PERLE: I know. I think what's going to
6 happen, in terms of -- somebody suggested how do we enforce
7 this. And I think the answer is that if it's in the rule,
8 when it comes to a situation where the program is suing the
9 attorney or the client or whatever to get fees that were
10 awarded for work done while the attorney -- that it's a basis
11 on which that suit -- it's one of the grounds on which the
12 suit could be brought.

13 I don't think that we're really going to be in a
14 position to enforce this, other than writing general
15 counsel's opinions, which say it's clear -- there are a
16 number of places in our rules where there are provisions that
17 really -- the Corporation is not in a position to really
18 enforce, but they do state the position of the Corporation.

19 CHAIR BATTLE: If there are no other questions
20 about that section, the next following section, Subsection
21 (c).

22 MR. McCALPIN: 5?

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1 CHAIR BATTLE: No, (c). If there are any about
2 (c)?

3 (No response.)

4 CHAIR BATTLE: If not, let's move on to 5 on page
5 14. Could you state your name for the record, please?

6 MS. VOELLM: My name is Karen Voellm. I'm with the
7 Office of Inspector General. I just wanted to briefly note
8 that in (c), there's some fairly specific language in some of
9 the IRS revenue rulings with respect to the nature of co-
10 counseling.

11 And I was just suggesting that we take a look at
12 some of the revenue rulings, that some of the language may
13 conflict with what is in (c). I don't have the specific
14 ruling here with me, but it might be something to look at.

15 MR. McCALPIN: I'm not sure I understand. If
16 there's cocounsel between the recipient and a private
17 attorney and the fee is shared between them, are you
18 suggesting that the portion of the fee that goes to the
19 recipient may be taxable?

20 MS. VOELLM: There is some specific language -- and
21 I can't remember the specific ruling, but it does address the
22 acceptability of cocounseling and associated fees. And I

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1 think that we should take a look at that one particular
2 ruling.

3 MS. GLASOW: Is that cocounseling between two
4 private attorneys, or cocounseling between a nonprofit
5 corporation or law firm?

6 MS. VOELLM: Right.

7 MS. GLASOW: Which?

8 MS. VOELLM: Between the nonprofit and private, not
9 between two private.

10 MS. SZYBALA: What we saw was one revenue ruling
11 that's an old revenue ruling that general counsel's office
12 probably should look at, where a not-for-profit law firm lost
13 its not-for-profit tax status. That was the bottom line in
14 the revenue ruling because of a cocounseling agreement with a
15 shared fee arrangement. And that was it. They were no
16 longer --

17 MS. PERLE: Was that with a nonprofit, or was it a
18 public interest law firm or Legal Services' program?

19 MS. SZYBALA: It was a nonprofit.

20 MS. PERLE: Which wasn't a legal organization,
21 probably?

22 MS. SZYBALA: It was a --

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1 MR. McCALPIN: Was it a 501(c) corporation?

2 MS. SZYBALA: Yes, it was.

3 MS. FAIRBANKS-WILLIAMS: 501(c)(3)?

4 MS. SZYBALA: Yes, it was. This is an old reg
5 rule.

6 MS. MERCADO: So it really goes to the issue not of
7 the sharing but to the issue of whether or not that nonprofit
8 now becomes a profit corporation in collecting fees.

9 MS. SZYBALA: In that joint fee agreement. And
10 that's my next question, whether how they look at that in
11 terms of profitability -- if you're going to enforce these on
12 fee profits.

13 MS. MERCADO: Let's give it the other scenario,
14 that they're the same nonprofit corporation handling the same
15 case getting all the attorney's fees to itself without
16 sharing it so someone else -- does that put it in the status
17 of a profit corporation, or does it only deal with a joint
18 contract?

19 MS. SZYBALA: That revenue rule is only about --
20 the reason for the loss of its tax status was because of the
21 cocounsel agreement.

22 MS. MERCADO: See, that doesn't make any sense.

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1 Because if they went on their own, they could have had twice
2 the money and put them in a higher status profit-wise.

3 MS. SZYBALA: You risk your tax status, depending
4 on why you accept the case. And if you're accepting it for
5 profit reasons, you risk the tax status, which is why you --

6 MS. PERLE: But there's no difference between that
7 situation and the situation where the Legal Services' program
8 accepts any case where there's a potential fee and gets it.

9 CHAIR BATTLE: If we're talking about an award of
10 attorney's fee, in my view, I see a distinction between what
11 the billable hourly rate might be for a Legal Services'
12 attorney and what the billable hourly rate might be for a
13 private attorney, which has built into it a profit return for
14 the hours put into it.

15 MS. PERLE: But I think the courts, at least in
16 recent years, have been pretty clear that Legal Services'
17 programs get market rate.

18 MS. MERCADO: That's right.

19 CHAIR BATTLE: Then that raises the profitability
20 issue. I think, though, the fact that the inspector
21 general's office has raised this issue means we need to go
22 back and review to ensure that how we construct Section (c)

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1 takes into account any potential impact it might have on any
2 programs that have 501(c)(3) status.

3 MR. McCALPIN: Or at least that the commentary
4 raises the flag.

5 MS. SZYBALA: I don't even know if the commentary
6 needs to raise it. I'm not sure it's an issue. The problem
7 is just that we found this revenue rule. We just found it.
8 So we need to bounce it to OGC. And I think that's all we
9 need to do.

10 CHAIR BATTLE: And maybe we need to hear back on
11 this before we make a final determination on this.

12 MS. PERLE: I mean, I think it's apparent that
13 you're not going to approve this rule to go out for notice
14 and comment today anyway. So I think that between now and
15 when you're looking at it again in December, you can get some
16 more information on that.

17 MR. BROOKS: Could the IG's office give the
18 committee a citation for that ruling, so we could think about
19 it?

20 MS. VOELLM: I didn't bring it with me, but yes.

21 MR. BROOKS: Just let us know where we can find it.

22 MS. VOELLM: Certainly. I can just fax a copy of

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1 it to you.

2 MR. BROOKS: Thanks.

3 MS. MERCADO: We'll have excellent researchers
4 start working on that.

5 CHAIR BATTLE: Anything else about (c) that was
6 significant? We appreciate that input.

7 (No response.)

8 CHAIR BATTLE: Then we can move on to 1609.5, which
9 deals with the whole fund balance problem, accounting for an
10 use of attorney's fees.

11 Bill?

12 MR. McCALPIN: I have two questions, at least, with
13 respect to this. First of all, the term "recipient's Legal
14 Services Corporation fund" was a new one to me. And I don't
15 understand precisely what that means. And it's used in both
16 (a) and (c).

17 And I'm not sure whether a recipient is required
18 under some other accounting procedure or something to have a
19 fund which it calls "Legal Services Corporation fund" or
20 whether it may put the funds received from the Corporation
21 into a number of different funds in its accounting system.
22 That's the first question. And I wonder if we need to

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1 explain by definition or in the commentary or something what
2 we mean by "recipient's Legal Services Corporation fund."

3 But then, let me go on. And the last part of (a)
4 says, "where work is supported in whole or in part with the
5 funds provided by the Corporation shall be allocated to the
6 recipient's Legal Services Corporation fund in proportion to
7 the amount of Corporation funds expended."

8 And let me give you a hypothetical. Suppose that a
9 case is undertaken and supported 50 percent by Legal Services
10 Corporation funds and 50 percent by other funds, that 100
11 percent of the fee comes to the recipient. Now, 50 percent
12 of it goes to the Corporation fund. Where does the other 50
13 percent go?

14 MS. PERLE: Under the current rule, it says that if
15 the other 50 percent of the funds came from IOLTA, that the
16 other 50 percent of the fees goes to the IOLTA fund. What
17 this rule says is that we're only controlling what happens
18 with that portion of the fees that come from work supported
19 by Legal Services Corporation.

20 The Legal Services Corporation has a concept of
21 derivative income, which would apply to attorney's fees
22 derived from work supported by the Corporation. Not all

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1 funders treat income as derivative income or treat derivative
2 income in the same way. Other funders may have no rule as to
3 what you do with attorney's fees derived from work supported
4 by their funds, or they may require it to go back into the
5 fund, or they may require that there are certain restrictions
6 that apply to it.

7 But again, this is a situation where we think that
8 the Corporation shouldn't tell another funder what needs to
9 be done with fees that are derived from work that was
10 supported by their funds.

11 MS. FAIRBANKS-WILLIAMS: That's what we do in
12 Vermont. If anything comes in that was funded by Legal
13 Services, it goes back to Legal Services. If it comes in
14 from Developmental Disabilities, it goes back to
15 Developmental Disabilities. We have about seven or eight
16 categories, and each one has their own thing. And it's all
17 kept separate.

18 MR. McCALPIN: Is there such a thing, the recipient
19 calls a "Legal Services Corporation fund"?

20 MS. PERLE: I think the answer is probably "yes."
21 But Gary Singen has indicated that while he has no problem
22 with the substantive way that this provision is written and

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1 he agrees with it, he thinks that there is better language
2 that we can use to describe how that process would go. And I
3 think that we should defer to Gary, who is certainly much
4 more expert on this than the rest of us.

5 MS. GLASOW: We may have to refer to the audit
6 guide. They talk about accounting in terms of LSC funds and
7 the LSC accounts, versus private funds' accounts. And Gary's
8 going to help us with the exact language that will clarify
9 this, also with clarifying in proportion to what.

10 CHAIR BATTLE: I was going to raise that question.
11 Because when you look at this, for example, when it says "in
12 proportion to the amount of Corporation funds expended," one
13 could actually take the salary, the hours, and the
14 specific --

15 MS. FAIRBANKS-WILLIAMS: The telephone and all this
16 bit.

17 CHAIR BATTLE: And so, therefore, even though 50
18 percent of what went into the case came from the Legal
19 Services Corporation funds, when you actually look at the
20 actual cost -- and since you say "amount of Corporation funds
21 expended," if you use that specific amount, you might come
22 out with a smaller percentage than 50 percent.

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1 MR. MCCALPIN: No, you would come up with a larger.

2 CHAIR BATTLE: Or a larger.

3 MS. PERLE: No, but I think the point is that you
4 do try to make some determination about how much it costs to
5 support litigation. And if it costs you \$100,000, \$50,000 of
6 those funds came from LSC and 50,000 came from IOLTA -- I
7 mean, you could get \$300,000 in fees. And so 150 would go
8 back to the LSC fund, and the other 150 would go as directed
9 by IOLTA.

10 MR. MCCALPIN: Let's go back to what you said a
11 minute ago, that in a fee award, these are ordinarily awarded
12 to a Legal Services entity at market rates.

13 MS. PERLE: Correct.

14 MR. MCCALPIN: Which would be rather less than
15 cost.

16 MS. PERLE: No. I think it would be in many
17 situations rather more than cost.

18 MR. MCCALPIN: Yes. The cost would be less than
19 the market rate.

20 MS. PERLE: Right.

21 CHAIR BATTLE: That's the point I'm making.

22 MR. MCCALPIN: That's right. So that in a

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1 situation like that, if 50 percent of the time was put in by
2 the Legal Services' attorney and 50 percent by the private
3 attorney, the Legal Services' program would wind up getting
4 less than 50 percent of the fee, simply --

5 MS. PERLE: No. No.

6 MS. BERGMARK: No. I think we're talking about a
7 situation within the Legal Services' program itself, not the
8 fees that are going elsewhere, but within that amount of
9 money that the program spent, that it should be proportionate
10 with our LSC devotion of time to that case should be
11 proportionately reimbursed to the LSC account.

12 MS. PERLE: Right.

13 CHAIR BATTLE: And the language needs to be, I
14 think, a little bit clearer to ensure that the concern that
15 Bill has raised and the question that I have raised is
16 clarified, so that you don't have actual expenditures
17 reimbursed and proportionality thrown off by this.

18 MS. PERLE: This is one of these provisions that
19 has been worked over several times in the working group and
20 with the staff. And we keep changing it. And we haven't
21 quite gotten to the point where we're all totally comfortable
22 that it says what it means. But I would hope that you would

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1 allow the staff and I to work with Gary, who does understand
2 all these concepts.

3 And he was at the working group meeting. And he
4 understands all of the discussions. But I think he was not
5 prepared at that time and hasn't had a chance since then to
6 really sit down and kind of parse through the language to
7 make it totally clear what we mean. But he understands it.
8 And I think that you understand what we're trying to
9 accomplish here.

10 CHAIR BATTLE: Maria, and then Bill.

11 MS. MERCADO: Because I think that the way the
12 regulation reads right now could mean it to say that if 50
13 percent of the time was spent by the LSC attorney using LSC
14 funds, and you get a 200,000 recovery, and if it's a
15 proportionate amount, the way it reads now, then he would
16 only get, what, 50,000?

17 Or would he get 100,000 of that? I mean, it
18 depends on what proportion of an amount, because they're
19 getting a higher than a market value. Or if they're getting
20 attorney's fees that include in it other additional costs or
21 what have you, and the cost is actually the time that they
22 put into it, it costs Legal Services. I mean, there's a lot

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1 of ways of weighing what those attorney's fees are going to
2 be.

3 MS. PERLE: But this is not intended to deal with
4 the situation where we're cocounseling and we're splitting
5 the fee with a private attorney.

6 This is intended to deal with -- there's work
7 that's performed by a program, attorney's fees are awarded --
8 how you allocate those fees once they come back into the
9 program, whether all of them have to be treated as derivative
10 income for LSC purposes, whether some proportion of them have
11 to be treated as derivative income for LSC purposes, and what
12 happens to the rest of it.

13 MS. MERCADO: I'm sorry. I didn't mean it to be in
14 a cocounseling sense. I meant the proportion of what they
15 got from Legal Services' funding versus IOLTA or foundation
16 money somewhere else.

17 MS. PERLE: Right.

18 MS. GLASOW: You're right. We need to clarify
19 that.

20 MS. PERLE: And the programs allocate expenses all
21 the time from one funding source to another. And they use
22 the audit guide and a variety of other pieces of guidance.

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1 And so I don't think it's all that difficult for them to make
2 that determination about what the allocation is.

3 The point of the change in this rule was simply to
4 say that the only thing that we're going to decide on is that
5 they must allocate the appropriate proportional amount to the
6 LSC fund, so that it will be restricted for LSC purposes to
7 things with respect to restrictions that are on LSC funds.
8 And that's primarily what the concern is.

9 MR. BROOKS: Is this any change in the substantive
10 treatment of this problem? It seems this is --

11 MS. PERLE: There is a slight change. And the
12 slight change is that this rule no longer says, "And in
13 addition to the LSC allocation, you must take the other
14 monies and allocate them to IOLTA or to private monies or
15 foundation monies."

16 Because we're saying, "If that funder wishes to
17 require you to do it, fine. But otherwise, you can put it in
18 an unrestricted fund, or you can use it in whatever" --

19 CHAIR BATTLE: Well, conceivably, you could give it
20 all to the Legal Services' fund.

21 MS. PERLE: You could, yes. There would be nothing
22 to prevent you from doing that.

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1 CHAIR BATTLE: Yes.

2 MR. BROOKS: But the point is that the accounting
3 treatment of this is not supposed to be any different as far
4 as LSC funds expenses.

5 MS. PERLE: Correct. There's no substantive change
6 with respect to LSC funds.

7 MR. BROOKS: And this is the kind of thing that has
8 been going on within the Corporation for a long time. So
9 what we're looking for really is an accurate accounting
10 language here to fit what we all know has been going on and
11 merging it with --

12 MS. PERLE: Now, I will say that early on in the
13 discussions, there were a number of other proposals to treat
14 those funds. I mean, one of them was a proposal which said
15 that all you have to do is reimburse the LSC fund for actual
16 expenses, and then you can use anything over that in any way
17 that you wish.

18 And while I thought there was a -- you know, I
19 think that many programs would like that to be so, there was
20 -- clearly, people felt that that posed a great danger. It
21 sent up a red flag. And it fed into the hands of those who
22 would have Legal Services' programs not be permitted to

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1 accept attorney's fees, because there would be this great pot
2 of money to go off and do cases that they shouldn't be doing.

3 So I think people felt that it wasn't worth the
4 effort to do that. Then, there were other folks that would
5 have gone even farther, which is to not treat attorney's fees
6 as derivative income for any purpose, and just say, "It's
7 gravy," and you put all of them in an unrestricted fund.

8 And we don't have any -- there is nothing that sort
9 of would carry the Corporation in formata through to funds
10 that were derived from work performed under -- and again, I
11 mean, even more so, people felt, "Wow, that would be great,
12 but we're not going to suggest that, because it's just too
13 dangerous politically."

14 So basically, what the programs felt was the most
15 appropriate thing was to continue the Corporation's
16 derivative income policy with respect to LSC funds but not
17 have LSC impose that on other funders. So that's what the
18 change is intended to do. And I think that if we work with
19 Gary, we'll come up with some language that makes that very
20 clear.

21 CHAIR BATTLE: Okay. Suzanne?

22 MS. GLASOW: Just two points. One, on the

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1 derivative funds issue, if we were a federal agency, it would
2 be very clear that attorney's fees taken in by federally-
3 funded Legal Services would be considered derivative funds.
4 And the federal government has very clear options of what you
5 can do with those funds. We're not a federal agency. We're
6 not subject to that. So we have some discretion.

7 However, again, often, we look to what the federal
8 government does, in terms of what feelings on the Hill or
9 whatever may be. So that's for your information.

10 MS. PERLE: They don't require other funders to
11 treat --

12 MS. GLASOW: No. That's correct. That's correct.
13 When Gary called me day before yesterday and talked to me
14 about his concerns about his language, I did look at the
15 audit guide. And there is a specific provision in there
16 about court-awarded attorney's fees.

17 So perhaps after we work with Gary, we may even
18 need to make a specific reference to the audit guide or
19 whatever, so we're not really making policy. We just need to
20 improve the wording.

21 CHAIR BATTLE: Right. And it needs to be worded in
22 such a way that it consistently will implement with ease

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1 whatever we have got in the audit guide that really reflects
2 the policy on this issue. Okay.

3 Anything else in (b) or (c) under "accounting for
4 and use of attorney's fees"?

5 MS. PERLE: I think Gary has some similar concerns
6 about (b). Is that right, Suzanne?

7 MS. GLASOW: He does on the supplementary
8 information, yes. He's not happy with the example we give in
9 the first paragraph under Section 1609.5(b). So again, we
10 need to work with him. I think we just need to improve my
11 understanding of accounting. It's not my forte. And I'm
12 sure he'll be able to help me with that.

13 MR. McCALPIN: Yes. I had a problem with the last
14 sentence in that paragraph under 1609.5(b). I thought that
15 what you meant was, for example, LSC could permit a recipient
16 that operated on an accrual rather than a cash basis to
17 record an award that had not been recorded as a receivable.

18 MS. GLASOW: He says that whole concept is just
19 wrong. So we were just going to take that out and revise the
20 whole thing.

21 MS. PERLE: I mean, there are examples where the
22 treatment of a particular attorney's fee award is not

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1 obvious. And there needs to be some different treatment from
2 what is the obvious in order to account adequately for the
3 circumstances.

4 And the Corporation, I think, has been able to work
5 with programs to work out something that is acceptable to the
6 program and consistent with the audit guide and various other
7 accounting rules.

8 MS. MERCADO: Especially because something -- I
9 mean, even though initially the court may award attorney's
10 fees in a case, if the other side goes back and appeals the
11 issue of attorney's fees, a lot of times what happens,
12 especially if you're in the 5th Circuit or the 11th Circuit,
13 you know, they're going to take away the attorney's fees from
14 Legal Services, saying, "They're nonprofit. They're being
15 funded by the federal government. They don't need attorney's
16 fees."

17 MS. PERLE: Well, I think that happens elsewhere,
18 as well. And I think that -- I got a call from a program
19 that had received and, in fact, had in hand a large
20 attorney's fee award. But they couldn't spend it, because it
21 was on appeal. And while they thought that ultimately they
22 would prevail and they would have the money, nevertheless,

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1 they really couldn't count it as part of their fund balance,
2 because it was subject to --

3 CHAIR BATTLE: And because of that, I would think
4 that -- I noticed in the last example, you talk about a year-
5 end problem.

6 And by and large, even if you get the award, I
7 would think that for the duration of the time that that might
8 be appealable is another time frame in which those funds
9 don't need to be subject to any kind of movement by LSC and
10 that we might need to account for that in such a way that the
11 program feels comfortable in understanding that
12 notwithstanding whatever it is that we look at at the end of
13 the year to determine whether you've got to turn any funds
14 back, and award, while there is the possibility of a pendency
15 of an appeal, can't be counted.

16 MS. PERLE: Yes. And we really are talking about
17 it in the fund balance context. That is the situation that's
18 of concern to programs, how it's treated for fund balance
19 purposes.

20 Because now, under the current fund balance rule,
21 if a program has more than 10 percent of its LSC funds left
22 over at the end of the year, they either have to give them

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1 back to the Corporation, or they have to seek a waiver. And
2 that waiver can be granted up to 25 percent.

3 But sometimes, there are situations where a small
4 program has been working on a case for years and years and
5 years, and they get in a fee which is more than 25 percent of
6 their LSC grant. And we have to really figure out a way to
7 deal with that situation. I mean, obviously, they need to
8 think of some way that it needs to be spent over time or some
9 purpose for which it's going to be held for some period of
10 time or whatever.

11 CHAIR BATTLE: Or another way of counting that 25
12 percent, particularly if you've worked on a case for 10
13 years, you get a fee in one year pro rata, if you go back
14 over the years, it ought not to account as though all of it
15 were earned in that year.

16 MS. PERLE: Within that year. Right.

17 CHAIR BATTLE: I mean, it seems to me that there
18 ought to be something that we can address from an accounting
19 point of view to --

20 MS. PERLE: Right. But I think that what we became
21 convinced of -- and I'm not sure whether this was part of the
22 discussion when we last took this up -- is that rather than

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1 deal with it as we first did in the draft, which is to say
2 that attorney's fees are just not subject to the fund balance
3 rule, that what we really need to do is address the fund
4 balance rule.

5 And we need to do that fairly quickly, so that we
6 can deal with that in the context of other -- there are other
7 situations where programs get large amounts of money -- if
8 they sell a building, for example. And so we need to address
9 that question somewhat more broadly, but we need to do it
10 fairly soon. In the meantime, the waiver provision can be
11 used.

12 MS. MERCADO: And there has to be some kind of a
13 pro rata share of expenditures per year of the time that they
14 put into it.

15 MS. PERLE: There are ways to address the fund
16 balance issue, which is not -- the remedy for a fund balance
17 is not to take the money back, but it's to require the
18 program to come up with a plan for how it's going to
19 reasonably spend it, which I think is what's done with
20 respect to fund balances and other situations.

21 CHAIR BATTLE: Okay. If that is everything on
22 1609.5, we can move onto 1609.6, "acceptance of

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1 reimbursements." (**backup**)

2 MR. McCALPIN: I have a couple of problems -- with
3 the reg itself, but with the commentary. First of all, you
4 can read this paragraph (a) of the commentary to suggest that
5 the only possible recovery is expert fees, which are the big
6 one. But there can be significant discovery costs, court
7 costs.

8 It seems to me that this overly emphasizes expert
9 witness fees and could lead somebody to believe that there
10 are other litigation costs which would not be recoverable.

11 MS. GLASOW: We can add more examples.

12 MR. McCALPIN: Pardon?

13 MS. GLASOW: We can add more examples.

14 MS. PERLE: Or we can just say that this is an
15 example.

16 MR. McCALPIN: Yes. That's right. The other one
17 is narrow. About the middle, there's a line that starts,
18 "Reimbursement for these costs out of back awards." I'm sure
19 you're not talking about spinal cord injuries. But
20 "retroactive" may be better.

21 CHAIR BATTLE: When the comments refer to the
22 applicability of 1609.8, that section no longer -- I see.

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1 It's deletion of that section.

2 MS. PERLE: Right.

3 MS. GLASOW: Correct.

4 CHAIR BATTLE: All right. I was about to say, it
5 doesn't exist anymore.

6 MR. McCALPIN: But also, deletion of 1609.7.

7 MS. PERLE: Right. We need to make that clearer.
8 You're absolutely right about that.

9 CHAIR BATTLE: Okay.

10 MR. McCALPIN: Madam Chair, I would think that
11 unlike 1604, this reg is not in a position for us to forward
12 it for publication. And I would expect that we would have
13 all of these things that we discussed this morning reviewed
14 and this reg brought back to us; is that correct?

15 CHAIR BATTLE: Yes. Yes. I would accept that as
16 a --

17 MS. PERLE: In December?

18 CHAIR BATTLE: In December, yes. And I would just
19 urge the staff, as you go through this, the changes that we
20 have discussed today, if they will be bolded, then in our
21 next review, we should be able to focus on those areas where
22 we have proposed changes.

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1 MS. PERLE: We'll take out -- just to make it
2 clearer, I think we'll take out the bold that appeared today.

3 CHAIR BATTLE: Yes. And put in the bold related to
4 what we have got here.

5 MS. PERLE: Yes.

6 CHAIR BATTLE: If there are sections, and I think
7 there are some that we reviewed today that are bolded that we
8 accepted, then it ought to be in plain print the next time,
9 with the specific --

10 MS. PERLE: Right, so that the bold only represents
11 changes from the last time you saw it.

12 CHAIR BATTLE: To this one. That's right. That's
13 right. Okay. We may now move on to 1610 in our discussion.
14 And 1610 really is a compilation of sections which address
15 funds from sources other than the Corporation, the use of
16 funds from sources other than the Corporation.

17 We do have some changes to this that we need to
18 consider. The commentary is substantially brief. It's about
19 three pages long. So why don't we go through it page by page
20 now? And the actual proposed rule is only a page and-a-half.
21 We can do them in tandem as we have the other sections, since
22 most of us should be pretty familiar with this particular

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1 rule, 1610.

2 Page 1 has the background information. I guess
3 we're going to need to roll into this the same kind of --
4 "Congress may consider legislation," rather than "is
5 currently considering it" in the paragraph that's the third
6 from the bottom of that page.

7 Are there any other changes on page 1?

8 MS. MERCADO: Page 1 of the comments?

9 CHAIR BATTLE: Page 1 of the comments, yes. And
10 we're going to start with "purpose," which is at the bottom
11 of that page.

12 MS. PERLE: As you recall, there was no purpose
13 section in this rule, and the committee suggested,
14 appropriately, that we add one.

15 CHAIR BATTLE: Yes.

16 MS. PERLE: So we have just added one that was very
17 simple.

18 MR. MCCALPIN: Pardon?

19 MS. PERLE: There was no purpose section in this
20 regulation, so we added a very simple purpose section, which
21 I think captures what this rule is about without loading it
22 up with anything extraneous.

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1 CHAIR BATTLE: Okay. Any questions about purpose?
2 (No response.)

3 CHAIR BATTLE: We can move on, then, to
4 "definitions."

5 MS. PERLE: I would make one suggestion under the
6 1610.2, "definitions." In the commentary, we have an example
7 at the end of the paragraph that starts on page 1 and ends on
8 page 2 which deals with Part 1612. And I think it's not an
9 appropriate example, because we have removed Part 1612 from
10 this rule. So I think we --

11 CHAIR BATTLE: Use another example.

12 MS. PERLE: Yes.

13 CHAIR BATTLE: Bill?

14 MR. McCALPIN: Two comments. One, here again is a
15 -- well, two questions that we raised yesterday. One,
16 there's a reference to "the Act," which is not defined. And
17 are we going to rely on 1600 for a definition of "the Act,"
18 or are we going to include a definition seriatim in
19 regulations as we go along?

20 And I think whatever the answer to the question
21 yesterday was would still apply. But more particularly, if
22 you begin with the sentence at the bottom of the first page

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1 and continue it on, it says that "Restrictions apply only to
2 those provisions that implement the Act that contain specific
3 prohibitions and not to those based on restrictions contained
4 in the Act only in wide respect are those that are included
5 in the regulation but are in addition to the prohibitions in
6 the Act."

7 Yesterday, we said we were going to raise a flag
8 when we talked about our imposing restrictions beyond those
9 that are in the Act. And I wonder what are the prohibitions
10 referred to there that are included in the regulation but are
11 in addition to the prohibitions in the Act.

12 MS. PERLE: Well, I'm not sure I can give you a
13 specific example. There may be some things in the advocacy
14 training and organizing activities and in the legislative and
15 administrative advocacy which -- actually, we have removed
16 that. Excuse me. Well, I'm trying to think of an example.

17 Obviously, our goal is to remove all of those
18 extraneous restrictions. But you may remember that we added
19 one when we went through 1608. And there are a number of
20 other things in the current regulations which we haven't
21 gotten to which go beyond the restrictions in the Act.

22 MR. McCALPIN: We're talking about this regulation.

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1 And if we are not imposing any restrictions in addition to
2 those in the Act, then I think we ought to delete this
3 reference. If we are imposing such restrictions, we ought to
4 know what they are.

5 MS. SZYBALA: What you were just discussing at some
6 length, the question of statutory fees and Social Security
7 cases, that's a place where Congress told the Corporation to
8 make guidelines and permitted the programs to do anything
9 that's consistent with the Corporation guidelines.

10 To the extent the Corporation makes a guideline
11 that says, "You cannot take the fee out of the client's
12 recovery," it's going to be a prohibition that's not in the
13 Act. And what this is saying is that private fees are not
14 subject to that prohibition, which is precisely what Roger
15 McCallister liked about it.

16 I mean, that's what this means, that to the extent
17 things are found only in LSC guidelines under the Act but not
18 in the Act itself, private funds are not going to be
19 restricted.

20 MS. PERLE: Except that we're removing 1609. It's
21 not the right example, because this proposal removes 1609
22 from the coverage of 1610.

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1 MS. SZYBALA: The example. This, you mean?

2 MS. PERLE: No, no, no.

3 MS. GLASOW: But the reason we're removing that is
4 because we say it deals with private funds. I think what
5 we're just trying to make clear -- because abortion also is
6 another instance where we have a stricter prohibition in the
7 rider than we do in the LSC Act.

8 So I think it is important to make it clear that
9 such intention of the LSC Act, which restricts private funds,
10 only applies to restrictions that are, indeed, in the LSC
11 Act. Because it has been misinterpreted in the past. And I
12 think that's all we're trying to do.

13 MS. MERCADO: That's right.

14 MR. McCALPIN: You already said "restrictions
15 contained in the riders to the LSC appropriation." And I
16 just don't see where in this regulation we are imposing
17 restrictions in addition to prohibitions contained in the
18 Act.

19 MS. PERLE: We're not. That's the point.

20 MR. McCALPIN: Well, then, why are we --

21 MS. MERCADO: No, and it says, "and not to those
22 that are based" --

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1 MS. PERLE: But it does apply to those.

2 MR. MCCALPIN: What?

3 MS. MERCADO: See, read the sentence.

4 CHAIR BATTLE: Start at the beginning. Why don't
5 we just read it?

6 MS. PERLE: You have to read the whole sentence.

7 MR. MCCALPIN: "The definition of this purpose is
8 to propose to be revised to make it clear that the
9 restriction on private funds applies only to those provisions
10 of the LSC regulations that implement the provisions of the
11 Act that contains specific prohibitions and not to those that
12 are based on restrictions contained only in riders or those
13 that are included in these regulations but are in addition to
14 the prohibitions in the Act."

15 MS. GLASOW: I think it's important, because even
16 though we're talking about these activities in Section
17 1610(c), in terms of you can't use private funds for these if
18 you can't use LSC funds, we have other regulations that also
19 deal with these activities.

20 And some of those regulations may be implementing
21 prohibitions in the rider. And we just want to make it clear
22 up front here that the private funds part only applies to

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1 restrictions that may be in another regulation over here, for
2 instance, on class actions, that are actually restricted in
3 the LSC Act.

4 CHAIR BATTLE: I almost view this as three
5 concentric circles. We're talking about one circle which
6 would identify the restrictions that are contained in Section
7 1010(c) of the Act. We have in addition to that restrictions
8 that have been imposed by the riders. And we have
9 restrictions that may appear in our regulations.

10 And to the extent here that you have something in
11 1010(c) that is not reflected in any way, any greater
12 restriction or lesser restriction on that issue in the other
13 two circles, then we're only speaking when we define the term
14 "purposes prohibited by the Act" to mean just that, the Act
15 and the Act only.

16 MS. PERLE: That's correct. I thought this
17 language was fairly clear. But if it's not, we certainly
18 could redraft it.

19 CHAIR BATTLE: Let's massage it just a little bit.

20 MS. PERLE: Or maybe Martha needs to draw a Ven
21 diagram.

22 (Laughter.)

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1 CHAIR BATTLE: Okay. Legislative and
2 administrative representation is removed from this rule.

3 MS. PERLE: That's one of those areas where there
4 are a number of -- where the regulation, which is very
5 complicated and difficult to follow -- many of the
6 restrictions that are contained in that rule are based on the
7 rider, rather than on the LSC Act.

8 And in addition, there are many other things that
9 are included within that regulation which have no basis
10 directly in the LSC Act or in the rider. And what we did
11 last year was attempt to clarify some places in that rule
12 where it was appropriate to apply the restrictions to private
13 funds and others where it wasn't.

14 And I think we got about 30 or 40 percent of the
15 way down the road towards clearing that up, so that the rule
16 itself deals much better -- not totally, but much better with
17 what is and what isn't covered -- what activities may and may
18 not be done with private funds. And I think it only adds
19 confusion to say that you need to look at the restrictions on
20 legislative and administrative advocacy in this context and
21 in 1610.

22 Just look at 1612 and whatever we come up with

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1 later in 1612, and that will clarify what's restricted and
2 what's not restricted. But by having it in here, it just
3 suggests that the restrictions on private funds go further
4 than what they actually do.

5 CHAIR BATTLE: Okay. Now, with respect to fee-
6 generating cases, we're going to delete its reference in this
7 rule, as well, right?

8 MS. PERLE: Right. We're not deleting anything --
9 okay.

10 CHAIR BATTLE: We're just deleting it from this
11 rule as a clean statement with regard to prohibitions
12 contained in the Act. Then, IOLTA funds are now going to be
13 defined. Are there any questions about the definition of
14 IOLTA?

15 MS. PERLE: Let me just note that I talked to
16 several people in the IOLTA community about this definition.
17 And the language that's included on page 3, most of that is
18 language that came directly from some folks in the IOLTA
19 community who suggested these are the things we needed to
20 say.

21 So I'm pretty comfortable that this definition is
22 one that the IOLTA community agrees with and that they're

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1 happy with the language that's in the commentary, as well.
2 Of course, we'll get comments.

3 MR. BROOKS: Just one suggestion. The fourth line
4 from the bottom of the first paragraph on page 3, it's in the
5 sentence that begins the line above, "The interest generated
6 by these funds is remitted by financial institutions." I
7 think we ought to say "by the depository institution."

8 MS. PERLE: Okay.

9 CHAIR BATTLE: Okay. Is there anything else in the
10 definition of "IOLTA"?

11 (No response.)

12 CHAIR BATTLE: You also have a definition of
13 "tribal funds." Is this definition anywhere else in any of
14 the regulations?

15 MS. PERLE: It's in 1600. But I think we probably
16 ought to delete it from 1600 and just put it here, because I
17 don't think there's any other place in the rules where it's
18 used.

19 Is that correct, Suzanne, as far as you know?
20 We'll have to check on that, but --

21 MS. GLASOW: I'm not sure. There may be something
22 in PAI, but it may not be tribal funds. It may be tribes.

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1 I'm not sure there's an exception for tribal funds to the PAI
2 requirement.

3 MS. PERLE: We'll have to look at that. But this
4 is identical to the definition in 1600. Right now, it just
5 means that it's in two places. But they're exactly the same.

6 MR. BROOKS: Can we go back for a moment to
7 1610.2(a), where we say "refers to"? Should that be "means"
8 to be consistent? The second line of (a).

9 MS. MERCADO: Which one? Oh, "means."

10 MR. BROOKS: On page 4.

11 MS. MERCADO: "Means any activities"?

12 CHAIR BATTLE: Yes.

13 MS. MERCADO: You all did it on the (b) and (c).

14 MS. PERLE: In the rest of the rule, the other
15 changes are just sort of small changes in wording and
16 corrections to things that you pointed out at our last
17 meeting. I don't think there are any substantive changes.
18 Excuse me. I apologize. There is a major change that you
19 pointed out.

20 MR. MCCALPIN: Where are we?

21 CHAIR BATTLE: We have just done the definition of
22 "tribal funds," which is on page 5 and the concomitant

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1 supplementary information on page 3. So we --

2 MR. McCALPIN: If we're finished that, I would
3 point out that there is no comment whatsoever with respect to
4 1610.3.

5 MS. PERLE: I think that's because there wasn't any
6 substantial change. There was just a slight change in
7 wording. And we can say that there was no substantial
8 change.

9 MR. McCALPIN: I just wondered whether that was
10 intentional or whether something was omitted. The fact that
11 there isn't any comment --

12 CHAIR BATTLE: I've got a question about 1610.3
13 based on the discussion that we just had earlier about
14 specifically what this section is intended to implement.
15 Since we have now narrowed the scope of 1610 to specifically
16 those prohibitions that come from the statute or the Act, is
17 this language appropriate in setting out the prohibition that
18 it be inclusive as well of corporate Corporation regulations?

19 In other words, are we now saying that any
20 regulations that we implement to impose restrictions also are
21 restricted in their use of private funds across the board?
22 And maybe we need to take a look at that to see if that's

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1 what we intend to do.

2 MS. PERLE: You know, we haven't really thought
3 about this, but maybe what we ought to do is to leave out
4 both here and in the definition "or Corporation regulations."

5 CHAIR BATTLE: Yes.

6 MS. PERLE: And then say that the restrictions that
7 are in the --

8 CHAIR BATTLE: Regulations themselves.

9 MS. PERLE: That are derived directly from the Act
10 are applicable, which I think we have done.

11 MS. MERCADO: I think we did that in the initial
12 comment.

13 MS. PERLE: Yes. Take it out of both the
14 definition and this section.

15 MS. GLASOW: Because then we don't even cite the
16 regs anyway in those numbers.

17 MS. PERLE: Right. The regs are not cited. And I
18 think that because of the definition in 1610.2(a), it does
19 already include reference to the provisions of the
20 regulations. So when you refer to "the Act," you are
21 referring to the appropriate regulation sections, as well,
22 and we really don't need to repeat it.

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1 CHAIR BATTLE: You're raising the question about
2 whether it's repetitious. And I'm raising, I guess, a
3 substantive question as to whether -- there are some
4 regulations that implement these restrictive provisions in
5 the Act. And also, there are some regulations that don't
6 implement the restrictive provisions in the Act. And I'm
7 hoping that we're distinguishing them.

8 MS. PERLE: Right. Well, I think we're
9 distinguishing them because we do have a definition of that
10 phrase, "purpose prohibited by the Act or Corporation
11 regulations."

12 CHAIR BATTLE: Thereunder.

13 MS. PERLE: Under 1610.2(a). But I think --

14 CHAIR BATTLE: No, but I'm saying it should be
15 "prohibitions by the Act or Corporation regulations
16 thereunder," meaning the specific regulations that implement
17 those restrictions in the Act.

18 MS. PERLE: I think if you say "thereunder,"
19 though, the problem is that "thereunder" -- there is a sort
20 of general regulatory -- there is a general language giving
21 the Corporation authority to pass regulations. So that could
22 be interpreted that way, as well.

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1 I think we really are much better off by just
2 deleting the phrase "or Corporation regulations" from the
3 definition and from the prohibition. And we still say
4 "purpose prohibited by the Act" means "any activity
5 prohibited by the following sections of the Act and those
6 provisions of the regulations the implement such section of
7 the Act."

8 CHAIR BATTLE: Okay. We have got it. We're now on
9 the same sheet of music.

10 MS. PERLE: I think that was one of those things
11 that we read a million times and never caught, but I think
12 that's absolutely correct.

13 CHAIR BATTLE: Okay. All right. 1610.4,
14 "authorized use of other funds." We have got public, IOLTA,
15 or tribal funds. Is there anything else that should fit into
16 that category? Are these the only --

17 MS. PERLE: I think they're the only ones that the
18 Act permits us to have.

19 CHAIR BATTLE: We have deleted accounting, 1610.4.

20 MS. PERLE: I think the IG has some views on that.
21 We deleted that as a result of the conversation that we had
22 the last time we considered this with the committee. But I

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1 think the IG feels that it's not appropriate to delete it.

2 MS. MERCADO: I thought we were going to get into
3 all the other financials.

4 MS. SZYBALA: Did you get a memo? I mean, we sent
5 the committee a short memo.

6 MR. MCCALPIN: Yes.

7 CHAIR BATTLE: I'm sure that I did.

8 MS. SZYBALA: Well, that kind of explains it. And
9 the problem might be -- I mean, I've since discussed it with
10 Linda and Suzanne. I think the feeling here was that
11 basically, the accounting rules are elsewhere. They exist
12 elsewhere, the requirement for "separate and distinct." And
13 therefore, it doesn't need to be here.

14 And if that's true, then the problem here is with
15 the commentary, which suggests that it doesn't exist anywhere
16 else at the moment, but we don't like it here. It's
17 outdated. The commentary is not describing what's being done
18 here, if the real purpose is to take this out because it's
19 redundant of the guidance that exists elsewhere. And it's
20 more appropriate in accounting --

21 CHAIR BATTLE: So if we can adjust the comments to
22 reflect that there are guidelines elsewhere, would that

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1 satisfy the IG concern?

2 MS. SZYBALA: Yes. I think our memo said that, as
3 well. I mean, bottom line, it's the commentary that's the
4 problem.

5 MS. PERLE: I would suggest that the three of us
6 work together to develop language that meets the concerns of
7 the IG in the commentary.

8 MS. MERCADO: You've already got it in your first
9 sentence in the commentary, that it is to be included with
10 other provisions dealing with fiscal matters. And there are
11 other provisions in the regulations that deal with fiscal
12 matters.

13 MS. PERLE: Yes.

14 MS. SZYBALA: That's the problem. See, if the
15 purpose is to take it out because some day, we're going to
16 have guidance that it will be incorporated into, the IG has a
17 problem with it, because --

18 MS. PERLE: But we do have guidance.

19 MS. SZYBALA: Right, but that's a different thing.
20 To say, "We're taking it out because it does exist elsewhere"
21 is different than taking it out because someday, we're going
22 to put it elsewhere.

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1 MS. PERLE: I think that the use of the word
2 "outdated" was somewhat unfortunate. I'm not sure where that
3 came from.

4 CHAIR BATTLE: Because it is redundant?

5 MS. MERCADO: Right, instead of "outdated."

6 MS. PERLE: We'll work with Renee and come up with
7 language that reflects what actually --

8 MS. MERCADO: Or you can just even put that whole
9 thing out and just put, "This section is proposed to be
10 deleted and should be included within the provision of the
11 fiscal matter," because you're trying to clean it all up --

12 MS. PERLE: Because the directions --

13 CHAIR BATTLE: We need to cite to where it is. If
14 people are going through this trying to figure out what we
15 have done, if we have got it someplace else --

16 MS. PERLE: Well, we have it in the commentary.

17 CHAIR BATTLE: Okay.

18 MS. PERLE: But I think, really, it's just that
19 there's some unfortunate wording in the commentary that is
20 somewhat misleading, in terms of how these accounting issues
21 are dealt with by the Corporation.

22 And what we really need to do is say in a

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1 straightforward manner, "This rule was adopted before the
2 Corporation had adopted any direction to programs about how
3 funds were to be accounted for." The Corporation now has
4 such direction in the audit guide in 1630 and elsewhere, and
5 we can point to anything else, and that programs should refer
6 to those appropriate documents for how to do it.

7 And I think we should state that. And I think
8 that's consistent with the view that the committee shared
9 with us last time.

10 CHAIR BATTLE: Okay. And the final provision is
11 1610.5 with regard to waiver.

12 Bill?

13 MR. McCALPIN: One, again, there is no commentary
14 with respect to this provision. But let me raise a question
15 for you. 1610.3 would, in effect, say that private funds
16 could not be used for certain abortions, school
17 desegregation, selective service cases. Does 1610.5 mean
18 that the president can waive that?

19 MS. PERLE: "Only when necessary to permit the
20 Corporation to make a contract or other arrangement for the
21 provision of legal services with a private attorney, law
22 firm, state, or local entity of attorneys or Legal Aid

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1 organization that has a separate public defender."

2 MR. McCALPIN: So could O'Hara have permitted
3 Evergreen to use private funds for abortion cases?

4 MS. PERLE: No.

5 MR. McCALPIN: Why not?

6 MS. PERLE: Because they're not a Legal Aid
7 organization that has a separate public defender program.

8 MR. McCALPIN: "With any private attorney, law
9 firm, state or local entity, or a legal organization that has
10 a" -- so he can permit New York to use private funds for
11 abortion cases?

12 MS. PERLE: He could. I don't think he would.

13 MS. BERGMARK: Linda, you may want to simply say
14 that in -- the very last phrase is "that has a separate
15 public defender." It's as though you can waive it -- if they
16 happen to be one of these organizations that provides a
17 public defender service, then they can get a waiver as to
18 other things, as well.

19 So what you really want to say is "in order to
20 provide a separate public -- or make available a separate
21 public defender."

22 MS. PERLE: But it's also that if the Corporation

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1 wanted to contract with a private attorney that in its
2 private practice -- with a private law firm that in its
3 private practice did abortion or selective service cases, the
4 Corporation could do that and would not require that private
5 attorney or private law firm to apply the restriction.

6 CHAIR BATTLE: But the waiver isn't with respect to
7 whether Legal Services can undertake that representation; it
8 is with respect to whether that contract would somehow negate
9 the restriction.

10 MS. PERLE: Right. I think what we ought to do is
11 put two sentences -- put a period after --

12 MR. McCALPIN: Why would the Corporation want to
13 make a contract with a private attorney to handle abortion
14 cases if it doesn't involve LSC funds?

15 MS. PERLE: No. You misunderstood what I was
16 suggesting. What I was suggesting is the Corporation might
17 want to contract with a private law firm to do legal
18 assistance activities under our Act. But that same private
19 attorney might in another part of his or her practice do
20 abortion cases or selective service cases or desegregation
21 cases. And we don't want to apply that restriction to the
22 attorney's entire other practice.

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1 MS. MERCADO: This deals with the restrictions on
2 the other entity that we're cocounseling with.

3 CHAIR BATTLE: Yes. But it needs to be more
4 clearly stated to that effect. I think the way it's stated
5 is the way that Bill could potentially read it.

6 It looks like it's alternative three situations --
7 not to negate the contract, but the waiver part of that
8 sentence seems to indicate that the waiver might apply to the
9 program, as well. And so we just need to clarify in the
10 language what that waiver is intended to do.

11 MS. PERLE: Right. I was going to suggest that we
12 might want to put a period after "state or local entity of
13 attorneys" and then say, "The president may waive the
14 provision on" -- Section (a)(3), which is the criminal
15 proceeding -- "may waive Section (a)(3) to permit it to make
16 a contract with a legal or an organization that has a
17 separate public defender program."

18 MR. BROOKS: Or if we change the word "when" to "to
19 the extent that" or "to the extent necessary to permit."
20 That limits it.

21 CHAIR BATTLE: "To the extent necessary." That's
22 perfect language, John.

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1 MS. MERCADO: Okay. Read it for me how it would
2 read.

3 CHAIR BATTLE: "Any provision of this part may be
4 waived by the president of the Corporation, to the extent
5 that it is necessary to permit the Corporation to make a
6 contract or other arrangement for the provision of legal
7 assistance with any private attorney, law firm, state or
8 local entity of attorneys."

9 MS. PERLE: Right.

10 CHAIR BATTLE: And then, "The president may waive
11 Section (a)(3) in order to provide for a legal aid
12 organization that has a separate public defender program."

13 MS. PERLE: Right.

14 MS. BERGMARK: Or "to the extent necessary to
15 permit such organization to have a separate public defender
16 program."

17 CHAIR BATTLE: Yes. You can use that.

18 MS. PERLE: The question is -- I mean, I guess this
19 is a question whether you want to -- I think what that would
20 do would be to say to local Legal Services programs that
21 don't now have a public defender program, "You can go out and
22 start one." You may want to decide that you want to do that.

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1 I'm not sure that the Act permits it. I think there is some
2 specific language in the Act. This language comes directly
3 from the Act.

4 MS. GLASOW: When Congress was doing this, they
5 recognized that there were some programs out there that they
6 wanted to continue to fund. And they put this language in
7 here to make sure that they wouldn't be kicked out of the
8 possibility of being Legal Services' recipients.

9 MR. McCALPIN: What section of the Act are you on?

10 MS. PERLE: We're looking at 1010(c).

11 MS. GLASOW: Section 1010(c).

12 MR. McCALPIN: Section what?

13 MS. PERLE: 1010(c) of the Act. Do you have this
14 little pamphlet? It's on --

15 CHAIR BATTLE: What page?

16 MS. PERLE: It's on page 14 of the pamphlet. And
17 that section is the legislative authority for this whole
18 rule. And you're looking at the end of that. And the last
19 phrase, which starts "or to prevent contracting or making
20 other arrangements with private attorneys, private firms, or
21 state or local entities of attorneys or with Legal Aid
22 Societies having separate public defender programs."

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1 So I think that what we're really intending is not
2 to encourage programs to go out and start separate public
3 defender programs but to say that for those few -- and I
4 think, again, there are five or six, New York, Cleveland --
5 there may be a few others that have --

6 MR. McCALPIN: L.A. may, too.

7 MS. PERLE: L.A. may? I really don't know. I just
8 know that there are a few that already had public defender
9 components at the time that the Corporation came into
10 existence and started providing funding for federally-funded
11 Legal Services' programs to allow those to continue. I don't
12 think there was any similar restriction on criminal
13 representation under OEO, so that was what --

14 MS. BERGMARK: What do you suppose a "state or
15 local entity of attorneys" is?

16 MS. PERLE: A Bar association.

17 MS. MERCADO: Is it meant to be a Bar association?

18 MS. PERLE: I think so. There are not many
19 situations where the Corporation contracts directly with the
20 law firm or private attorney. There may be in the future
21 situations where it contracts with a Bar association or some
22 other state or local entity of attorneys. I think that's

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1 intended to be "Bar association."

2 I think that we could certainly read it to mean
3 "Bar association" and change the language, if we would like.
4 But we're trying to stick with the language of the Act.

5 MS. BERGMARK: But doesn't it also apply to -- a
6 recipient might have a contract arrangement for bankruptcy
7 cases with a private lawyer who might also do an abortion
8 case in some other part of his practice. So it's --

9 MR. McCALPIN: This only applies to the
10 Corporation.

11 MS. PERLE: Well, it does only apply to the
12 Corporation in the rule. But I wonder -- I think if you will
13 look at the language of the Act itself -- and I admit to you
14 that I have not given this any thought -- that it doesn't say
15 specifically it applies only to the Corporation. It says "to
16 prevent contracting or making other arrangements." It
17 doesn't say "to prevent the Corporation from making other
18 arrangements." And so I think it certainly could --

19 MS. BERGMARK: The Corporation itself isn't going
20 to do it.

21 MR. McCALPIN: The introductory portion refers to
22 "nonfederal funds received by the Corporation and funds

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1 received by any recipient from a source other than the
2 Corporation."

3 MS. PERLE: Right.

4 MR. McCALPIN: Now, that refers to accounting. And
5 what you're reading comes a lot further down than the
6 section. But it may mean that recipients are included, as
7 well as the Corporation.

8 MS. GLASOW: But that is the wording for the
9 accounting part. And right after that, it says, "But any
10 funds so received for the provision of legal assistance."
11 And we have consistently interpreted that as meaning funds
12 received by our grantees, not the Corporation.

13 MS. PERLE: Right.

14 MS. GLASOW: So the use of the funds and this
15 exception on that use really would apply to funds received by
16 recipients. So they were basically trying to protect
17 recipient out there who had public defender programs, but we
18 might give them money to do civil legal assistance. Again,
19 it's this idea of the tail wagging the dog or whatever.

20 MS. PERLE: But I'm not so sure that's true. I
21 think that in terms of what has just been suggested, that if
22 we changed this, this would clear up that situation where

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1 there are subrecipients that are Bar associations, where
2 there has always been this sort of "iffiness" as to whether
3 these restrictions apply to their nonLSC funds.

4 I mean, we have always argued, and I think we have
5 succeeded in arguing that it shouldn't. But there have been
6 times in which the Corporation has suggested that it should.
7 Now, the problem is that it involves a waiver. It
8 involves --

9 MS. MERCADO: And it's a waiver to the Corporation
10 or to the recipient?

11 MS. PERLE: But the problem is, you have to go
12 through the process of asking for a waiver under this rule.

13 CHAIR BATTLE: Right. I was about to say,
14 following Linda, what you said a little bit earlier, why
15 don't we define "state or local entity of attorneys" as "Bar
16 associations" in our definitions? And that would be --

17 MS. SZYBALA: That comes straight out of the Act.

18 CHAIR BATTLE: It comes straight out of the Act,
19 but we can interpret and define the term.

20 MS. PERLE: Well, I think we could just change -- I
21 don't know that we have to define it. I think we could just
22 change it here. It comes out of the Act, but we have

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1 rearranged the language, anyway.

2 But I'm wondering whether we want to say -- instead
3 of calling this a "waiver," we want to call this section an
4 "applicability section" and then say that "No provision of
5 this part shall be read to prevent the Corporation or a
6 recipient from making a contract or other arrangement for the
7 provision of legal assistance with any private attorney, law
8 firm, state or local Bar association or preventing the
9 Corporation from contracting or granting to a Legal Aid
10 organization that has a separate public defender program."

11 In other words, make it self-executing, rather than
12 having it have to go through a waiver process.

13 MR. McCALPIN: I would like to look at it and think
14 about it.

15 MS. GLASOW: I would like to look at the
16 legislative history, too.

17 CHAIR BATTLE: I think we need language in the
18 comments that specifically addresses the statutory history of
19 this provision and the intent in the changes that we're going
20 to implement, and we need language that defined more clearly
21 the terms and also this proposal that it be self-executing as
22 it relates to legal organizations.

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1 MS. PERLE: I'm just reading the language of the
2 Act. And the Act is self-executing. It says "except that
3 this provision shall not be construed to prevent recipients
4 from receiving other public funds or tribal funds," blah,
5 blah, blah, "or to prevent contracting or making arrangements
6 with private attorneys, private law firms, or other state or
7 local entities of attorneys."

8 So I think the language of the Act is self-
9 executing. And I frankly don't see why we don't make the
10 language of the rules self-executing, as well.

11 CHAIR BATTLE: I think we're suggesting that it
12 should be. I don't think anyone on the committee is
13 suggesting that it ought not be. We're simply suggesting
14 that clarity be given to it in the comments, so that it's
15 clear --

16 MS. PERLE: Well, we have no commentary at all
17 right now on this section.

18 CHAIR BATTLE: Right. I'm proposing that we have
19 comments that make it clear.

20 MS. MERCADO: And I guess because part of the
21 problem for me is that "a local entity of attorneys or a
22 state entity of attorneys" cannot only mean a Bar

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1 association, but that it could mean some other nonprofit
2 attorneys that do -- whether it's Lawyers' Committee or
3 somebody else that does that.

4 MS. PERLE: And we might not want to suggest --

5 MS. MERCADO: The Attorney General's consumer -- we
6 have done a lot of cases with the Attorney General's consumer
7 division. And a lot of the consumer fraud cases were -- a
8 very significant number of clients were at the legal counsel.

9 MS. GLASOW: I would like to look back to the
10 legislative history. I know there was a lot of debate on
11 this issue, and it will be in the Congressional record, so we
12 can see exactly what they were talking about.

13 MS. PERLE: We can see whether they meant "Bar
14 association." If they meant "Bar association," we ought to
15 say it.

16 CHAIR BATTLE: And if they meant "entity," then
17 it's broader.

18 MS. PERLE: Then we ought to try to figure out what
19 kind of entity they meant and then make some determination
20 about whether the self-executing nature of the thing really
21 gives too much leeway, if they meant something broader than
22 "Bar association."

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1 CHAIR BATTLE: Okay. We are at a point where we
2 have at least given our secondary review to 1610. And based
3 on the substantial comments that we have gotten and our
4 requests for additional information, I think we need to get
5 1610 back, as well, when we get 1609 back and review it
6 before we give the green light to send it to the Board and
7 out for publication for comments. So I would expect that we
8 would receive 1609 and 1610 back in our December meeting.

9 Okay. We are right at about 12:09. And Pat has
10 informed me that lunch is ready and outside. So our next
11 item on our agenda is 1611 and, quite frankly, I think it
12 would be overly optimistic to think that we're going to get
13 completely through it.

14 But I think we ought to get started with it this
15 afternoon and go as long as we can until we'll begin to start
16 losing our Board members sometime around 3 o'clock this
17 afternoon. But I do feel accomplished in that we have gotten
18 through a second good cut on 1610 and 1609.

19 MS. PERLE: I think that the changes that are in
20 1611 are not substantial, from what we looked at last time.
21 And I think that we certainly can get through it, if the
22 committee is so inclined.

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1 MR. McCALPIN: That doesn't necessarily mean we do
2 not give de novo review.

3 (Laughter.)

4 MS. PERLE: No, I'm not suggesting that. I would
5 never suggest that, Mr. McCalpin.

6 CHAIR BATTLE: His review up here is to give a de
7 novo review.

8 MS. PERLE: To the extent that the committee wishes
9 to focus only on the places where there are changes, we
10 clearly can get through it. To the extent that they wish to
11 go and give de novo review to other aspects, then it might
12 take a little longer.

13 CHAIR BATTLE: Let's recess, and let's make it an
14 hour. We said 30 minutes yesterday. We went 45. And Bill
15 has got to check out, so we'll be back at 1 o'clock.

16 (Whereupon, at 12:07 p.m., a luncheon recess was
17 taken.)

18
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22

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

(1:10 p.m.)

CHAIR BATTLE: We are graced this afternoon with Alex Forger, who has come to be with us for lunch and to share with us over lunch. And we're happy to have you with us this afternoon.

We were successful this morning in getting through another cut on 1609 and 1610. And for this afternoon for the duration, we plan to take up 1611, which deals with financial eligibility.

My first belief is that we may not be able to complete this this afternoon. Linda was saying before the break, if we only looked at the bolded information, we certainly should be able to get through it. But I think there might be some editing and other concerns that may rise from our discussion and our review.

If we're not able to finish 1611 this afternoon, we certainly will take it up at whatever point we have completed it and review it at our December meeting.

What I would hope that we could do, though, is if we are not able to complete our review of 1611 this afternoon and any of the Board members have specific editing-type

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1 changes, that you would get those editing changes to the
2 staff, so that when we sit down and look at 1611 the next
3 time, we can focus on those substantive issues that might
4 need to be addressed.

5 And that's just my suggestion to us, so that we can
6 hopefully move the discussion in 1611 along the substantive
7 grounds and let the editing changes go forward, whether we
8 have had a chance to discuss them or not.

9 Now, the way that we have approach the other regs
10 has been to consider both the supplementary information,
11 along with the actual rule sections. And that has worked
12 with all of the other sections. I think we can approach this
13 particular reg in much the same way.

14 So we'll start on page 1 under the last tab, which
15 starts out, "The supplementary information for the proposed
16 rule." And on page 16, you'll find the first page involved
17 with the actual proposed rule. Are there any questions or
18 concerns about page 1?

19 (No response.)

20 CHAIR BATTLE: At the top of page 2, as we have in
21 all other instances, we need to make the language consistent
22 with where Congress is with regard to reauthorization in

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1 paragraph 1. The "authority" section, there are no questions
2 about that?

3 MR. McCALPIN: Yes, I have a question.

4 CHAIR BATTLE: Okay.

5 MR. McCALPIN: I don't understand the relevance of
6 1006(b)(3) to the subject matter of this regulation. And I
7 certainly don't find that it is specifically referred to in
8 there, you know, "determined in a manner conducive to the
9 development of an effective attorney-client relationship."

10 It doesn't seem to me that that's really what
11 1006(b)(3) is about, which talks about "not interfere with
12 the exercise in the matter of professional judgement." I
13 really just don't see the relevance of that section of the
14 statute to the subject matter of this regulation.

15 MS. PERLE: It's not intended to refer specifically
16 to the purpose section, which is where the language about
17 "manner conducive to the development of an effective
18 attorney-client relationship" is. It's intended to deal with
19 the issue that we have dealt with a number of times dealing
20 with the access of the Corporation to information.

21 MR. McCALPIN: That's not 1006(b)(3).

22 MS. PERLE: Yes, it is. That's the one that says

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1 the Corporation can't abrogate the authority of state and
2 local jurisdictions to enforce the rules of professional
3 responsibility.

4 CHAIR BATTLE: Let me just read the section I think
5 that Bill is raising a question about, for clarity on the
6 record.

7 1006(b)(3) reads, "The Corporation shall not under
8 any provision of this title interfere with any attorney in
9 carrying out his professional responsibilities to his client
10 as established in the canon of ethics and the code of
11 professional responsibility of the American Bar Association,
12 referred collectively in this title as 'professional
13 responsibilities,' or abrogate as to attorneys in programs
14 assisted under this title the authority of a state or other
15 jurisdiction to enforce the standards of professional
16 responsibility generally applicable to attorneys in such
17 jurisdiction. The Corporation shall ensure that activities
18 under this title are carried out in a manner consistent with
19 attorneys' professional responsibilities."

20 Now, as I understand what Linda is saying, in
21 addition to the other sections which pertain specifically to
22 financial eligibility, because in this particular reg, we

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1 also speak to the issue of professional responsibility, we're
2 using as authority now inclusive 1006(b)(3). Is that the
3 purpose of adding it?

4 MS. PERLE: Right.

5 MR. McCALPIN: But I don't find anything in the
6 purpose section, .1.

7 MS. PERLE: The authority section is before the
8 purpose section. It's not directly --

9 MR. McCALPIN: I see.

10 MS. GLASOW: It's authority for the whole rule.

11 MS. PERLE: It's for the whole rule.

12 CHAIR BATTLE: On page 16, the authority is cited,
13 citing specific sections of the statute before you get into
14 purpose.

15 MR. McCALPIN: All right. I confused "authority"
16 and purpose."

17 CHAIR BATTLE: Okay. Now that we have got
18 authority straight, let's move on to purpose, if there are no
19 other questions about authority.

20 The purpose is substantially the same as it was the
21 last time that we reviewed it, and it appears that there have
22 not been any changes in the supplemental information, as

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1 well. Are there any questions about purpose?

2 (No response.)

3 CHAIR BATTLE: If there are not, then let's move on
4 to definitions. And in definitions, we do have some changes.
5 "Applicable rules of professional responsibility" is a new
6 definition that was added to make this reference clear. My
7 question is, is the applicable rules of professional
8 responsibility is also defined in 1600?

9 MS. PERLE: No.

10 CHAIR BATTLE: No?

11 MS. PERLE: No.

12 CHAIR BATTLE: It's defined as it pertains to this
13 section?

14 MS. PERLE: Yes. This is a new definition.

15 CHAIR BATTLE: Is it defined anywhere else in the
16 regs?

17 MS. PERLE: No, it's not. But I think that there
18 may be other situations where we might want to use the
19 definition. So we need to, I think at some point, go back
20 and figure out whether we need to put this in 1600.

21 MS. MERCADO: One of the regs that we put in
22 yesterday had specific reference to this provision,

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1 "professional responsibility." And we had a whole discussion
2 about what that entailed.

3 MS. PERLE: Right.

4 MS. MERCADO: It was dealing with the mandatory pro
5 bono issue or whatever and those --

6 MS. PERLE: Yes. And we did use "applicable rules
7 of professional responsibility" in that rule, but we didn't
8 define it in that rule. So it may be appropriate to
9 incorporate this into 1600.

10 MR. McCALPIN: Let me sing a refrain again that I
11 did the last time. If you take the boldfaced part of the
12 first paragraph under "definitions," I'm not --

13 MS. MERCADO: What page?

14 CHAIR BATTLE: Page 2.

15 MR. McCALPIN: Page 2. I'm not sure that in any
16 conflicts of law sense, what we are saying there represents
17 an appropriate choice of law. I continue to believe that the
18 place at which the client applies gives the information --
19 presumably the services rendered is the area whose rules of
20 professional responsibility ought to apply, irrespective of
21 the fact that the program for its own administrative
22 preferences may shift the record someplace else.

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1 MS. PERLE: This was added, as I recall, in
2 response to a suggestion made by Mr. Brooks that we --

3 MR. McCALPIN: Maybe I'm disagreeing with him.

4 MS. PERLE: Well, that's your prerogative. But as
5 I recall the conversation, Mr. Brooks said, "Well, whichever
6 one is more protective of the information that the client
7 provided should be the applicable one." And so we were just
8 following that.

9 MR. McCALPIN: And in a conflicts of law sense, I'm
10 not sure that that is an appropriate basis for a
11 determination.

12 MR. BROOKS: I think the idea was to apply the
13 regulation to the place at which the question arose. And if
14 the demand were in the jurisdiction where the records were,
15 that's where the question would arise and be adjudicated.

16 MR. McCALPIN: But that's not what we say here.
17 What we say here is "whichever is more protective."

18 CHAIR BATTLE: And it seems to me, if there is a
19 conflicts question, that if you resolve it in favor of
20 utilizing the more protective rule of client confidentiality,
21 then by that scope, you are necessarily covering both.

22 So rather than make a conflicts of laws

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1 determination as to which one ought to be the applicable one,
2 where at this point, we don't know whether there might be
3 things beyond our vision as to how that conflict ought to be
4 resolved, to use this approach would give us the kind of
5 coverage that no one would be out of compliance with their
6 respective rules of professional responsibility with regard
7 to how the material was utilized or disclosed, it seems to
8 me.

9 So I guess what I'm saying is that I, in looking at
10 this, agree with John that if we have got to resolve a
11 conflicts question, rather than making it on grounds of
12 conflict of laws, if we do it this way, all parties are best
13 protected.

14 MR. McCALPIN: I think you're wrong. But let the
15 majority rule.

16 MS. PERLE: Again, the next step, we'll send this
17 out for notice and comment. We can get comments from Bar
18 associations on this issue.

19 MS. MERCADO: But the following statement that
20 follows that, it still makes it clear that we're not
21 abrogating the authority of the pertinent jurisdiction to
22 enforce its applicable rules.

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1 I mean, even if we're saying that, the conflict
2 where there is not clarity even in the local jurisdiction,
3 that it be the protection of the client confidentiality,
4 still, the authority of the pertinent jurisdiction is going
5 to rule. I mean, the conflict of laws, whatever it is in
6 those jurisdictions, will ultimately rule.

7 CHAIR BATTLE: That's right.

8 MS. MERCADO: But if it doesn't, then this is what
9 we will deal with.

10 CHAIR BATTLE: Okay. Is there anything else about
11 the section on definitions that we need to take a look at?
12 We do have under "definitions" bolded information and the
13 definition of "total cash receipts." We have been consistent
14 in the first four definitions in using the term that we have
15 come to use as a term of art, "means" whatever.

16 When we get down to total cash recipients, we talk
17 about what it "includes but is not limited to." And there
18 may be a reason for doing it that way.

19 MR. McCALPIN: Can I raise a question of form? It
20 seems to me that in other regulations, we have subheadings
21 for each of the terms that we define. Here, we do not. It
22 just seems to me that for consistency and form, we ought to

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1 do it one way or the other.

2 MS. GLASOW: Sure. That's fine.

3 CHAIR BATTLE: Underlining as a subheading.

4 MR. McCALPIN: In other words, A, B, C, D, or
5 however we do it.

6 MS. PERLE: I think the current rules are not
7 consistent, so we were just following along with whatever was
8 the practice in the current rule.

9 MR. McCALPIN: It seems to me we ought to be
10 consistent.

11 CHAIR BATTLE: If we were to take the suggestion by
12 Bill McCalpin, "applicable rules of professional
13 responsibility" would become A, "assets," B --

14 MR. McCALPIN: Or 1, 2, or however you want to do
15 it.

16 CHAIR BATTLE: "Governmental programs," C, and
17 "income," D and "total cash recipients," E.

18 MS. FAIRBANKS-WILLIAMS: When you get ready to get
19 to "liquid assets" or whatever, I would like to tell you a
20 horror story.

21 CHAIR BATTLE: Okay.

22 (Laughter.)

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1 MR. BROOKS: On the top of page 3, this may be
2 substance, but I think it just needs rearrangement of the
3 language. The "onlys" -- in that last sentence in the first
4 incomplete paragraph, "The LSC Act requires that the
5 recipients take into account only liquid assets." What I
6 think you mean is "only requires."

7 MR. McCALPIN: Or "only take into account."

8 MR. BROOKS: No. It's not limiting what you can
9 take into account. It only requires that you take into
10 account liquid assets.

11 MS. MERCADO: I see.

12 MR. BROOKS: So I think we need to bring that --
13 and I'm assuming this is a matter of grammar and not a matter
14 of substance. But I checked with the Act, and it seems to me
15 clear that we should say "only requires." And in the first
16 line of the next paragraph, the proposed definition "only
17 requires inclusion." And I think as it is, the sense is
18 quite wrong.

19 MS. MERCADO: I see. Yes. That's liquid assets
20 there.

21 MS. FAIRBANKS-WILLIAMS: Well, a while back when
22 they started talking about nonliquid assets, a couple or

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1 three years ago, I had this family who were -- well, how can
2 I best describe it -- were worked a starving-to-death farm, I
3 guess, would be my best description.

4 They applied for some help to get some food stamps
5 and so on, so forth. They had not filed their income tax,
6 because they didn't happen to have money enough to pay the
7 guy that was doing their income tax. So he would not release
8 their income tax to the welfare office.

9 We then went to Legal Aid to see if Legal Aid would
10 help them to get their income tax released so they could at
11 least get some help. And according to the liquid assets,
12 Legal Aid couldn't help them, because the grandfather had
13 added the son's name to a piece of land, so that when he
14 died, the son would inherit it. But it couldn't be sold
15 until the grandfather was dead. So it was not a liquid
16 asset, as far as I was concerned.

17 They proceeded to lose the farm, had no place to
18 live -- well, they could have pitched a tent in the middle of
19 the winter on this small wood lot that belonged to the
20 grandfather. But she ended up deciding that the only thing
21 that they could do was say that he had abused the children so
22 that she could go into the shelter, which she proceeded to

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1 do.

2 And then, the shelter finally found them a place to
3 live. And he finally got a job in New York and got back
4 together. But it was two and-a-half years. And had they not
5 counted those liquid assets, which could not have been sold
6 until the old man died, they could have received some help
7 and could have had Legal Aid help. So you've got a
8 snagglefoo there somewhere.

9 MS. PERLE: Well, I think that this was redrafted
10 to take that into account. What you're talking about is
11 nonliquid assets. And what we have said is that you don't
12 have to take into account nonliquid assets anymore. Because
13 the Act only requires that you take into account liquid
14 assets, "liquid assets" meaning cash.

15 MS. FAIRBANKS-WILLIAMS: Yes, but it says that it
16 was revised in 1983. Now, have you taken that part out that
17 was revised in 1983?

18 MS. PERLE: Yes.

19 MS. GLASOW: That's right.

20 MS. PERLE: We have gone back to what was in effect
21 prior to 1983.

22 CHAIR BATTLE: Well, the way that that particular

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1 section is worded -- I guess what Edna is saying is that
2 since that sentence comes afterwards, it may lead one to
3 believe that that 1983 is still in effect.

4 MS. FAIRBANKS-WILLIAMS: Thing still is in effect.

5 CHAIR BATTLE: And we may need to state that prior
6 to stating what the standard is now.

7 MS. GLASOW: Earlier on. Okay.

8 CHAIR BATTLE: So if we'll take that last sentence
9 out and move it up, I think it will be clearer.

10 MS. GLASOW: I see. Yes.

11 MS. PERLE: Okay.

12 CHAIR BATTLE: It's a good point. Anything else
13 pertaining to definitions?

14 (No response.)

15 CHAIR BATTLE: The next section is 1611.3,
16 "financial eligibility policies or guidelines," Subsection
17 (a). Just an editorial on page 4, about middle of the first
18 paragraph, "Other regular or reoccurring sources of" --

19 MS. PERLE: I'm sorry. We changed it in the rule,
20 but we just didn't change it here. We did change it in the
21 rule.

22 CHAIR BATTLE: All right.

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1 MS. GLASOW: What line is that on?

2 MS. PERLE: "Recurring" -- here.

3 CHAIR BATTLE: It's "recurring" now in the rule on
4 page 17, but it's "reoccurring" on page 4.

5 MS. PERLE: Right. Thank you for catching that.

6 CHAIR BATTLE: Okay. Anything else under
7 Subsection (a) of "financial eligibility policies or
8 guidelines"?

9 MS. PERLE: In the next paragraph that begins,
10 "Total cash receipts," sort of about a third of the way down,
11 there's a sentence that says, "These one-time items, however,
12 should be considered by the recipients when it reviews" --
13 and I think it should say "by recipients when reviewing an
14 applicant's assets."

15 MS. MERCADO: What page are you on, Linda?

16 MS. PERLE: I'm on page 4. The antecedent and the
17 verb didn't match, so we just need to make those parallel.
18 There are probably other places with similar things, but
19 that's just one I caught.

20 MR. BROOKS: Have we got 1611.3(a)?

21 CHAIR BATTLE: Yes.

22 MR. BROOKS: The word "governing body," I think,

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1 should be eliminated and just leave it "the recipient shall."

2 MS. PERLE: Are we looking at the rule itself, or
3 the --

4 MR. BROOKS: Looking at the rule on page 17.

5 MS. PERLE: There are certain things, I think,
6 where the rules suggest that the governing body really should
7 be involved in the decision. There are certain other
8 situations where it's not -- it could be left to local
9 discretion as to whether the policies are policies adopted
10 simply by the staff or whether they should be adopted by the
11 governing body.

12 And in this one, we felt we wanted to make it quite
13 clear that the governing body of the recipient should be
14 involved in making those determinations.

15 CHAIR BATTLE: Is your concern, John, the
16 definition of "governing body" and "policy body" and the
17 distinctions therein?

18 MR. BROOKS: Yes.

19 CHAIR BATTLE: We may need to clarify or put in
20 Part 1600 a definition, so that any time we refer to a
21 "governing body," it is inclusive of the governing body if it
22 happens to be a policy body given responsibilities for making

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1 certain decisions for establishing policy for LSC funds' use.

2 MR. BROOKS: It seems to me to make it clear, we
3 ought to have a definition in 1611 of "governing body" to
4 include "policy body" as defined in 1607 or whatever it is.

5 CHAIR BATTLE: Okay. Do we have any questions
6 about 1611.3(b), which we do have new language in?

7 MS. PERLE: I just want to explain what this does.
8 As you may recall in our last discussion, we talked about the
9 fact that the statute requires the consideration of assets,
10 but it doesn't specifically require the consideration of
11 these other things to determine whether someone who would be
12 income eligible but for other reason would not be considered
13 to be eligible.

14 So this splits that list of considerations into two
15 separate ones, one of which is mandatory, which includes only
16 the assets, and the other, which is discretionary which
17 includes all the other things. And in addition, I pulled out
18 priorities from the list and just put it in under 5, making
19 it clear that in addition to priorities -- that all these
20 things are in addition to priorities.

21 Because priorities are separate from eligibility
22 determination. And that's the point we wanted to make. And

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1 I think that was the point that Mr. Gottlieb made in his
2 comment or one of the points that he made in his comment.

3 CHAIR BATTLE: Okay. Bill?

4 MR. McCALPIN: Are we dealing with (c) now?

5 CHAIR BATTLE: Unless there are questions about
6 (b). I think she was --

7 MR. McCALPIN: Well, I think the priority she was
8 referring to is in (c)(5).

9 MS. PERLE: It is in (c). Right. But (b) and (c)
10 were in the last draft one section. And now, they're pulled
11 out in these two separate sections.

12 MR. McCALPIN: I have a problem with the language
13 of the caption in (c). "The recipient's financial
14 eligibility policies or guidelines may also provide for
15 consideration the following factors." And you limit it to
16 disqualifying. And yet I think that some of the factors
17 listed below may lean in favor of accepting the case.

18 I think that the disqualifying is taken care of in
19 1611.4(d), which refers back to this section. I would
20 propose that the caption read, "The recipient's financial
21 eligibility policies and guidelines may also provide for
22 consideration of the following factors in determining

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1 eligibility for service."

2 MS. PERLE: The current rule, I think, does sort of
3 treat that in the way that you're suggesting. The problem
4 is, then, it never was clear whether a particular factor was
5 a qualifying factor or a disqualifying factor. Now, under
6 this rule, we sort of separate out which factors you can
7 consider to include a person who might otherwise not be
8 eligible under the 125 percent income figures.

9 This is intended to say, "Here is a person that is
10 under that figure." These are other things that you can look
11 at and say, "Well, we shouldn't serve that person, even
12 though they're under that 125 percent."

13 Then, there's a separate listing starting on page
14 20, which are the authorized adjustments. And those are
15 things which you can take into account to permit you to serve
16 someone who is between 125 percent and 200 percent of the
17 poverty line. Some of those same things are repeated; for
18 example, current income prospects, which can be taken into
19 account either way.

20 MS. FAIRBANKS-WILLIAMS: That's what I take
21 exception to, is the prospects. We have got one case going
22 on in Vermont now where they assumed that they were going to

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1 go back to work at the ski area in mid-October. And they're
2 not back to work yet. And they are getting kind of hungry.
3 So assuming their prospects and what they get is two
4 different things.

5 MS. PERLE: But if you look at this, this says that
6 you may take these things into account.

7 MS. FAIRBANKS-WILLIAMS: To disqualify. It says
8 "which may be used to disqualify an applicant for services."

9 MS. PERLE: That's right. They don't have to be
10 used. And if there's any suggestion that -- I think that
11 most recipients would only apply this to disqualify someone
12 if it was quite clear that they were going back to work.

13 MR. McCALPIN: Here, we are only talking about
14 policies and guidelines. And I think policies and guidelines
15 may cut either way. And I think that some of these could --
16 if you have to make a choice between taking the case of a
17 person within the 125 percent or not, items 2 or 3 may cause
18 you to take the case, rather than not take the case.

19 And all we're talking about now is not the
20 application of these but the existence of policies and
21 guidelines generally. When we get over to 1611.4, we're
22 talking about the application of them. And you may use them

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1 either affirmatively or negatively.

2 MS. PERLE: The reason it was done in the way it
3 was was that we wanted to be clear which things were used for
4 which purposes.

5 MR. McCALPIN: Doesn't 4(d) say this?

6 MS. PERLE: And under the current rule, it's very
7 unclear how things should be used. And this was an attempt
8 to --

9 MR. McCALPIN: Doesn't (4)(d) say that? Page 19.

10 MS. PERLE: Well, that refers back to this list of
11 things on page 18 under (c).

12 MR. McCALPIN: Right. So why --

13 MS. PERLE: All it says is you're supposed to apply
14 these things both to people under 125 percent and to people
15 who are between 125 percent and 200 percent.

16 MR. McCALPIN: Right. Right. But I think that you
17 can use these criteria either to disqualify or to accept.

18 MS. PERLE: Well, I think that to the extent that a
19 person who is already under 125 percent, you're not going to
20 say, "Therefore, I will accept you regarding the availability
21 of private or other legal representation." The point here
22 was, if there is available private representation for minimal

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1 cost, then the program could say it was not going to accept
2 this person.

3 MR. McCALPIN: That's what (4)(d) says.

4 MS. PERLE: That's right.

5 MR. McCALPIN: But on the other hand --

6 MS. PERLE: And (c) says it, as well.

7 MR. McCALPIN: If more housing cases come in, then
8 the program can handle, it may decide that with respect to a
9 particular one, the consequences for the individual or group
10 would be so great that they'll take it.

11 MS. PERLE: Yes. I understand what you're saying.
12 And I'm certainly not disagreeing with you. But I'm trying
13 to think through how that plays into the decision of a
14 particular grantee with respect to a particular person.

15 MR. McCALPIN: And isn't that taken care of by
16 1611.4(d)?

17 MS. PERLE: I guess I'm having a little trouble
18 figuring out -- that's part of what I'm having some trouble
19 figuring out, because (4)(d) just simply says you deal with
20 these issues in the same way for this group of people as you
21 do for the other group of people.

22 MR. McCALPIN: I'm not hearing you.

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1 MS. PERLE: You have a person whose income clearly
2 is below 125 percent. You have to consider assets. In
3 addition, there's a range of things that the program could
4 use to say, "We are not going to serve this person, despite
5 the fact that they are eligible under 3(c)."

6 You then have a person who is between 125 percent
7 and 200 percent of poverty. They may have one of these other
8 factors that are listed in 1611.5(a) that would suggest that
9 you should serve them. And all that -- I'm sorry. I'm
10 getting kind of confused. And all that the other provision
11 does is say, "But before you make that decision, you have to
12 look at these other factors, as well, in the same way that
13 you look at them for somebody who is below 125 percent."

14 MR. McCALPIN: Fine. I think that's 5(a).

15 CHAIR BATTLE: Because the major concern is the
16 language that's used in (c) which indicates disqualification.
17 And in your view, that does not subsume the prospect of
18 qualification?

19 MR. McCALPIN: Right. I think it unnecessarily
20 limits the application of these criteria.

21 CHAIR BATTLE: If that's the case, then can we come
22 up with language that will subsume both possibilities once

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1 these criteria are determined to be usable for making a
2 financial eligibility determination?

3 MR. McCALPIN: Oh, it's not the financial
4 eligibility determination. It's the determination beyond
5 financial eligibility.

6 MS. PERLE: That's right.

7 CHAIR BATTLE: Well, eligibility determination.

8 MS. PERLE: I think the point that -- the reason
9 they're done this way is because you have somebody who is
10 financially eligible, they're within your priorities. There
11 may be -- what we didn't want to do was create an
12 entitlement. We wanted to say, "There may be other reasons
13 why a recipient would choose not to serve that person."

14 CHAIR BATTLE: Right.

15 MR. McCALPIN: And you've done that in 1611.4(d).

16 MS. PERLE: No, because 4(d) is only applicable to
17 people in the next category.

18 CHAIR BATTLE: "Does not exceed the annual income
19 ceiling."

20 MS. MERCADO: But this whole regulation only deals
21 with financial eligibility. It doesn't deal with eligibility
22 under other factors --

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1 CHAIR BATTLE: Yes, it does. In other words, what
2 we have got is a --

3 MS. MERCADO: So this title is wrong?

4 MS. PERLE: I'm sorry. I'm confusing 4(d). I was
5 confusing 4(d) with something that appears in 5. I'm sorry.
6 I'm having a little trouble focusing on --

7 CHAIR BATTLE: Once you determine financial
8 eligibility, then you can make -- among all those people that
9 are financially eligible, you can look at other specific
10 factors to determine which cases you're going to take.

11 MS. PERLE: Right.

12 CHAIR BATTLE: And that's what these factors are, 1
13 through 5.

14 MS. PERLE: Right.

15 MS. MERCADO: I understand that. I guess I got
16 confused, because at least this paper that I was looking at
17 here just had "financial eligibility" as the title of this
18 1611.

19 MR. McCALPIN: That's right.

20 CHAIR BATTLE: That's right.

21 MS. MERCADO: But it's really not just financial
22 eligibility. You're really looking at other factors of

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1 client eligibility, which is different from just financial
2 eligibility.

3 MR. McCALPIN: Well, we changed to -- I think it
4 was originally "eligibility for service," or something like
5 that.

6 MS. PERLE: Right, it was.

7 MS. GLASOW: It refers to other factors, but the
8 thrust of this rule is definitely financial eligibility. I
9 mean, it may refer to "priorities" or whatever, but those are
10 handled in another rule somewhere. And we just kind of
11 incorporate it into this to refer to it. But the real thrust
12 of this rule is financial eligibility.

13 CHAIR BATTLE: So you're dealing with a situation
14 where you've got to either -- you've got a category of people
15 who meet the financial eligibility guidelines. And then,
16 you've got people that are 125 percent and, therefore, above
17 it.

18 But you've got other factors in determining
19 eligibility that you can throw in to make a determination as
20 to whether or not this case, though it exceeds by 25 percent
21 the guidelines, still ought to be eligible. So the
22 overriding concern is in both of these instances financial

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1 eligibility.

2 MS. GLASOW: I think Bill's point in paragraph (c)
3 is that looking at each of these factors, the outcome of
4 looking at that factor could either disqualify or qualify a
5 person. So I don't have any problem with taking out "use to
6 disqualify" for paragraph (c). Because earlier on, you said
7 they have --

8 MR. MCCALPIN: "The following factors in
9 determining eligibility for service." It can go either way.

10 CHAIR BATTLE: Can we do this? That's a proposal
11 that Bill has made to this language.

12 Linda, if you in going back through this see any
13 real problem with that, let's have it bolded for the next
14 meeting, and let us know.

15 But I do understand the concern that you raised,
16 and particularly because the term "determining eligibility"
17 is inclusive of a qualification as well as disqualification
18 of eligibility, whereas the term "disqualify" only handles
19 the negative, that at least --

20 MS. FAIRBANKS-WILLIAMS: It jumps out at you.

21 CHAIR BATTLE: Yes. That at least this proposal
22 gives us both options in utilizing those factors.

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1 MR. BROOKS: Well, I would just like to give the
2 draft people a vote of confidence. As far as I'm concerned.
3 you've said what needs to be said. And the only suggestion I
4 would have is removing the word "financial" in the heading,
5 inasmuch as it does go beyond the financial considerations.
6 But it seems to me the disqualification is for otherwise
7 financially eligible clients.

8 MS. PERLE: Right.

9 MR. BROOKS: And the second section is to permit
10 prima facie disqualified clients to become eligible.

11 MS. PERLE: Right.

12 MR. BROOKS: And it seems to me, that's very
13 logical. And the only confusion might be that we limit it in
14 the title to "financial."

15 MS. MERCADO: Which is what I mentioned a moment
16 ago, that if I just picked it up and looked at it and if, in
17 fact, I was wanting to look at some factors that dealt with
18 the other criteria at which you looked to determine whether
19 or not a client is eligible, I probably wouldn't look at
20 this. Because finance is not a concern for me.

21 MS. PERLE: Right. And actually, that was one of
22 the points that Steve Gottlieb made in his letter, as well,

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1 that in many respects, these go into the priorities
2 decisions.

3 MS. MERCADO: This would be financial and something
4 that would direct the reader immediately to headings. And
5 they're trying to figure out where they are to look for a
6 particular regulation on eligibility of client. I mean,
7 under the statute, it's eligibility factors. It's not solely
8 limited to financial eligibility.

9 MS. GLASOW: Right. We could look for something
10 more general.

11 MS. PERLE: We may want to sort of rethink the
12 whole notion in focusing this on financial eligibility. And
13 we may just want to suggest that it's financial eligibility,
14 rather than --

15 MS. MERCADO: You may put "financial eligibility
16 and other factors" or whatever.

17 MS. GLASOW: "Standards for eligibility for legal
18 assistance."

19 CHAIR BATTLE: Or you could define "financial
20 eligibility" to include other factors.

21 MS. PERLE: I'm not sure that makes -- I mean,
22 maybe we would just go back to the way the current rule is

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1 written. I mean, I'm having a little trouble --

2 CHAIR BATTLE: What does the current rule say?

3 MS. PERLE: The current rule, first of all, deals
4 with eligibility. And there's a section on determination of
5 eligibility. And it says, "In addition to gross income, a
6 recipient shall consider the other relevant factors listed in
7 paragraphs (b)(1) and (b)(2) of this section before
8 determining whether a person is eligible to receive legal
9 assistance." And it lists factors --

10 MS. MERCADO: Client eligibility, I think, would be
11 sufficient to cover it, because it includes financial, as
12 well as priority setting, as well as availability of counsel
13 in that area, all those other factors.

14 MS. PERLE: The problem is, under the current rule,
15 1611.5, "determinations of eligibility," there's a whole
16 bunch of things that don't necessarily relate appropriately
17 to one another pushed together in one rule.

18 And what LSC had done on various occasions was to
19 tell programs that they had made the wrong eligibility
20 determination, because they had used a particular factor in a
21 way that the Corporation felt was not appropriate for them to
22 use it, whereas the rule had never really spelled out whether

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1 this is a factor that you should use in this situation rather
2 than that situation.

3 And so there were lots of instances in which the
4 Corporation just sort of pulled out of the air -- or it
5 appeared that they had pulled out of the air language
6 interpreting the rule that wasn't necessarily clear from the
7 rule itself. So the attempt that we were making here was to
8 make it clear in the rule itself how particular factors were
9 to be used.

10 CHAIR BATTLE: The Act speaks to eligibility
11 guidelines. I mean, that's the language that the Act uses.

12 MS. PERLE: Yes, it does. And most of those are
13 financial.

14 CHAIR BATTLE: Yes. To the extent that the concern
15 that Maria is raising that eligibility does go broader than
16 just financial or other factors, we could simply use the term
17 "eligibility."

18 MS. PERLE: Right. But I'm not sure that that -- I
19 mean, I think the question is really whether we want to have
20 in here the things that are listed under (c) at all. The
21 only one that I have some question about is 4, which is
22 mentioned in the statute, although it's permissive.

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1 And I think that we would like to have in here some
2 notion that -- maybe we don't want to spell out the specific
3 things, but some notion that the program can adopt some sorts
4 of standards and criteria for determining when they were
5 going to accept or not accept a person who is otherwise
6 financially eligible. Because you don't want a program to be
7 forced to take everybody who comes in the door who has a
8 priority case who is financially eligible. They would be
9 totally overwhelmed.

10 MR. McCALPIN: Not Mr. Durant's first come, first
11 serve.

12 MS. PERLE: Right. Right. And maybe what we
13 really want to do is simply make (c) -- combine the sort of
14 overall language in (c) and remove 1 through 4 and just
15 reference that there are other criteria and leave it up to
16 the programs to make a determination about which criteria
17 they will use.

18 CHAIR BATTLE: Rosie, did you need to come to the
19 mike? I see your hand up.

20 MS. NEWSOME: Yes. I need an explanation on page
21 20, 1116.5. My name is Rosie Newsome.

22 MR. McCALPIN: Page what?

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1 CHAIR BATTLE: Page 20.

2 MS. NEWSOME: 1116.5.

3 CHAIR BATTLE: We haven't gotten to that one just
4 yet. Can you hold that until we do? We're still struggling
5 with, I think, 4.

6 MS. NEWSOME: Okay. But shouldn't this apply also
7 -- it's under "eligibility."

8 CHAIR BATTLE: Tell me what you're referring to.

9 MS. NEWSOME: I'm talking about the 200 percent --
10 over 200 percent.

11 MS. PERLE: Under.

12 MS. NEWSOME: No. Mine says "if his or her income
13 is over 200 percent" at the very bottom.

14 MS. PERLE: Oh, yes. I'm sorry. That's only with
15 respect to this limited situation of medical expenses.
16 That's saying that someone may have an income, but all of it
17 is devoted to paying for a nursing home or medical expenses.
18 And that's in the current rule, and that has always been
19 there. It's worded differently, but it is the same
20 provision.

21 MS. NEWSOME: So you're saying if my office, our
22 guideline for financial eligibility is 125 percent, they

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1 would be able to go 75 percent more for another client under
2 these circumstance?

3 MS. FAIRBANKS-WILLIAMS: Only if that person was in
4 the nursing home.

5 MS. PERLE: Only if that person -- most of that
6 person's income was devoted to medical or nursing home
7 expenses. And then, after you deduct those, they don't have
8 other income that would bring them over 125 percent.

9 CHAIR BATTLE: Okay. I think for clarity sake,
10 let's get back -- that's a point that we need to cover, but
11 we need to clear up where we were and first of all, getting
12 a good fix on the overall scheme as to whether or not this is
13 eligibility, or is this centrally financial eligibility.

14 Do we need to in the purpose set out that we're
15 talking about financial eligibility and the consideration of
16 other factors once financial eligibility is determined and
17 clarify it there? What we're trying to do now is to make the
18 regulations easy and clear for people to use. And to
19 accomplish that, we probably need to make sure that it's
20 clear what's being covered in each of the sections.

21 MR. BROOKS: Well, don't we do that in the purpose
22 clause? We say "ensure that a recipient would determine

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1 financial eligibility according to criteria that takes
2 effect," count as factors and so on, and to afford sufficient
3 latitude for a recipient to consider local circumstances and
4 its own resource limitations.

5 MS. PERLE: I think that the point that is made --
6 and it's one well taken -- is that we might want to in that
7 second line take out "financial" and place it later in the
8 sentence, so that it would read, "This part is designed to
9 ensure that a recipient will determine eligibility for legal
10 assistance according to financial and other criteria."

11 CHAIR BATTLE: Yes.

12 MS. MERCADO: Yes.

13 MS. PERLE: But I don't think that really finally
14 solves Mr. McCalpin's problem. And I'm not sure that I know
15 how to exactly grapple with it. I am thinking that --

16 MR. McCALPIN: I would leave the subheads under (c)
17 in there. I think they're useful.

18 MS. MERCADO: I do, too. Because I think that the
19 whole emphasis behind putting in the subheads was because a
20 tremendous amount of problems that grantees were dealing with
21 without having any sort of some direction about some of the
22 different criteria that we would be taking into account.

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1 MS. PERLE: I know. I think the thing that's
2 troubling me is that I don't want to have a situation -- and
3 I don't know whether this would happen. I don't want to have
4 the situation where someone comes in who is above 125 percent
5 of poverty and says, for example, "But if I don't get this
6 legal assistance, terrible things will happen to my family."
7 And the program says, "Okay. Then, therefore, we're going to
8 represent you." Because --

9 MR. McCALPIN: 1611.5, I'm going to suggest that we
10 talk about it in terms of authorized exceptions, rather than
11 adjustments. Because I don't think we're adjusting the
12 income ceiling, which is set once for the year in an
13 individual case. I think we are going to make exceptions to
14 the income ceiling in particular cases.

15 MS. PERLE: I'll just note that we used a word
16 different from "exceptions" because the first time we
17 discussed this rule, there was substantial objection to the
18 notion that we had a ceiling and then we could make
19 exceptions to it.

20 MR. McCALPIN: But you don't really want to adjust
21 the ceiling on an ad hoc basis client by client.

22 MS. MERCADO: Yes. I think "exceptions" is better.

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1 Because that makes it seem like the whole entity -- the
2 ceiling is adjusted, so that it would be adjusted for any
3 client that came in, that it would be above 200 percent
4 income. That's not what you mean. You mean that it's an
5 exception to that particular client that's coming in with
6 those particular factors.

7 MS. PERLE: I have no objection to that. I just
8 was noting that we did it in response to what we understood
9 the committee -- the problems that the committee had with the
10 use of the word "exceptions." But we can certainly go back
11 to that. That's what's in the current rule.

12 CHAIR BATTLE: Okay. Bill, I'm not sure, but we
13 have got a lengthy transcript at this point about your
14 concern and about how it plays into the language that we have
15 in (c). And we have got the concern that Linda has expressed
16 and John has expressed about once a person meets basic
17 financial eligibility, what kind of factors you can use to
18 further determine how they ultimately will be eligible for
19 services.

20 And so I think if we have got the record on that,
21 if you can come back with language which will meet the
22 objective of giving programs a specific list of other factors

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1 they can consider once financial eligibility has been
2 determined, then that will satisfy the concerns that have
3 been raised.

4 MS. PERLE: As I'm listening to what you're saying
5 and as I listened to what Mr. McCalpin said, I think that the
6 way to deal with this is to in the bold at the top of the
7 page 18 -- that what we should really say is that "The
8 recipient's eligibility policies and guidelines may also
9 provide for consideration of the following factors which may
10 be used to determine whether a recipient will provide service
11 to a financially eligible applicant."

12 MR. McCALPIN: That's fine.

13 CHAIR BATTLE: That's good.

14 MR. McCALPIN: I've got no problem with that.

15 MS. MERCADO: Could you read that again for me?

16 MR. McCALPIN: I think it's a longer way of saying
17 what I had, but go ahead.

18 MS. PERLE: I just want to make it clear that it's
19 only people who are financially eligible to whom you apply
20 these things to.

21 MR. McCALPIN: Right.

22 MS. MERCADO: Could you read that again?

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1 MS. PERLE: "The recipient's eligibility policies
2 or guidelines may also provide for consideration of the
3 following factors which may be used by the recipient to
4 determine" -- I don't remember exactly what I said.

5 MR. McCALPIN: "Whether service will be provided."

6 MS. PERLE: "To an otherwise financially eligible
7 client."

8 CHAIR BATTLE: "To an otherwise"?

9 MS. PERLE: Well, no, it wouldn't be "otherwise."

10 CHAIR BATTLE: To all. Okay.

11 MR. McCALPIN: I think you ought to work that
12 language.

13 MS. PERLE: Okay. And maybe we can shorten it.
14 But the notion is that we want to make it clear that --

15 CHAIR BATTLE: That this is a screening device that
16 comes after financial eligibility.

17 MS. PERLE: That's right. And you don't consider
18 these things until you've determined that the person is
19 financially eligible. That's my point, and that's my
20 concern.

21 CHAIR BATTLE: Okay.

22 MS. PERLE: I understand that you don't have any

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1 problem with that. My concern was that the language make
2 that clear. I know that substantively, you agree with that.

3 CHAIR BATTLE: We can move on now to 1611.4,
4 "annual income ceilings."

5 MR. McCALPIN: Picking up on a comment that was
6 made earlier and consistent with what we have just been
7 talking about, would it be useful to include the phrase
8 "prima facie" between "considered" and "financially" in the
9 second line?

10 MR. BROOKS: Second line where?

11 MR. McCALPIN: Second line from the bottom of page
12 18, second line of 1611.4. "An annual income below which
13 persons will be considered, prima facie, eligible." Well,
14 maybe they're considered financially eligible, but that
15 doesn't mean they're fully eligible.

16 MS. PERLE: Right.

17 CHAIR BATTLE: The same kind of message, it seems
18 to me, to this. Because what you're saying is, even though
19 you're financially eligible, you may not be given service.

20 MS. PERLE: Right, because of other factors and
21 also the assets. And you don't want to say that just because
22 you have an income below, you're prima face eligible.

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1 Because you also have to consider assets.

2 MR. McCALPIN: You're right. You're right.

3 MS. MERCADO: Take "prima facie" out?

4 MS. PERLE: I would not recommend that the
5 committee do that.

6 CHAIR BATTLE: But I think the record will reflect
7 the concern as it relates to how this language is set out.

8 MS. PERLE: I'm not sure I understand that.

9 MS. MERCADO: It doesn't really apply in this
10 circumstance, because you've got a lot of other factors other
11 than financial eligibility.

12 MS. PERLE: Yes. This is only setting out income.

13 MS. MERCADO: It doesn't set out assets at all or
14 debts or anything else.

15 CHAIR BATTLE: So I thought the question was, are
16 we appropriate in using the term "financially eligible" here,
17 or not?

18 MR. McCALPIN: So long as we -- that doesn't imply
19 that if you're financially eligible, you've cleared all the
20 hurdles, and you get service.

21 MS. MERCADO: That's right.

22 MS. PERLE: But I think that there is a problem

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1 here. We added this language. This is different from what
2 was in the last version that you looked at. And I don't know
3 exactly what that one said, but it suggests that the asset
4 issue is not a financial eligibility issue, and it is. So I
5 think that we do need to address that, the use of the words
6 which say "which persons will be" --

7 MR. McCALPIN: "May be considered"?

8 CHAIR BATTLE: See, you took exactly -- I have my
9 notes from the last time, and what you've done is precisely
10 what we directed you to do.

11 MS. PERLE: Yes. I think that's right. But I
12 think there's a problem with it.

13 CHAIR BATTLE: Yes. And that was the point that I
14 was raising.

15 MR. McCALPIN: I think it was the "below which"
16 that we inserted --

17 CHAIR BATTLE: Yes. We did "below which," and then
18 we said "which will be considered financially eligible" was
19 the other thing that we recommended be added. But it does
20 create a problem that we need to have addressed.

21 MS. PERLE: I think what we said before was
22 something like "will establish an annual income ceiling for

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1 financial eligibility." I think that's something --

2 CHAIR BATTLE: The way it read before we did
3 anything to it was, "Every recipient shall establish an
4 income ceiling for persons to be eligible to receive legal
5 assistance supported with funds provided under this Act."

6 MS. PERLE: Right. And that, to me, said that if
7 you're above the income ceiling, you won't receive it, unless
8 one of these other exceptions apply. If you're below it, it
9 doesn't automatically mean you are financially eligible,
10 because there are other factors.

11 So I think that we might want to go aback to the
12 pervious -- or some variation of the previous draft. Because
13 I think this causes a problem which we weren't really --

14 CHAIR BATTLE: But I think if we go back to how
15 we're going to distinguish financial eligibility from being
16 totally eligible for service, then as we use the term
17 "financial eligibility" in this part, it won't necessarily
18 communicate total eligibility for receipt of service.

19 MS. PERLE: My only point really is that in
20 addition to income, we have to consider assets. That's
21 really the only point, and that I think that this is
22 misleading. Maybe what we need to do is just add something

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1 in this sentence that says --

2 CHAIR BATTLE: So you're saying "annual income
3 ceiling and assets"?

4 MS. FAIRBANKS-WILLIAMS: Then, you get back to the
5 problem of whether they're fixed assets or liquid assets or
6 what, if you just say "assets."

7 MS. PERLE: But we defined "assets" elsewhere. I
8 wanted to deal with assets and income separately, because I
9 didn't want to cause confusion. But I think we may need to
10 have some reference in (a) to the asset provision in 1611.6.

11 CHAIR BATTLE: Okay.

12 MS. PERLE: We'll work on that.

13 CHAIR BATTLE: Okay.

14 MR. BROOKS: Well, in 1611.6 on page 21 when we're
15 dealing with asset ceilings, we have a little different
16 formula. "The governing body of the recipient shall
17 establish guidelines incorporating reasonable asset ceilings
18 to be utilized in determining eligibility for services under
19 1611.3." And I wonder if we couldn't use that same lingo,
20 "income ceilings to be utilized in determining eligibility
21 for services."

22 MS. PERLE: I think that would be good.

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1 MS. MERCADO: Linda?

2 MS. PERLE: Yes?

3 MS. MERCADO: In 1611.4(d) --

4 CHAIR BATTLE: Hold that for just a quick second.

5 MS. MERCADO: No, because it deals with the fact
6 that you're talking about, as far as the asset ceiling.

7 Because it deals back with Section 1611.3(b) or (c).

8 CHAIR BATTLE: Yes.

9 MS. MERCADO: I mean, the whole concept of what
10 you're discussing in that first paragraph under 1611.4(a), as
11 far as the assets and financial eligibility, is clarified
12 under 1611.4(d).

13 CHAIR BATTLE: Yes. I think that was Bill's point.

14 MS. MERCADO: It takes care of that. It's just
15 that we wanted it all in that first paragraph, and it really
16 goes through all the different sections.

17 CHAIR BATTLE: I think that was in part Bill's
18 point earlier about that section.

19 MS. PERLE: I'm a little lost.

20 CHAIR BATTLE: What she's saying is that if you
21 look at 1611.4(d), it --

22 MR. McCALPIN: (c) or (d)?

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1 CHAIR BATTLE: (d).

2 MS. PERLE: (d).

3 CHAIR BATTLE: Which is the point that I think Bill
4 raised, that it basically says that an applicant for services
5 whose income does not exceed this may be denied service on
6 the basis of any of the other factors considered in .3(b) or
7 (c).

8 MS. MERCADO: The 3(b) deals with the assets
9 and --

10 CHAIR BATTLE: And I was going to say, do we have
11 any questions about it?

12 MS. PERLE: No. I think it goes to the point that
13 Bill raised before, which is that we need to change that to
14 suggest that before you determine whether a person is
15 financially eligible, you go back to look at that. But it
16 doesn't necessarily mean that it's only denial of service.

17 CHAIR BATTLE: Are there any questions about
18 1611.4(b)?

19 (No response.)

20 CHAIR BATTLE: Or (c)?

21 (No response.)

22 CHAIR BATTLE: We didn't make any changes to (c) --

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1 we made one small change, these factors in (c). And (d), we
2 have discussed. I think Maria has just raised (d), and Bill
3 raised (d). So you're familiar with the changes needed in
4 (d).

5 (e)?

6 (No response.)

7 CHAIR BATTLE: We made minimal changes to (e) last
8 time, and they are reflected. Just "legal assistance," I
9 think, is the only change to (e).

10 We then can move on to 1611.5, "authorized
11 adjustments to the recipient's annual income ceiling." Now,
12 Bill has already raised the point about using the term
13 "exception" as opposed to "adjustments" to title 1611.5. Are
14 there any questions about Subsection (a)?

15 MR. McCALPIN: Let me go to page 7, the last
16 sentence of the introductory paragraph. I'm not quite sure
17 -- it says "includes 4 and 5 in the title contained to
18 reflect the view that the factors that may be considered do
19 not constitute exceptions in income ceilings." Well, I think
20 they are exceptions.

21 "But instead, they are to be viewed as restrictions
22 on an applicant's use of income that would permit a recipient

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1 to deem an individual to fall below the income ceiling."
2 What does that mean? If he uses the income to pay medical
3 expense --

4 MS. PERLE: It's not available for other things,
5 for other expenses -- living expenses.

6 CHAIR BATTLE: Well, if the comment says these are
7 not exceptions, but the rule says this is an exception --

8 MS. PERLE: Obviously, we have to make those
9 parallel.

10 CHAIR BATTLE: We have got to make some changes to
11 make them consistent.

12 MS. BERGMARK: And Linda, what was the rationale --
13 I was at that regs working group meeting, but I don't
14 remember the discussion about exceptions versus --

15 MS. PERLE: This one didn't come up in the regs
16 working group.

17 MS. BERGMARK: What is the consideration, the
18 underlying --

19 MS. PERLE: This wasn't discussed in the regs
20 working group.

21 MS. BERGMARK: What is the reason, then, to avoid
22 use of the word "exception"?

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1 MS. PERLE: Because there was a discussion which
2 said under the Act, the Corporation has to establish maximum
3 income guidelines. And then I think it was Mr. McCalpin who
4 raised the objection to the use of "exceptions," saying we
5 didn't have any authority to make exceptions to that.

6 MR. McCALPIN: No, I don't think that was right.

7 MS. PERLE: I certainly could be wrong. That's my
8 recollection.

9 MS. BERGMARK: Is what you're trying to say, though
10 -- it isn't as though we say to a person, "Gee, your income
11 is 250 percent income, but we're going to make an exception
12 for you, because actually, we just think you can't afford
13 services, so we're going to help you out." You're trying
14 to --

15 MS. PERLE: Well, first of all, it only is those
16 people up to 200 percent.

17 MS. BERGMARK: Right. I understand that. But
18 you're trying to create a category of exceptions or
19 adjustments which are about income that is, in effect, not
20 accessible to a person.

21 MS. PERLE: Right. Because it's devoted to some
22 other purpose, or the current income prospects -- because it

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1 suggests if you look at a person's income over the course of
2 a year, they may be making --

3 MS. BERGMARK: But you still have "deeming."

4 MS. PERLE: Right. That's exactly right. And, in
5 fact, we did use the word -- we used "deeming" in (a)(3).
6 "The recipient determines that the applicant should be deemed
7 to be eligible for services on the basis of one or more of
8 the following factors that restrict the applicant's financial
9 ability to afford legal assistance." So maybe the problem is
10 in the title.

11 CHAIR BATTLE: Are there any questions when we get
12 into the substance of (a), either subparts 1, 2, or 3? And 3
13 has subparts, too.

14 MR. McCALPIN: I would suggest in 3, where in the
15 last line of the introductory part of 3, "the applicant's
16 financial ability to afford private legal assistance" is, I
17 think, what we're talking about, to go outside the program to
18 get legal assistance.

19 MS. MERCADO: Have we ever used "private legal
20 assistance anywhere"?

21 CHAIR BATTLE: Do we use "private attorney"?

22 MS. PERLE: We use "private attorney" in other

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1 places.

2 CHAIR BATTLE: Which raises one question which
3 during one of the breaks we kind of discussed. In the area
4 of Social Security, there are paralegal who hold themselves
5 out as Social Security experts and, for that purpose, would
6 be providing, I guess, legal assistance between not as a
7 private attorney.

8 MS. BERGMARK: That would extend "private legal
9 assistance" here.

10 MR. BROOKS: They can't practice law. Can they
11 provide legal assistance?

12 MS. PERLE: Well, they're doing it. And there's a
13 lot of discussion under the unauthorized practice of law
14 rules as to whether they're committing unauthorized practice
15 of law. That hasn't been resolved.

16 MS. FAIRBANKS-WILLIAMS: We have a bill in our
17 legislature to legalize them.

18 CHAIR BATTLE: To make them legal?

19 MS. FAIRBANKS-WILLIAMS: Yes.

20 MS. PERLE: It's a very hot topic in the legal
21 field.

22 MR. McCALPIN: Nonlawyer practice.

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1 CHAIR BATTLE: The nonlawyer practice of law.

2 MR. McCALPIN: Yes, exactly.

3 MS. MERCADO: All the mediators and arbitrators and
4 stuff are now falling into that category.

5 CHAIR BATTLE: Do we have anything under Subpart
6 (a) or (b) or (c)?

7 MS. PERLE: Is the consensus that we will put in
8 "private" there? I don't have any objection to that. I just
9 want to make sure.

10 MR. McCALPIN: That we'll what?

11 MS. PERLE: That we'll put the word "private" in
12 there. Is that a consensus?

13 CHAIR BATTLE: Yes.

14 MS. PERLE: Okay. And do we need to define that?
15 That's my question.

16 MR. McCALPIN: No.

17 MS. PERLE: Okay. Fine. In connection with (c),
18 you've done what I asked. But as I read it, I think it is
19 still too restrictive. The only examples we give are taxes.
20 And I think that we need to indicate something other than
21 taxes. And I thought, "What about a judgement?"

22 Now, in (f), you take care of a particular category

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1 of judgements, child support or alimony. But there may very
2 well be other judgements against an individual which are a
3 fixed debt or obligation. I would just like to see something
4 besides taxes.

5 MS. PERLE: Well, we did in the commentary indicate
6 that were other things besides taxes. Now, maybe the way to
7 fix this is to combine (c) and (f). Because you're right.
8 child support or alimony is a fixed debt or obligation. And
9 that way, it would give two different kinds of examples.

10 MR. McCALPIN: I think that might do it.

11 MS. PERLE: I think that might do it, yes. Because
12 (f) was something that we added, I think, separately as a new
13 category, because it did not appear to be there before, and
14 it made sense if you included it in income that you should be
15 able to exclude it from those who pay it. So why don't we do
16 that? And I think that would take care of your problem.
17 Okay.

18 CHAIR BATTLE: We have got some changes in (b), the
19 addition of language to the third line.

20 MS. PERLE: This was clarification language. I
21 don't think it represents any substantive change. But I
22 think the committee was concerned -- the way the provision

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1 read before, it was not clear what kinds of information
2 needed to be included.

3 CHAIR BATTLE: "Documentation and recordkeeping on
4 the specific factors that were relied upon to make a
5 determination when a person falls above the financial
6 eligibility guidelines." Does the language now proposed to
7 go into (b) clarify all concerns about that?

8 (No response.)

9 CHAIR BATTLE: If it does, let's move on to 1611.6,
10 "asset ceilings," Subpart (a).

11 MS. MERCADO: I'm sorry. I sort of fell asleep
12 here. But on Section (b), was this where we had the
13 discussion about the fact that there will be kept sort of a
14 separate sheet, if you will, of the specific factors relied
15 upon, so that that way, in case of complaints or grievances
16 or OIG investigations or whatever, we would not violate the
17 client-attorney privilege?

18 CHAIR BATTLE: Yes.

19 MS. MERCADO: Okay. I'm not sure where that comes
20 up or where we put it.

21 MR. McCALPIN: Let's go back just a minute to the
22 last sentence of the commentary under 1611.5 at the top of

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1 page 10. I'm not quite sure what we did in the discussion
2 earlier this afternoon with respect to that subject. But
3 whatever we did, this sentence needs to be consistent with
4 whatever we did before about which applicable rules are going
5 to be used.

6 MS. PERLE: Right. I think we'll just take the
7 language from paragraph (f) and sort of incorporate it into
8 that paragraph. We still would like to ask for comments, if
9 there are any other specific kinds of debts or obligations
10 that need to be specifically listed.

11 MS. MERCADO: I think so, too.

12 MR. McCALPIN: The other provisions on page 3 of
13 the comment --

14 MS. FAIRBANKS-WILLIAMS: The one thing that you
15 haven't got listed in there is fines.

16 CHAIR BATTLE: Criminal or civil?

17 MS. FAIRBANKS-WILLIAMS: Either one.

18 MS. BERGMARK: One has an exception.

19 MS. FAIRBANKS-WILLIAMS: They have to be paid. And
20 the money has to be there, or the husband goes to jail. And
21 then, he can't support the kids anyway.

22 MS. PERLE: Right. But there is a catch-all under

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1 what's now (g) and will, I think, be (f). It says, "Other
2 significant factors that the recipient finds are related to
3 the applicants financial ability to afford private legal
4 assistance." I think it is impossible to sit down and try to
5 list everything.

6 CHAIR BATTLE: All the examples. Right.

7 MS. PERLE: I think what you want to do is give
8 examples of the things that are most commonly -- that
9 recipients most commonly find exist. And then, you have a
10 catch-all which says there may be some other specific factors
11 that relate to this particular individual that a program is
12 permitted to take into account. And that's what (g) --

13 CHAIR BATTLE: Linda, I know that we have had this
14 discussion before, so I don't think we should go over
15 something that we have already spent a tremendous amount of
16 time on.

17 But when I read this again this morning,
18 particularly because what we're talking about is separate
19 recordkeeping for the purpose of determining eligibility and
20 this client confidentiality, I was trying to remember what
21 the discussion was with regard to why income information
22 would be considered confidential.

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1 MR. McCALPIN: I don't think it is. That's the
2 dispute. I think in some jurisdictions, it may be considered
3 protected, in other jurisdictions, not. And that's basically
4 what we did in 1611.8(d).

5 MS. GLASOW: Actually, I think the bottom line that
6 we came to is that maybe we don't have to necessarily
7 determine that, that the local applicable rules would
8 determine that. And, therefore --

9 CHAIR BATTLE: So we are recordkeeping-wise putting
10 them in a separate place, so that however it's determined, we
11 are designating recordkeeping which ought to give us ease in
12 implementing any request --

13 MS. PERLE: And what we're looking for in this is
14 sort of overall statistical information, basically, from the
15 program that says, "We accepted 3,000 people for service last
16 year; of those 3,000, 25 were accepted for service on the
17 basis of these exceptional situations, and 1 of them was for
18 (c), 4 of them were for (d), 5 of them were for (f).

19 MR. FORTUNO: "And 35 were refused for this
20 reason."

21 MS. PERLE: This is dealing with those situations
22 where they were accepted, where they wouldn't have qualified

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1 under the 125 percent.

2 MS. MERCADO: And our complaints come from people
3 who have been refused.

4 MS. PERLE: Well, that's not entirely true.

5 MS. FAIRBANKS-WILLIAMS: I think we should be
6 keeping more track of requests that are made that are
7 refused.

8 MS. PERLE: I didn't hear what Martha said, but we
9 also have lots of situations where somebody on the other side
10 in a piece of litigation are complaining that the person who
11 is being represented shouldn't be represented.

12 MS. GLASOW: That's what she said.

13 MS. PERLE: Okay. I'm sorry. But this doesn't go
14 to the question of whether the Corporation has access to
15 information in a particular set -- with respect to a
16 particular person.

17 CHAIR BATTLE: It's just a question of
18 recordkeeping.

19 MS. PERLE: Right. This is to give the Corporation
20 access to statistical information about how this plays out.
21 And certainly, I think we would all agree that if all they
22 want is statistical information, there isn't any reason,

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1 whether it's required or not -- there isn't any reason for
2 the Corporation to have that information connected to an
3 individual.

4 CHAIR BATTLE: Okay. Now, we're down to 1611.6,
5 "asset sales." We have simply added a citation on page 21.
6 And on 22(b), we have made some changes.

7 MR. BROOKS: We agreed to add sub (c), didn't we,
8 to 1611.3(b) and (c) on the last line of page 21?

9 MS. GLASOW: Yes.

10 MR. McCALPIN: Well, 3(b) specifically relates to
11 assets.

12 MS. PERLE: To assets.

13 CHAIR BATTLE: Okay?

14 MS. PERLE: Originally, I think it said "1611.3."
15 And now, we have indicated that it applies to 3(b), rather
16 than --

17 MR. McCALPIN: Let me raise a question. At the
18 bottom of page 10, 1611.6(c), where it says, "The subsection
19 was revised to make it clear that the director of a recipient
20 could designate another staff member to make the
21 determination to waive asset ceilings in unusual situations."

22 Does the same apply with respect to income

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1 ceilings? Can you delegate the authority? Why do we
2 specifically refer to a delegation of authority to waive
3 asset ceilings, and I don't think we deal one way or another
4 with the ability to delegate the authority to waive income
5 ceilings?

6 MS. PERLE: I don't think we have ever had a
7 specific requirement -- because I don't think it's a waiver
8 in quite the same way. You have the provisions in the
9 regulation that say if the person qualifies under these
10 various exceptions or adjustments or exemptions, whatever we
11 want to put it, then they are eligible for service or deemed
12 to be eligible for service.

13 And I think those determinations are made
14 frequently by intake workers. I don't think that those
15 decisions come to the executive director. But the asset
16 ceiling is a much more concrete limitation, which
17 traditionally, there has to have been a specific
18 determination made to waive it.

19 MS. BERGMARK: Although it is interesting that we
20 delve that far into a specific aspect of an overall
21 eligibility policy that we might well leave to the local
22 board.

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1 In other words -- I don't have a strong feeling
2 about a disclaimer, but it is a very specific sort of notion
3 about what we're asking a program board to include in its
4 eligibility policies; in other words, that there should be
5 specific director-approved or designee-approved waiver, as
6 opposed to these consideration of factors for which we
7 provide no particular instruction on who gets to be the final
8 authority on implementing these factors.

9 CHAIR BATTLE: And as long as we use "recipient,"
10 then it seems to me it's up to the recipient to make a
11 designee who has all the responsibilities that we contain
12 under "recipients."

13 MS. GLASOW: I think it came from the fact that in
14 the current rule, there is a waiver provision. And that may
15 be there because of the tremendous controversy over this
16 whole section when it was promulgated back in 1983.

17 CHAIR BATTLE: We are about at 2:30, which means we
18 have been going for two and-a-half hours. We have said that
19 we're going to cut out at about approximately -- Bill, is it
20 3:00 or 3:30 that you need to leave?

21 MR. McCALPIN: 3:30.

22 CHAIR BATTLE: 3:30? Which is another hour from

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1 now. Why don't we take a five-minute break? I think
2 everybody is getting a bit weary. And I wanted to offer us
3 all at least a break in the morning and a break in the
4 afternoon. And now might be a good time to do it.

5 (A brief recess was taken.)

6 CHAIR BATTLE: We're going to go back on the
7 record. We had considered asset ceilings, 1611.6. And I
8 think -- have we completed our consideration of 1611.6 and
9 can move on to "group eligibility"?

10 (No response.)

11 CHAIR BATTLE: If there are no other questions
12 about asset ceilings, then we will move on to "group
13 eligibility," 1611.7. When I look at where we were before
14 and where we are now on 1611.7, we just made minor changes
15 that are reflected on what we have got here to "group
16 eligibility."

17 Are there any questions about 1611.7 or about the
18 comments that pertain to 1611.7?

19 MR. McCALPIN: Guess what? I have no comments.

20 MS. PERLE: I'm so disappointed.

21 (Laughter.)

22 CHAIR BATTLE: That means that you are to be

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1 congratulated. You've done an outstanding job on 1611.7.
2 And you have passed the scrutiny of this committee.

3 MS. PERLE: Thank you.

4 CHAIR BATTLE: And let's send it out separately for
5 publication, before somebody pulls it back.

6 We can move on to 1611.8, which pertains to the
7 manner of determining financial eligibility. We only
8 suggested one change in this reg -- well, I take that back.
9 We suggested two areas to change; one, in subsection (d), we
10 added the information to verify the information to make that
11 sentence complete; and in subsection (d), we did some
12 changing to the language there, as well.

13 MS. PERLE: I think that this captures the language
14 that Mr. McCalpin suggested.

15 MR. McCALPIN: I would only suggest that you add
16 the article "the" before the last word in 1611.8(d), "to
17 carry out the representation."

18 MS. MERCADO: Where are you at?

19 MR. McCALPIN: Page 24, top of the page, "to carry
20 out the representation."

21 CHAIR BATTLE: "Carry out the representation."

22 MS. PERLE: That's fine.

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1 CHAIR BATTLE: Okay. Then, if there are no
2 questions about either the comments or the rule pertaining to
3 1611.8, we can move on to "retainer agreements," 1611.9.
4 There were some minor changes that we proposed to the rule to
5 make it easier to read last time. I think in (d), we made
6 some changes.

7 And we talked about this whole business of brief
8 service to make it clear that in intake, sometimes, you give
9 people directions as to where to go or what to do. And in
10 (e), we added "acting as cocounsel," so that the retainer
11 agreement can extend legal services without executing a
12 separate retainer agreement, so long as it's within the scope
13 of the original agreement.

14 MS. PERLE: Right, but what we clarified, I think,
15 was that you wish to make it clear that you're really only
16 talking about the cocounseling arrangement and that if you
17 were talking about a situation where one recipient took on a
18 case initially and then actually turned the case over to a
19 support center and then was no longer part of the
20 representation, that you should have a new retainer
21 agreement. I think we have clarified that in the commentary.

22 CHAIR BATTLE: Okay.

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1 MR. McCALPIN: I've been quiet long enough.

2 (Laughter.)

3 CHAIR BATTLE: I couldn't believe my ears.

4 MS. MERCADO: The flight may be waiting.

5 CHAIR BATTLE: Yes?

6 MR. McCALPIN: First of all, I would just like to
7 suggest to the drafters that in 1611.9(a), you consider
8 taking the phrase at the end that begins with "each
9 individual" -- moving that whole phrase up to follow the word
10 "execute" in the first line, "execute with each individual or
11 group plan or anyone who is represented a written agreement
12 in a form consistent with" -- and so on.

13 MS. PERLE: So done.

14 MR. McCALPIN: And one other slight comment. In
15 the commentary on page 14, 1611.9(c) -- I guess it's the
16 second sentence -- starts, "As with financial information."
17 "This section requires that disclosure of information be
18 consistent," I think.

19 MS. PERLE: Fine. I agree.

20 CHAIR BATTLE: Do you have anything else on 1611.9,
21 "retainer agreement"?

22 MR. McCALPIN: Just let me ask you one --

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1 grammatically, do we talk about "so long as" or "as long as"?

2 MS. PERLE: That's a disagreement that Suzanne and
3 I have. I always say "as long as." She always says "so long
4 as." So I don't think it makes any difference.

5 MR. McCALPIN: I don't know whether there is a
6 grammatical preference.

7 MS. MERCADO: "So long."

8 MR. McCALPIN: Page 24, third -- bottom.

9 MS. PERLE: I prefer "as long," but I don't think
10 it really matters. I think it's just style.

11 MS. MERCADO: Does the committee have a preference?

12 MS. PERLE: If the committee has a preference, we
13 can certainly change it.

14 MS. MERCADO: I'm not a member of the committee.

15 MR. BROOKS: Do you want a vote of the committee?

16 CHAIR BATTLE: A vote of the committee, should we
17 go "so" or "as long as"?

18 MS. PERLE: "So" or "as long as."

19 (Laughter.)

20 CHAIR BATTLE: Which sentence are we talking about?

21 MS. PERLE: The very last three words on the page
22 on page 24.

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1 CHAIR BATTLE: "So long."

2 MS. MERCADO: "So long as." Yes, that's what it
3 says.

4 MS. PERLE: What's your preference?

5 MR. BROOKS: "As."

6 MS. GLASOW: We need a show of hands.

7 MS. PERLE: Can we vote?

8 MR. McCALPIN: Is there a grammatically correct way
9 of doing it?

10 MS. PERLE: I don't think so. I don't think it
11 matters. I think it's purely a stylistic thing. Do we have
12 a grammarian in our midst?

13 MS. GLASOW: We can check with Joanne.

14 MS. PERLE: Suzanne suggests we check with Joanne
15 Gretch, who knows about such things.

16 CHAIR BATTLE: Okay. I guess what you're hearing
17 is that the committee doesn't really have a preference one
18 way or the other. So long as we're consistent.

19 (Laughter.)

20 MS. PERLE: We will only be consistent in those
21 areas where I wrote the text versus those areas where Suzanne
22 wrote the text.

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1 CHAIR BATTLE: Anything else on 1611.9?

2 (No response.)

3 CHAIR BATTLE: Much to my amazement, we are now at
4 1611.10, "change in circumstance." And we really didn't
5 propose anything but a comma in our last discussion, which
6 now is after the term "likely to continue."

7 MR. BROOKS: Two commas.

8 CHAIR BATTLE: Two commas.

9 CHAIR BATTLE: That's right. "Sufficient and
10 likely to continue."

11 MS. PERLE: And you did suggest a change in the
12 language on the commentary, that we make it clear that it's
13 revisions to the current language on page 15 when we did
14 that.

15 MS. MERCADO: It means we ought to take breaks more
16 often. We come back with revised energy, and we quickly go
17 through this.

18 CHAIR BATTLE: That's right. So we are now at a
19 point that I believe we have completed our consideration of
20 1611. So we have -- on the dot, it is now 3:02 -- we have
21 been able to complete all that we set out in our agenda at
22 our last meeting by giving consideration to, today, 1609,

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1 1610, and 1611 and, on yesterday's, 1607 and 1602 and 1604.

2 I think before we close out today, we need to have
3 some discussion as to whether or not we need a meeting at the
4 time that we're scheduled now to meet in Boston. My
5 inclination is -- just a minute.

6 MR. McCALPIN: I'm suggesting that we haven't
7 closed off on 1611. What are we going to do with it? My
8 short-term memory being what it is, I can't remember. But I
9 don't think there's any serious problem that requires
10 significant redrafting of 1611, is there? Can we approve it
11 for publication under the usual conditions?

12 CHAIR BATTLE: Well, I thought what we said -- we
13 do have some changes. I don't know if they're significant,
14 but I thought what we said was we would receive just the
15 bolded information in December. And with that, we would
16 review the bolded information. And if there are no
17 objections, we would send it out after that, so at least we
18 have one last chance to look at 1611.

19 MS. MERCADO: I'll go back and reread this.

20 MR. McCALPIN: I would think that we were almost at
21 the point where we could let you have a final look at it and
22 circulate it to the Board and send it out for publication.

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1 CHAIR BATTLE: I will defer on that to the
2 committee and the members that are here. If you feel
3 comfortable with it -- I'm looking back through what we have
4 got. Most of the changes were editorial changes, I think,
5 that were made to 1611.

6 MR. McCALPIN: I think that's right.

7 CHAIR BATTLE: There were some changes, and there
8 was much discussion on the front end about the whole issue of
9 financial eligibility and coming up with another definition
10 that clarified exactly where we are with regard to
11 eligibility pertaining to this regulation.

12 MR. McCALPIN: I would be willing to leave that to
13 you and the drafters.

14 MS. BERGMARK: And I think this is a reg that would
15 be nice to be getting a move on. I mean, there's some
16 difficulties with the current reg that would be nice to get
17 over that hurdle. So if it's possible to move it, that
18 certainly would be good.

19 MS. PERLE: And certainly, if we have any questions
20 based on our notes and our reading of the transcript about
21 whether there was a consensus on something, we can confer
22 with Ms. Battle or --

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1 CHAIR BATTLE: What we need to do, with that being
2 the case, then, is to have both 1607 and 1611 prepared for
3 next Friday. Because we have to make -- this is going out to
4 publication.

5 MR. McCALPIN: No.

6 CHAIR BATTLE: That's right. This is --

7 MR. McCALPIN: This is just for publication.

8 CHAIR BATTLE: We have plenty of time. We have got
9 between now and December. So we can get together on the
10 final editing and go ahead and get it out.

11 MS. PERLE: That's right. And I just want to note
12 something that I said earlier. What we're doing here, don't
13 forget, is that we're sending this out for notice and
14 publication, so that it doesn't have to be perfect.

15 It should be as close as we can to a document that
16 resolves the issues in a way that's satisfactory to the
17 committee or that raises questions where there isn't
18 consensus. But we have plenty of opportunity to revisit this
19 rule at a later time.

20 M O T I O N

21 MR. McCALPIN: Therefore, I would move that the
22 committee approve 1611 for publication, subject to a final

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1 edit by the Chair and the members of the staff and drafting
2 committee and circulation to the Board for the possibility of
3 interdicting publication. But aside from that, that it be
4 approved for publication and comment.

5 MS. GLASOW: You want that same 15-day period?

6 MR. McCALPIN: Yes.

7 CHAIR BATTLE: Do I have a second?

8 MS. WATLINGTON: Second.

9 CHAIR BATTLE: Okay. It has been properly moved
10 and seconded that we put 1611 out for publication subject to
11 the procedure that we have adopted as a committee. All in
12 favor?

13 (Chorus of ayes.)

14 CHAIR BATTLE: All opposed?

15 (No response.)

16 CHAIR BATTLE: Motion carries.

17 MR. BROOKS: I might note that we passed the same
18 vote in relation to 1609 and 1610 without the 15 --

19 MR. McCALPIN: No.

20 MR. BROOKS: Which was it?

21 CHAIR BATTLE: 1609 and 1610.

22 MR. BROOKS: 1607, I guess.

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1 MR. McCALPIN: No. 1607 has already been
2 published.

3 MS. PERLE: 1604.

4 MR. McCALPIN: That goes for final.

5 MR. BROOKS: Wait a minute. Which one was it?

6 MS. PERLE: 1604, "outside practice."

7 MR. BROOKS: 1604, without the 15-day limit after
8 the circulation to the Board. That's what you just put in?

9 MR. McCALPIN: Well, I thought that I --

10 MS. PERLE: No, I think the general policy is that
11 you --

12 MR. BROOKS: It wasn't in the other one.

13 CHAIR BATTLE: Let me get control here. Let me
14 recognize hands.

15 I believe, John, what you're raising is the
16 question as to whether or not 1604 has likewise gone out for
17 publication. I believe that there was a motion at the end of
18 our consideration that it be approved for publication. I
19 believe that it is subject to publication under the procedure
20 adopted by this committee, notwithstanding whether the motion
21 says it or not, unless the motion says expressly that it's
22 not.

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1 So if we go back and read it, if he didn't say it,
2 then the procedure is going to be the same for 1604 that it
3 will be for 1611.

4 MR. BROOKS: Okay.

5 CHAIR BATTLE: Okay? And so I then, indeed, feel
6 quite accomplished with this meeting. We have a final rule
7 that we're going to recommend next weekend in Boston to the
8 Board, 1607. We have then gone through and approved for
9 publication two major rules, actually, 1604 and 1611. We're
10 going to give another cut or review to 1609 and 1610 when we
11 meet in December.

12 MR. MCCALPIN: What about 1602?

13 CHAIR BATTLE: And 1602 -- my thinking about 1602
14 -- and I talked with Renee just briefly -- there is no real
15 rush on 1602, "Freedom of Information Act," particularly
16 because what we have asked is not just for those particular
17 amendments that pertain to the inspector general, but to a
18 comprehensive review.

19 And I'm not certainly whether the working group had
20 its opportunity to do its cut on 1602 and consider it just as
21 we have all of the others. So my thinking with regard to
22 1602 is that we want to make sure it has been through the

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1 whole process. And I'm not at this point suggesting that it
2 necessarily be on our agenda for the December meeting.

3 MS. PERLE: I have a question --

4 CHAIR BATTLE: Unless the working group between now
5 and December has a opportunity to meet and discuss it.

6 MS. PERLE: No, I don't think we will. But my
7 question is, when the working group meets to consider it, are
8 we going to consider exactly what's here, or are you going to
9 ask the staff to go back and sort of incorporate some of the
10 other concerns that were raised by Ms. Mercado and others
11 about the parts of the rule that weren't changed in the last
12 revision?

13 MS. MERCADO: I think that we said that because we
14 were going to do a comprehensive review of it, that we needed
15 to incorporate the comments that we brought up.

16 CHAIR BATTLE: But the normal process would have
17 been that the working group would have looked it before we
18 ever got a shot at it.

19 MS. PERLE: But you have to understand something,
20 that the rules that we're dealing with were developed by the
21 working group before this Board was in place, before we had
22 any real relationship with the staff of the Corporation that

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1 we could work on these rules.

2 And I think that that situation has changed. And
3 we're working much more collaboratively on developing rules
4 for the future. And this rule was developed by the staff
5 prior to the time that we had that relationship.

6 CHAIR BATTLE: So what you're saying is that 1602
7 hasn't been through the process at all of the working group?

8 MS. PERLE: Not at all. But we don't have a
9 problem if the staff wants to take back and incorporate the
10 notions that Ms. Mercado was discussing. And I'll work with
11 Suzanne to make sure that they capture those things and then
12 have a new draft for the working group to react to. I think
13 that makes more sense.

14 MR. McCALPIN: LaVeeda?

15 CHAIR BATTLE: Yes?

16 MR. McCALPIN: Let me suggest that 1602 was one of
17 those two rules that I suggested that perhaps the reverse of
18 the procedure was appropriate, because it did not directly
19 impinge on recipients.

20 MS. PERLE: Well, I don't necessarily agree with
21 that. But I think it's appropriate that the staff has
22 already done a lot of work.

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1 MR. McCALPIN: I think it's one of those ones that
2 we can do at the staff level and then send to the working
3 group.

4 MS. PERLE: Right, for our reaction. I think
5 that's right.

6 CHAIR BATTLE: And at this point, the staff at
7 least has an idea from the committee as to its thinking about
8 some of the issues in that particular rule. It makes sense,
9 based on what Linda is saying, that what she takes back to
10 the working group be something that reflects both our
11 thinking and the staff's review before you bring it back.

12 MS. PERLE: Right. I'm happy to work with the
13 staff to give them sort of my thoughts about what -- you
14 know, my interpretations of what was discussed here and
15 perhaps to bring some field perspective to the discussion
16 before -- but I don't have a problem, if the staff does the
17 work.

18 (Laughter.)

19 MR. McCALPIN: What I'm suggesting is that it come
20 back here before it goes out to the working group.

21 MS. PERLE: Not necessarily. Not necessarily.

22 CHAIR BATTLE: My suggestion would be, now that the

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1 staff has heard from us and the staff needs to go back and
2 rework the Freedom of Information provision, that it go from
3 the staff to the working group and then to us.

4 And that way, it's not that we have already kind of
5 put our seal of final approval on it, and the working group's
6 look at it comes after we have kind of formed our opinions,
7 but that when it comes back to us, we have the benefit of
8 both what the staff has had to say, as well as the working
9 group.

10 MS. PERLE: Which is just what we really have seen
11 with respect to all these other rules. The working group has
12 given them to the staff, the staff has put its stamp on them,
13 and then they have come to you.

14 CHAIR BATTLE: Right. So we have kind of worked
15 this one all the way around, but with it not necessarily
16 being on our agenda for December, at this point.

17 MS. PERLE: I think that there's a lot of more
18 pressing things to do for December.

19 CHAIR BATTLE: Okay. Now that we have gone through
20 what we expect that we might cover in December, is there any
21 other business or public comment that we need to take?

22 MR. McCALPIN: You wanted to talk about a November

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1 meeting, didn't you?

2 CHAIR BATTLE: Yes. I'm getting to that. I just
3 looked back down and saw "public comment" and "consider and
4 act on other business first," to see if there's anything else
5 before I talk about our November meeting.

6 (No response.)

7 CHAIR BATTLE: Nancy, do you have anything? What I
8 was going to say with regard to whether we ought to meet in
9 November, my inclination is that we have got 1607 for final
10 and that I will see it and that we will make our
11 recommendation to the Board on it and that I don't see that
12 we have a need or a reason for that one-hour meeting in
13 November.

14 I think that this should free us up, as Ms.
15 McCartle and Tom Smegal and Edna have been gracious enough to
16 participate in our committee to give my committee members an
17 opportunity to rest up and be involved in the joint meeting
18 that is now scheduled for the Audit and Review Committee, as
19 well as the Delivery Committee.

20 MS. PERLE: The only caveat that I would add is
21 that I think you might want to see 1607 with the changes that
22 we have incorporated before it goes to the Board. But we can

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1 do that by circulating it.

2 CHAIR BATTLE: Right. Circulate it, and if anybody
3 has a question about an editing change, then I think we can
4 accomplish that without having a full-blown committee
5 meeting.

6 MS. PERLE: But understanding that it will be
7 circulated at the last minute, because we have only a week.

8 CHAIR BATTLE: Speaking of other business, John has
9 a letter that he in his wisdom has offered to our Chair on
10 the inspector general's report as it relates to our process.
11 And he raises some specific issues that I think are worthy of
12 note by our committee about how the inspector general's
13 report characterizes where we are with respect to its
14 participation in our meetings and in the whole process of
15 rule making that we have undertaken.

16 And he makes some suggestions to the inspector
17 general as to a more accurate way to communicate our
18 involvement. I wanted to give him an opportunity to speak to
19 this letter and to have some reaction from the committee.

20 MR. BROOKS: Having read the inspector general's
21 semiannual report, it seemed to me that while the tone of it
22 I thought was very satisfactory and I put in a letter to the

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1 Chairman to this effect, not only that the tone of the report
2 is good and indicates what I believe is a developing
3 relationship of mutual respect and cooperation.

4 I do think, however, that a couple of small changes
5 in the report would be more accurate in that the report
6 indicates that the committee and the Board has in some
7 instances reacted to suggestions of the IG whereas, in
8 effect, I think we had made our decisions before the IG made
9 his suggestions.

10 And on the page headed "audit activities," the
11 second sentence of the second paragraph relating to
12 management "have not begun to embark on reengineering of the
13 grantee monitoring project process until the receipt of the
14 audit," I think it's chronologically in error. And I think
15 we should suggest that the IG, rather than "since has
16 embarked on reengineering" should say the management "had
17 already begun reengineering."

18 The other one, in the withdrawal of 1602, the
19 report implies that it was withdrawn -- I haven't got it
20 before me now. But I think it should add, to be accurate,
21 that the regulation was withdrawn so it could be reviewed by
22 the Board in the light of revisions being made to other

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1 regulations. Now, we might put a copy of this letter into
2 the record, if we wanted.

3 MS. BERGMARK: Our process on the IG's semiannual
4 reports is that management prepares a response to the report,
5 you may recall, having gotten the last one for a notational
6 vote. We expect to be getting one out, I think, today. I
7 haven't talked to Victor about it today -- or perhaps Monday,
8 so that you at least will have it before we all get to
9 Boston.

10 But if you would like for me to convey this back to
11 Victor, I'll do so. He's working on our draft of the
12 response. And then the responsive remarks go in along with
13 the inspector general's report as the final report package.

14 MR. BROOKS: It's a small matter, in a way, and yet
15 I think it more accurately would reflect the relationship
16 between the Board and management on the one hand and the IG
17 on the other.

18 MS. BERGMARK: I agree with you on both points, as
19 well as the tone point. I think there is a developing
20 relationship of working together.

21 CHAIR BATTLE: Which management and the IG are to
22 be commended for, Bill.

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1 Are there any other comments or reactions to John
2 Brooks' proposal with regard to the semiannual report by the
3 inspector general?

4 (No response.)

5 CHAIR BATTLE: And I want to thank John for taking
6 the time to carefully review that Board report and to make
7 those notes known to our Board Chair, so that the report is
8 clear, and it will communicate to Congress exactly where we
9 are with respect to the process of moving.

10 Rosie, public comment?

11 MS. NEWSOME: Yes, Madam Chair. Rosie Newsome. I
12 would just at this time, Madam Chair, like to thank you and
13 your committee, our staff for accepting me as a part of your
14 committee. Because it is on behalf of myself and the clients
15 that I represent. I would just like to say thank you all
16 very much.

17 CHAIR BATTLE: You are very welcome.

18 The final thing that I wanted to take up was this
19 issue as to whether we needed to meet in November. And as
20 I've already stated, my inclination is that we do not need to
21 meet, that we can circulate a copy of 1607 for everyone's
22 review prior to the date of the Board meeting. If there are

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1 any needs for editing changes, we should be able to make
2 those editing changes.

3 If there is any other feeling about that on the
4 committee, let me know now. But what we did was to publish
5 that just in case there was the opportunity to get something
6 out that someone felt real strongly about having to review
7 one point before we got it to the Board to give us that
8 opportunity to do that, so that this wouldn't end up falling
9 into next year before it actually went out for publication.

10 And it seems that we have finished on the dime.
11 And we don't need that hour. So at this point, then, I'm
12 going to request -- Pat's not here, but Ruby is -- that if we
13 have to publish in the Federal Register or if we just rescind
14 the meeting notice, that we find as a committee that we are
15 not going to need to meet in Boston, we're going to go and
16 enjoy John Brooks' home and his firm and his people while
17 we're there.

18 MR. BROOKS: You can all come out to a Western
19 breakfast.

20 CHAIR BATTLE: That's right.

21 MS. FAIRBANKS-WILLIAMS: Did I understand you to
22 say that John's letter was going to be incorporated into the

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1 -- I didn't hear a motion on the subject or whatever.

2 CHAIR BATTLE: I think management -- the letter
3 went to the Board Chair. It was for our committee's
4 reaction. And it is going to go to the management report.
5 That is a response to the inspector general's report.

6 MS. FAIRBANKS-WILLIAMS: But it will be a matter of
7 record, is what I'm trying to get?

8 CHAIR BATTLE: Yes. Yes.

9 MS. FAIRBANKS-WILLIAMS: Okay.

10 MR. BROOKS: Well, as a finale, I guess we'll say
11 on to Boston. And if anybody has any questions about
12 logistics or anything else up there that I can help with, let
13 me know. And we'll see you not only at the meetings, but at
14 the reception and the dinner.

15 CHAIR BATTLE: That's right.

16 MS. MERCADO: New England clam chowder.

17 MR. BROOKS: I'll do my best. If the menu isn't
18 frozen yet, we'll see if we can manage it.

19 MR. McCALPIN: We don't want frozen clam chowder.

20 (Laughter.)

21 CHAIR BATTLE: And finally, my word of thanks to
22 Linda and to Suzanne and Martha for such tremendous staff

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1 support, as we always get, to our meeting.

2 MS. BERGMARK: Linda and Suzanne is a proper place
3 to stop.

4 CHAIR BATTLE: And to the committee, because what
5 we do is not something that anybody in the world can do,
6 going through these regulations line by line, word by word,
7 pondering them, struggling with them to try to get them in a
8 position that 20 years from now, as people ponder them,
9 they'll know that we put the time and effort in to try to
10 make them work and work well for us. So thank you very much.

11 MS. GLASOW: You're welcome.

12 MR. BROOKS: And 20 years from now, if they need to
13 be revised, Linda will be here to do it.

14 (Laughter.)

15 MS. PERLE: I don't think so. I'll be on a beach
16 someplace.

17 CHAIR BATTLE: I'll entertain a motion to adjourn
18 at this time.

19 M O T I O N

20 MR. BROOKS: So moved.

21 CHAIR BATTLE: Second?

22 MR. McCALPIN: Second.

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1 CHAIR BATTLE: All in favor?

2 (Chorus of ayes.)

3 CHAIR BATTLE: I'm not even going to take
4 opposition to it. We are now adjourned.

5 (Whereupon, at 3:21 p.m., the meeting of the Board
6 of Directors Operations and Regulations Committee was
7 adjourned.)

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