

ORIGINAL

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS



OPERATIONS AND REGULATIONS COMMITTEE MEETING
OPEN SESSION

RETURN TO CORPORATION
SECRETARY ARCHIVES FILE

Saturday, September 17, 1994

9:15 a.m.

Washington Court Hotel
525 New Jersey Avenue, Northwest
Sagamore Hill Room
Washington, D.C. 20001

BOARD MEMBERS PRESENT:

LaVeeda Morgan Battle, Chair
John G. Brooks
F. Wm. McCalpin
Ernestine P. Watlington
Hulett H. Askew
Maria L. Mercado

Others:
Linda Perle, CLASP
Roger McCollister, Kansas LS
Charles Fary, Outside Counsel

STAFF PRESENT:

Martha Bergmark, Executive Vice President
Patricia D. Batie, Secretary
Victor Fortuno, General Counsel
Edouard Quatrevaux, Inspector General
Suzanne Glasow, Sr. Counsel for Op's & Reg's/OC

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P R O C E E D I N G S

(9:15 a.m.)

CHAIR BATTLE: We'll now come back to order to resume a meeting of the Operations and Regulations Committee. I just noticed, in reviewing our agenda, that one thing we'd like to welcome Bucky, who is here with us today. We did not approve the minutes of the July 15, 1994, meeting on yesterday. So I will today entertain a motion.

M O T I O N

MR. MCCALPIN: So moved.

MR. WATLINGTON: Second.

CHAIR BATTLE: It's been properly seconded. All in favor?

(A chorus of ayes.)

CHAIR BATTLE: Any opposition?

(No response.)

CHAIR BATTLE: Motion carried. Approval of the minutes has been achieved. We intentionally bifurcated our work after we got a chance to determine what we could get done, and I felt very good about the fact that we completed our task on yesterday of reviewing 1607 and also 1604 as well as 1602.

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1 Today we have on our plate reviewing 1611 and
2 getting our first cut at 1609 and 1610. If there's no
3 objection by any of the Committee members, why don't we take
4 1611 up first. Suzanne and Linda will join us.

5 We have already had an opportunity to review 1611.
6 It is now in the proposed rule format, and it should
7 encompass our comments and observations at our July 15th
8 meeting. Committee members should have had an opportunity by
9 now to review the changes in the rule as well as the
10 comments, and the comment section is a bit different this
11 time as well. Suzanne, if we could get a -- or Linda.

12 MS. PERLE: The principal change between last time
13 and this time is one of organization because at our July
14 meeting Mr. McCalpin made a comment about how he thought -- I
15 don't remember exactly what he said, but, basically, that he
16 thought that there was this, sort of, peculiar organization
17 which he thought could be better -- that it could be
18 reorganized in a way that would make more sense.

19 So immediately after that meeting we took a look at
20 the rule as it was presented in July, and we did make those
21 changes. So now 1611.3, and the version last time was the
22 annual income ceiling, and that contained a number of things

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1 which didn't really fit under that rubric.

2 So what we did is we reorganized and we took out
3 those provisions and put them in a separate section, which is
4 now 1611.3 called Financial Eligibility Policies and
5 Guidelines, and pulled out those things that dealt, sort of,
6 more generally with the guidelines, and then 1611.4 is the
7 annual income ceiling.

8 And it only now deals with those parts of the Rule
9 that relate to the annual income ceiling. It was a fairly
10 substantial reorganization, but that didn't entail any
11 substantive changes.

12 CHAIR BATTLE: Okay. Bill?

13 MR. MCCALPIN: Well, I'd like to suggest that we go
14 through it from beginning to end.

15 CHAIR BATTLE: Okay.

16 MR. MCCALPIN: I have a number of comments --

17 CHAIR BATTLE: Why don't we start with 1611.1,
18 Purpose.

19 MR. MCCALPIN: Well, let me say, go to the comment
20 at the top of page 2. Why do we bother to put that statement
21 in this particular regulation? It seems to me it permeates
22 everything we're doing.

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1 CHAIR BATTLE: Now, which statement are you
2 referencing, the authorities section?

3 MS. GLASOW: About reauthorization.

4 CHAIR BATTLE: The reauthorization? Okay.

5 MR. MCCALPIN: Yeah.

6 CHAIR BATTLE: We've been doing that in each reg
7 because each time --

8 MR. MCCALPIN: We're putting them in for each one?

9 MS. GLASOW: The Committee asked us to put it in
10 every --

11 CHAIR BATTLE: That's right. And the reason being
12 that to the extent that someone picks up just one regulation
13 and they aren't following the sequence of various different
14 regulations that we're looking at, we just want to make sure
15 that it's clear that the changes that we're making now are
16 contingent upon anything that might come out of the
17 reauthorization.

18 MR. MCCALPIN: I just thought this was an isolated
19 statement, and I wondered why here and not every place for --

20 CHAIR BATTLE: It is every place.

21 MR. MCCALPIN: Okay.

22 CHAIR BATTLE: It is with each rule as we publish

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1 it.

2 MS. PERLE: Right. Yes. We may not have put it in
3 when we were drafting the rule, but before we prepare it for
4 publication we're now putting it in every rule that comes
5 before you at the request of the Chair.

6 MR. MCCALPIN: Okay.

7 CHAIR BATTLE: Okay? Okay. Is there anything else
8 about the Statement of Purpose either in the comment or the
9 proposed rule? It probably makes sense to handle them in
10 tandem. If people have questions about the comments, we'll
11 go through the rule and as well statements that relate to the
12 comments. Definitions. 1611.2.

13 MR. MCCALPIN: Let me ask about the last clause in
14 the first definition that, "The rules of ethics in the
15 jurisdiction where service is provided or the recipient
16 maintains its files." It seems to me that that injects an
17 element of uncertainty.

18 If we have either interstate or even -- well,
19 interstate, it would have to be where the service is provided
20 in one state and the file is in another state. It seems to
21 me there's an issue --

22 CHAIR BATTLE: Conflict question created.

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1 MR. MCCALPIN: Yeah, and if there is a difference
2 in the rules. I wonder why the and/or maintains its files.
3 Why don't we simply say, "where the service is provided"?

4 MS. MERCADO: Well, I can see, for example, like,
5 in some of the migrant programs that represent people who had
6 some violation, let's say in New Mexico, but it's a Texas
7 program, and the person is a Texas resident, but the wrong or
8 the act, the lawsuit or the action that the Legal Services
9 Corporation is doing on behalf of that client is in New
10 Mexico, but they're a resident of Texas, a program is
11 primarily funded in Texas, then you've got two jurisdictions
12 that you're going to have to deal with.

13 MR. MCCALPIN: It seems to me it's the question of
14 where the service or, as you put it, the wrong is, and that's
15 the place that you ought to look to it. If an inappropriate
16 action is taken in New Mexico, why would you look at the
17 Texas Rules of Conduct to determine the propriety of that
18 action?

19 MS. PERLE: But we're not dealing with the
20 propriety of the action in the underlying substantive issues
21 in the lawsuit. We're dealing with the rules that govern the
22 disclosure of information, where the information is located.

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1 That was --

2 MR. MCCALPIN: Well, then, why don't you simply say
3 "where the file is maintained"? If that's the purpose of
4 this, then why introduce the potential conflict?

5 MS. PERLE: I think that, in most situations, they
6 will be the same place, but in the situation that Maria,
7 Ms. Mercado, was talking about it could be in national
8 support centers or, perhaps, the Native American programs
9 there could be some difference. I guess we could put "where
10 the recipient maintains his files."

11 Most situations the language of the rule had always
12 said, "where the recipient provides legal services," and so
13 we added the files because we thought there might be these
14 kinds of situations as Ms. Mercado is talking about, but we
15 certainly could -- I think we could eliminate "where the
16 recipient provides legal services" and just put in "where the
17 recipient maintains his files."

18 MR. MCCALPIN: If the purpose of this is to guide
19 the question of access to files, then it seems to me --

20 MS. PERLE: Well, the other thing we could do is
21 add "as appropriate" or something. We would, you know, make
22 it clear that the law one place or the other governs,

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1 wherever it's appropriate.

2 CHAIR BATTLE: And it would be just simply "or"
3 instead of "and."

4 MS. PERLE: Yes. It should probably be "or."

5 MS. GLASOW: Would "applicable rules and
6 professional responsibility," in dropping all that, do it?

7 MS. PERLE: I'm sorry, Suzanne?

8 MS. GLASOW: If we just put "applicable rules" and
9 drop where "services provided maintains its files" --

10 MS. PERLE: Well, I think that the purpose -- I
11 mean --

12 MS. GLASOW: We're restating that.

13 MS. PERLE: We're then just restating the same
14 thing, and I think that the purpose is to define what
15 "applicable" means.

16 MS. GLASOW: Yeah.

17 MS. PERLE: But I think maybe what we ought to do
18 is drop the "and" and slash and put "as appropriate." Will
19 that do it?

20 MR. MCCALPIN: "In the jurisdiction --" read me
21 what you've got left.

22 MS. PERLE: "In the jurisdiction where the

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1 recipient provides legal services or maintains its files as
2 appropriate."

3 MR. MCCALPIN: Well, it seems to me you still have
4 the potential for conflict.

5 MS. MERCADO: No, Bud. I think --

6 MS. PERLE: I think that that may exist anyway no
7 matter what we write. There may be -- there's a potential
8 for --

9 MR. MCCALPIN: Well, if we simply limit it -- if
10 this is intended to affect the question of access to a file
11 on eligibility, then why don't we simply say it's the
12 jurisdiction where the file is kept?

13 CHAIR BATTLE: Because I've got a question about
14 that. "Applicable Rules of Professional Responsibility as
15 utilized in financial eligibility," does it only pertain to
16 the question of the maintenance of files, or is there any
17 other instance in which you're applying Rules of Professional
18 Responsibility with regard to disclosure, attorney-client
19 privilege, and, if you are, then it's not just an issue of
20 the files. It's an issue of that privilege and the
21 responsibilities that go along with professional
22 responsibility. I don't know the scope, but I'm just saying

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1 the scope may be broader than just the issue of files.

2 MS. PERLE: I think, you know, we're, basically,
3 dealing with financial eligibility information and
4 information that's in retainer agreements in this rule. So I
5 think that, for the most part, you're really talking about
6 things that are in files, but --

7 MS. GLASOW: In-take forms and retainer
8 agreements --

9 MS. PERLE: Right, primarily.

10 MS. MERCADO: And even with that I think that
11 depending on what the situation is, if you've got roving-type
12 of legal services, I mean even with an estate where you have,
13 you know -- well, even in the example I gave you before, if
14 they have staff of personnel or other programs that they
15 share files with, then -- and, in fact, you may also have
16 documents and policy will be in the other state as well, not
17 just in --

18 MS. PERLE: Right, particularly in a situation
19 where you have the National Support Center, where it's co-
20 counseling with the local program, and it could be that there
21 would be a conflict between those two jurisdictions which
22 would have to be resolved somehow but not by the Legal

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2 MS. MERCADO: I think that if you do the "or," it
3 seems that it covers either situation, and then it's just,
4 sort of, a case-by-case --

5 CHAIR BATTLE: Yeah, and as appropriate kind of
6 leaves it up to a determination as to which is proper on a
7 case-by-case basis.

8 MS. PERLE: I don't know whether we have a
9 consensus on that or not.

10 MR. MCCALPIN: What?

11 CHAIR BATTLE: At least two of us think by taking
12 the "and" out you resolve the problem, and "as appropriate"
13 means if someone makes a selection based on the
14 circumstances. Does that meet your concern, Bill?

15 MR. MCCALPIN: Not really, but I don't think it's
16 worth a big hassle.

17 CHAIR BATTLE: Okay.

18 MR. BROOKS: Well, I just wonder if we gained
19 anything by the definition. 1611 --

20 MS. PERLE: Well, it's a phrase that we've used
21 throughout the rule. We've used "applicable Rules of
22 Professional Responsibility" throughout the ruling. We felt

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1 that we needed to explain someplace what we meant by that.

2 MR. BROOKS: But if it raises more questions than
3 answers, the definition, I just wonder whether we gain
4 anything by it.

5 MS. PERLE: I, frankly, don't think that it does,
6 but it's your call.

7 CHAIR BATTLE: Because, by its very nature,
8 "applicable Rules of Professional Responsibility" means you
9 determine which is the appropriate" --

10 MS. PERLE: That's what I'm wondering, yeah.

11 MR. MCCALPIN: John, I think you're right. We
12 could do without it.

13 MS. GLASOW: I can't think of, you know, unless
14 there's been a problem, a real good reason why we need to
15 define that, because I think --

16 CHAIR BATTLE: Well, the only thing that this does
17 add is the whole question of what do you use to determine
18 what's appropriate. Do you use the file? Do you use the
19 jurisdiction where the legal representation is being --

20 MS. PERLE: Well, I think it also makes it quite
21 clear that is the law anyway, that it is the jurisdiction,
22 the particular jurisdiction rather than the ABA or rather

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1 than what LSC says it is that governs in this situation.

2 So I mean, I -- personally, I would prefer to leave
3 that in, but if you feel -- you know, obviously, if the
4 Committee feels strongly about it, we'll take it out. It's
5 your rule.

6 CHAIR BATTLE: Suzanne?

7 MS. GLASOW: I think it could go either way, you
8 know. If I were interpreting this, I would interpret it as
9 being the rules that would apply to that set of files, and it
10 would be a matter of local law. So I don't see a problem
11 with leaving it out, but I don't see a problem of putting it
12 in, either. I think either way is fine, if there's more
13 comfort having it in.

14 MS. MERCADO: I prefer having that because I think
15 there's still, especially in, like, some of the localities
16 where you're going to have programs that, maybe, are more,
17 you know, rural setting or more set out there is the question
18 about are we talking about the model rules, the ABA. Are we
19 talking about the state bar rules? Are we talking about
20 somewhere else? At least it gives them some guidance.

21 I don't think you ever error in being a little bit
22 more descriptive and definitive to people about what you're

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1 talking about, because it has created problems. So it's much
2 better to clarify it.

3 MS. PERLE: I think that's right. I don't think in
4 practice there's going to be -- I mean, it certainly is
5 possible that there may be a difference in the way two
6 jurisdictions that, where there's some question about which
7 is the appropriate jurisdiction, that might deal with them
8 differently, but I think, generally, the issues are going to
9 be dealt with similarly from jurisdiction to jurisdiction.

10 MR. BROOKS: Well, I think what we're concerned
11 about, really, is if it is contrary to the Rules of
12 Professional Responsibility in either the place where the
13 service was rendered, which is in the client's interest, or
14 in the jurisdiction where the files are kept, which is where
15 the attorney, presumably, would be responsible.

16 So, if it's contrary to the Rules of Professional
17 Responsibility in either case, it seems to me that the
18 information should not be disclosed. So I would suggest
19 keeping the "or" and "the jurisdiction where either the
20 recipient provides legal services or maintains its files."

21 MS. MERCADO: Yeah. Okay. So that's either/or?

22 MS. PERLE: And so leave out "as appropriate"? In

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1 other words, if it's more than one jurisdiction, you look to
2 the rules of both, and whichever one is more restrictive,
3 that's the one who controls? Is that what you're suggesting?

4 MR. BROOKS: Yeah.

5 MS. PERLE: So we leave out "as appropriate"?

6 CHAIR BATTLE: But I would think, in order for that
7 particular interpretation to be illuminated, that we'd need
8 to address it in the comments by saying that we want to make
9 sure that we error on the side of preserving that
10 relationship, of preserving the attorneys' ability to carry
11 out their responsibilities in line with the professional
12 rules.

13 So we made need to embellish comments to ensure
14 that people understand that interpretation to this language,
15 and I think by doing it that way we clarify how to --

16 MR. BROOKS: Hope so.

17 CHAIR BATTLE: -- how to approach an issue if you
18 get into a situation where there are, potentially, two
19 different sets of rules that may have application.

20 MS. PERLE: I think we can explain that, if people
21 are comfortable with that.

22 CHAIR BATTLE: That's an excellent suggestion.

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1 MS. PERLE: The way I have it is "in the
2 jurisdiction where the recipient either provides legal
3 services or maintains its files."

4 CHAIR BATTLE: Yeah. Okay. That's what I have.
5 Okay. Any questions about the definition for "assets"?

6 MR. MCCALPIN: I would simply suggest that it is
7 more consistent with the sensibilities of the profession that
8 you would use the word "retain" rather than "hire."

9 MS. PERLE: So done.

10 CHAIR BATTLE: We're not hired guns, are we? Okay.
11 Governmental program for low income individuals or families?
12 Income, total cash receipts. Okay. 1611 --

13 MR. MCCALPIN: Which one are you now to?

14 CHAIR BATTLE: Well, I just kind of --

15 MR. MCCALPIN: Well, the total --

16 CHAIR BATTLE: Total cash receipts?

17 MR. MCCALPIN: The total cash receipts, let me ask
18 you, the third line says, "Regular payments from public
19 assistance and other benefit programs," but then, on the
20 bottom of page 3, it says "it would not include, among other
21 things, rent subsidies, food stamps." Are not food stamps
22 regular payments from public assistance and other benefit

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1 programs?

2 MS. PERLE: They're not cash, and this is dealing
3 with cash receipts, and that has been a consistent -- that's
4 been the definition, included in the definition all along.

5 CHAIR BATTLE: But I guess what -- do you want a
6 clarifier on payments, regular cash payments or money
7 payments?

8 MR. MCCALPIN: What you're saying is an AFDC
9 payment would be included, but food stamps are not because
10 one is in cash and one is in a voucher.

11 MS. PERLE: Correct.

12 CHAIR BATTLE: Well, do you want to say "regular
13 money payments"? Is there some way to clarify "payments"?

14 MS. PERLE: We can certainly say "cash payments."

15 MR. MCCALPIN: Yeah, "regular cash payments from
16 public assistance and other benefit programs."

17 MS. PERLE: That's fine. That will clarify the
18 difference, but do you have a substantive problem --

19 MR. MCCALPIN: No, no. I just -- you know, I --

20 MS. PERLE: That's fine. We can add "cash."

21 CHAIR BATTLE: Okay. Anything else within this
22 section on definitions?

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1 MR. BROOKS: Yes.

2 CHAIR BATTLE: Okay.

3 MR. BROOKS: Back to the definition of "income." I
4 had a little trouble with the "and contribute to," but I
5 think we may have been over that before, but if we leave it
6 in we need the comma to be taken from after the word "to" to
7 after the word "of" in the third line. So it would read,
8 "all persons or resident members of, and contribute to the
9 support of."

10 MS. MERCADO: Okay. Yeah.

11 MS. PERLE: Thank you.

12 MR. MCCALPIN: Let me be my usually picky self. My
13 dictionary said that the word is "recurring," not
14 "reoccurring."

15 MS. MERCADO: Where is it?

16 MR. MCCALPIN: The second last line "total cash
17 receipts."

18 MR. BROOKS: I second that motion.

19 MR. MCCALPIN: Huh?

20 MR. BROOKS: I second that motion.

21 MS. MERCADO: It is recurring. Right. I haven't
22 looked at my dictionary, but I just remember that.

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1 MS. PERLE: The problem is that spell-check has its
2 limitations. If it's a word, it doesn't pick it up just
3 simply because it's the wrong word. You're absolutely
4 correct.

5 CHAIR BATTLE: 1611.3, Financial Eligibility
6 Policies or Guidelines.

7 MS. PERLE: I'd like to pass a letter that I got on
8 Wednesday from Steve Gottlieb from Atlanta Legal Aid Society.
9 He called me and had some concerns about this section,
10 particularly the things under B, and I think, after
11 discussing it with him, I agree that the points that he
12 raised in his letter were valid points, and I have a couple
13 of suggestions for what we might want to do to fix this
14 problem.

15 I have copies for the Committee, and then I have
16 some extras for people. I can explain, basically, the
17 concerns that are in the letter, but I just wanted you to
18 have it. Do you want to go through this, or do you want me
19 to make this -- explain the concern first?

20 MS. MERCADO: Explain the concern.

21 MS. PERLE: Okay. The concern is that in
22 1611.3(b) that the factors that are listed here are listed as

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1 mandatory considerations and include priorities and assets
2 which clearly aren't mandatory, but they also include a whole
3 bunch of other things which Steve said he thought really went
4 into a program's priority decisions.

5 He didn't mind as they were listed as things that
6 programs could take into consideration if they wish to not
7 provide service to a person who was otherwise financially
8 eligible, but he didn't think that it was appropriate for the
9 Corporation to mandate that with respect to each individual
10 who came into a program that the program go through this kind
11 of calculus to apply each of these things to the situation.
12 I think he's really correct. I think we ought to separate
13 out --

14 CHAIR BATTLE: We use the word "shall," and what
15 you're saying is there may be some things at that time are
16 discretionary and some that should be --

17 MS. PERLE: Right. So we should have a B and C,
18 and B should be those things which I think principally are
19 assets and priorities, which you really do have to -- which
20 the program does have to apply in each situation and then
21 other things to be listed as things that are appropriate to
22 consider but not mandatory.

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1 MR. MCCALPIN: So, basically, you're saying --

2 MS. MERCADO: Where are we at?

3 MS. PERLE: We're on the bottom of page 17.

4 MR. MCCALPIN: -- we would have 1 and 5, and the
5 other 5 with B and C?

6 MS. PERLE: Yes.

7 MR. BROOKS: Is that what you're saying?

8 MS. PERLE: I think that's right. I haven't had a
9 chance to really --

10 CHAIR BATTLE: Would it be 1, 2 and 5?

11 MR. MCCALPIN: No.

12 MS. PERLE: Well, 1 and 5 are statutorily required.
13 I don't think that the income prospects is in the statute.

14 MS. MERCADO: I don't recall there being one.

15 CHAIR BATTLE: What section would it be in in the
16 statute?

17 MS. PERLE: It would be in 1007 --

18 MS. GLASOW: I don't have -- It's 106(b)(1)(a)
19 maybe.

20 CHAIR BATTLE: Yes. Thank you. (B)(1)(a) has to
21 do with authority to ensure compliance with hearing.

22 MS. MERCADO: 106(b)(3)? No.

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1 MS. PERLE: It's 107(a)(2).

2 MS. MERCADO: (A)(2)(b)(1)(B)(i)

3 MS. PERLE: I don't think there's anything in there
4 that talks about the income prospects. I think that was an
5 invention in the first rule, which I think is a reasonable
6 one. I mean, if a person, you know, has currently very
7 little income but is about to -- has been hired and in two
8 months is going to start a job where they're paid \$25,000, I
9 think it may not be appropriate for a program to represent
10 that person, particularly if it's going to be a matter that's
11 going to continue over time, but I think that should be --
12 the program should be able to decide whether it's going to --

13 MS. MERCADO: But DHS and them don't consider
14 income prospects.

15 MS. PERLE: Well, that would be a factor in
16 determining whether we should include it or not. I don't
17 think that is --

18 CHAIR BATTLE: As long as the statute doesn't
19 require it, then I think the "shall" section needs to be
20 pared back to what our statutory requirements are --

21 MS. PERLE: That's exactly Steve's point.

22 CHAIR BATTLE: Okay.

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1 MS. PERLE: I don't think you need to read the
2 whole letter to understand that. So that really is exactly
3 his point, and I think he's absolutely right, but it's easily
4 corrected, and we can certainly do --

5 CHAIR BATTLE: Okay. So we'll create a section C
6 and use "may" and then include all other factors.

7 MS. PERLE: Right. Okay.

8 MR. MCCALPIN: Do we include the cost of living
9 anywhere as is contained in the statute?

10 MS. PERLE: The cost of living goes into the
11 consideration of where the recipient sets its annual income
12 ceiling, it's the 1611.4. It doesn't go into an individual
13 eligibility determination.

14 MS. GLASOW: All the factors that are required in
15 the statute are in here somewhere.

16 MS. PERLE: In an appropriate place.

17 MS. GLASOW: In the appropriate place rather than
18 putting them all together.

19 CHAIR BATTLE: Okay. Do we have any other
20 questions about 1611.3?

21 (No response.)

22 CHAIR BATTLE: Okay. When we say "reasonably

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1 available" in 5, "the existence of assets reasonably
2 available," you mean readily convertible to cash or cash?

3 MS. PERLE: That's within the definition of
4 "assets."

5 CHAIR BATTLE: Okay.

6 MS. PERLE: "Assets means that a minimum cash or
7 other liquid assets or resources that are readily convertible
8 to cash which are currently and actually available to
9 recipient and which could be used to retain private counsel."

10 CHAIR BATTLE: Okay. So when you put "reasonably,"
11 in here, that we don't really need because of the definition,
12 do we? The definition covers the availability, how you
13 determine availability.

14 MS. PERLE: I think you're right. I don't -- that
15 was added at some point, the "reasonably."

16 CHAIR BATTLE: But you don't --

17 MS. PERLE: Frankly, I don't recall why, but I
18 think we could take that out, because it is kind of
19 redundant. You're right.

20 CHAIR BATTLE: Okay.

21 MR. MCCALPIN: Tell me just in general terms how
22 you think C will read, the introductory portion of new C.

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1 MS. PERLE: I think it will read similarly to B,
2 but it will say -- well, we could simply say, "In addition,
3 recipient may consider the following factors." I mean,
4 that's, basically, what it is. It will be similar to B
5 except that it will be permissive rather than mandatory.

6 CHAIR BATTLE: Anything else in 1611.3?

7 (No response.)

8 CHAIR BATTLE: 1611.4, Annual Income Ceilings.

9 MR. MCCALPIN: I'd like to suggest a slightly
10 different phraseology for A. "Each recipient shall establish
11 an annual income ceiling below which persons may be eligible"
12 instead of "for persons to be eligible." It doesn't exactly
13 explain the relationship of the ceiling to the eligibility.

14 MS. PERLE: Okay, "establish an annual income
15 ceiling below which people" --

16 MR. MCCALPIN: "Persons."

17 MS. PERLE: "Persons."

18 MR. MCCALPIN: -- "may be eligible to receive legal
19 assistance supported with funds provided under the Act." It,
20 sort of, more clearly defines the --

21 MS. PERLE: Well, is it really "may be"? I mean, I
22 think that it would be "financially eligible."

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1 MR. MCCALPIN: They may be eligible, but they're
2 not guaranteeing.

3 MS. PERLE: They're not guaranteed of getting
4 service.

5 MR. MCCALPIN: That's right.

6 MS. PERLE: But they may be eligible.

7 MS. PERLE: That's fine.

8 MS. MERCADO: Why the "below"? Did you say
9 "below"? I still don't get the --

10 CHAIR BATTLE: The ceiling is the top.

11 MR. MCCALPIN: If you exceed the ceiling, you're
12 not eligible.

13 MS. PERLE: Except under certain circumstances,
14 which we discuss on the next section.

15 MS. MERCADO: And you're taking out "for," right?

16 MS. PERLE: Yeah, taking out "for," putting "below
17 which."

18 MR. MCCALPIN: Taking out "for persons to be
19 eligible."

20 MS. MERCADO: And it's now "below which" --

21 MR. MCCALPIN: "persons may be eligible."

22 MS. PERLE: I'm not sure -- I'm still not sure that

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1 it should be "may."

2 MR. ASKEW: It should be "will."

3 MR. MCCALPIN: "Will"?

4 MR. ASKEW: Yeah.

5 MR. MCCALPIN: You don't think that's misleading?

6 MS. PERLE: What about "will be considered
7 financially eligible?"

8 MR. MCCALPIN: Okay. That's fine.

9 CHAIR BATTLE: That's more precise.

10 MR. BROOKS: Do we need to consider "will be
11 eligible"?

12 MR. MCCALPIN: The problem, I'm afraid, is that it
13 could indicate a false promise.

14 MS. PERLE: We really don't want to create the
15 expectation that --

16 CHAIR BATTLE: Once you're eligible, you indeed
17 have a right to service.

18 MS. PERLE: That's right.

19 CHAIR BATTLE: Yeah --

20 MS. PERLE: We want to --

21 CHAIR BATTLE: -- some complaints come in I think -

22 -

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1 MS. PERLE: We'd like to, kind of, hedge that a
2 little bit yeah.

3 CHAIR BATTLE: Okay. Do we have that Appendix A
4 anywhere?

5 MS. PERLE: We have a copy of it, and what it says
6 is -- right now it's just numbers. It says -- you have size
7 of family, and then it says, "all states but Alaska and
8 Hawaii, and then there's a separate one for Alaska and a
9 separate one for Hawaii, and then underneath "size of
10 family," it says, "1 through 8," and it varies according to
11 the size of the family.

12 So that a family of one, a family with one person
13 in it, the ceiling would be 87 -- I don't know whether this
14 is the most current one but whatever year -- this is from
15 1993. So there's a more current one, but for 1993, the
16 ceiling was \$8,713, and for a family of eight in all states
17 but Alaska and Hawaii it would be \$30,238, and then there
18 is --

19 CHAIR BATTLE: Who generates that appendix?

20 MS. GLASOW: The federal government, the HHS
21 guidelines. We get them annually, and then we take 125
22 percent and we publish in the Federal Register and send it

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1 out.

2 MS. PERLE: So the Corporation generates them, but
3 they're based on the guidelines that HHS establishes.

4 MS. MERCADO: So we don't have a copy of that
5 attached here, right?

6 MS. PERLE: No, I'm sorry. It's not in your
7 booklet.

8 MR. MCCALPIN: I have a copy of it. Do you want to
9 see it?

10 MS. MERCADO: That's okay. I just wonder whether I
11 had a page missing.

12 MR. MCCALPIN: No.

13 CHAIR BATTLE: The cost of living I think is next,
14 Bill. Who asked the question? You asked the question about
15 the cost of living, I think.

16 MS. PERLE: Right. And in C --

17 CHAIR BATTLE: It's covered in C.

18 MR. MCCALPIN: Yeah. Well, they said that it's in
19 establishment of the ceiling rather than the determination of
20 the individual.

21 CHAIR BATTLE: Eligibility, yeah.

22 MR. BROOKS: Well, I wonder if we should have an

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1 Appendix A which is going to be out of date within a year.

2 MS. PERLE: We publish a new Appendix A every year.

3 It's just that this version of the rules was done in 1993.

4 The Corporation publishes annually in the spring a new

5 Appendix A, and it's published in the Federal Register.

6 MS. GLASOW: It's just a technical revision to the

7 rule every year.

8 MR. BROOKS: Yeah. Right, rather than saying "and

9 are revised annually," "as revised annually?"

10 MS. MERCADO: Where is that now?

11 MR. BROOKS: The top of page 19.

12 MS. MERCADO: Okay.

13 MR. MCCALPIN: John, do you want to see this?

14 Here's a copy of that thing.

15 MR. BROOKS: I don't think that will change my

16 suggestion.

17 MS. MERCADO: How does it read, now? " --

18 governing bodies shall review --" no. I'm sorry.

19 MS. PERLE: Yeah. In B, the last sentence that

20 starts on the bottom of page 18, "The calculations of 125

21 percent of the current federal poverty income guidelines are

22 set forth in Appendix C as revised annually."

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1 MS. MERCADO: As revised annually. Okay.

2 CHAIR BATTLE: You know the way this is worded,
3 "The recipient shall also consider other factors that it
4 determines are relevant, which may include but are not
5 limited to" is the same as "the recipient may consider other
6 factors," isn't it?

7 MR. MCCALPIN: Where are you now?

8 CHAIR BATTLE: I'm in C.

9 MR. MCCALPIN: C?

10 CHAIR BATTLE: Yes. In C, when we start talking
11 about the establishment of the annual income ceiling, the
12 second sentence reads, "The recipient shall also consider
13 other factors that it determines are relevant, which may
14 include but are not limited to --"

15 MS. PERLE: I should be "may"?

16 CHAIR BATTLE: It can simply be "the recipient may
17 consider these factors." That has the same meaning.

18 MS. GLASOW: I think this committee discussed this
19 at the last meeting. They let the recipient determine what
20 factors to consider, but once they considered those factors
21 were relevant to their area, then you decided that they
22 should consider those once they determined they were

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1 relevant. In other words, why not consider factors if they
2 are relevant to that local area.

3 CHAIR BATTLE: Okay.

4 MS. MERCADO: So that's why there's a "shall"
5 there, then?

6 MS. GLASOW: Yes.

7 MS. MERCADO: Okay.

8 MS. GLASOW: We could change that, but I think that
9 was --

10 MS. PERLE: We could change that --

11 MS. GLASOW: -- the rationale behind that language.

12 MS. PERLE: As you recall, at one point we had all
13 of these things together in one, and we had them all as
14 "may," and Renee pointed out that some of them were required
15 under the statute. So we pulled out the cost of living
16 because it's a statutory requirement, and then the others --

17 CHAIR BATTLE: And so are we identifying specific
18 factors in that mandatory consideration of the cost of living
19 so that it enforce that at least one of these needs to be
20 considered? Is that what we're attempting --

21 MS. PERLE: I think, in fact, it would be
22 appropriate to switch -- to change the "shall" in the second

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1 line of C to "may," the second "shall," "The recipient shall
2 also consider." We could put "The recipient may also
3 consider other factors," because I think the only thing
4 that's required in statute is cost of living, and the other
5 things, again, are inventions of the Corporation.

6 MS. BERGMAN: Although what you're trying to say
7 that it is, I think -- what I hear you saying is that if a
8 recipient determines that certain factors, it considers
9 certain factors relevant, then it ought to consider them. In
10 other words it's going to get itself in trouble establishing
11 factors and then not being able to show that it applied them.

12 MS. GLASOW: The statute under the mandatory says
13 "It shall consider other relevant factors." So, basically, I
14 think what we're doing is letting the recipient determine
15 what's relevant, but once they're determined to be relevant,
16 then under the Act they ought to consider --

17 CHAIR BATTLE: We will illumine what that means in
18 the comments, then. Now that makes sense now that you tell
19 me what the statutory language is. Otherwise, it really
20 comes across as a "may" as opposed to a "shall." Okay.

21 MR. BROOKS: Well, just to smooth it out a little
22 bit, I suggest if we put "may" we change the third and fourth

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1 lines to say "also consider other factors that it determines
2 are relevant including but not limited to."

3 MS. PERLE: Well, except that they may not consider
4 that these three things are relevant to them. So, if you say
5 "which include but are not limited to," it means they have to
6 consider these three, and I think the discussion was last
7 time we couldn't be laying out the kinds of things that they
8 ought to consider, but we shouldn't require them to consider
9 any particular ones, since they're not statutorily required.

10 CHAIR BATTLE: Okay. What I hear Linda saying is
11 that these particular three are not mandatory.

12 MS. MERCADO: That's right.

13 CHAIR BATTLE: So if you come up with a list, it
14 doesn't have to be expansive beyond this three, nor does it
15 have to include this three.

16 MS. PERLE: Right. That's why it's written the way
17 it's written.

18 CHAIR BATTLE: Okay.

19 MR. BROOKS: But I still think it's a little heavy
20 to put two "mays" in there.

21 MS. PERLE: We're not putting two mays. We're
22 leaving the "shall."

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1 MR. BROOKS: "They may also include," which -- I'm
2 sorry. "May also consider."

3 MS. PERLE: We're leaving it at "shall." That was
4 my understanding.

5 MR. BROOKS: Oh, you're leaving that "shall" in.
6 Oh, I'm sorry. All right.

7 MS. PERLE: Because the point is --

8 CHAIR BATTLE: "The recipient shall also consider
9 other factors. Those factors may include but are not limited
10 to" as another sentence?

11 MS. PERLE: I'm trying to reach back into my memory
12 of June when we last discussed this, and I think that we had
13 something like that at that point, but it was a discussion
14 which said, well, who determines what other factors?

15 And what we discussed was we needed to say that --
16 make it clear that the recipient determines the other factors
17 so that they couldn't be second-guessed by the Corporation or
18 anyone else as to what those relevant factors are, and that's
19 why we put in this rather long -- relatively flattering
20 language, but I think it was to respond specifically to a
21 concern that was raised by the Committee. I could be wrong
22 about that. That's my recollection, though, but it's your

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1 rule.

2 CHAIR BATTLE: Well, "The recipient shall also
3 consider other factors that it determines are relevant.
4 These factors may include" these three.

5 MS. PERLE: So, in other words, make it into
6 separate sentences?

7 MR. MCCALPIN: Two sentences?

8 CHAIR BATTLE: Yeah. That just -- run, when you've
9 got a "shall" and a "make" in the same sentence, it conveyed
10 a different message to me, and if you separate them out --

11 MS. PERLE: So you just put a period after
12 "relevant."

13 CHAIR BATTLE: Right.

14 MS. PERLE: And substitute "these factors for
15 which."

16 CHAIR BATTLE: Right.

17 MR. MCCALPIN: Yeah.

18 MS. PERLE: That's fine.

19 CHAIR BATTLE: Yea.

20 MS. PERLE: If we make the change that we were
21 discussing earlier by separating out in Section 1611.3(b) and
22 separating that into 3(b) and (c), in Section D on page 19,

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1 we have to make that reference to B.

2 MR. MCCALPIN: I've got a comment about D, if we're
3 there.

4 CHAIR BATTLE: Okay. Did you finish that one,
5 Linda? Okay. You were saying that need to make the
6 appropriate reference.

7 MS. PERLE: In D.

8 CHAIR BATTLE: In D. Okay.

9 MS. PERLE: To B and C.

10 CHAIR BATTLE: Okay. We are at D, Bill.

11 MR. MCCALPIN: I think there's a certain amount of
12 circumlocution in D where we say that, "The services may be
13 provided if they are not disqualified." Why don't we simply
14 say, "An applicant for service whose income does not exceed
15 the annual income ceiling established by the recipient may be
16 denied service on the basis of any of the factors considered
17 under 3(b) and (c)"?

18 MS. PERLE: Okay. I think that's fine. It's less
19 wordy.

20 MR. MCCALPIN: Yeah. That's why I used
21 circumlocution.

22 MS. MERCADO: Give me that language again.

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1 MR. MCCALPIN: You take out -- you take out
2 everything from the word "provided" in the second line
3 through the word "disqualified" in the fourth line and
4 substitute "denied service."

5 MS. MERCADO: Okay. Read it like you would read
6 it, Bill, so I can rewrite it.

7 MR. MCCALPIN: "An applicant for service whose
8 income does not exceed the annual income ceiling established
9 by the recipient may be denied service on the basis of any of
10 the factors considered under 1611.3(b) or (c)," I think.

11 MS. PERLE: Yes. I think that was quite helpful.

12 CHAIR BATTLE: All right. Any other -- I think
13 that's good for D. Anything about E?

14 MS. PERLE: Now, in E is a combination of two
15 provisions that existed in two different sections.

16 CHAIR BATTLE: This is the private funds section,
17 right?

18 MS. PERLE: Right. Well, it combines two things.
19 It combines a reference to the next section, which says that
20 there are other factors that can be built into consideration
21 of this, but then it also says that it doesn't affect private
22 funds, and it just -- when I rearranged things in the way

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1 that was suggested by Mr. McCalpin, there were these two --
2 left two provisions that, kind of, were next to one another,
3 and reading them it made more sense to put those two things
4 in one. You won't find this particular one in the last
5 version, but it's a combination.

6 MS. MERCADO: Linda?

7 MS. PERLE: Yeah.

8 MS. MERCADO: I just had a question on that phrase
9 in that very last sentence where it says, "The assistance
10 provided to the person supporting in whole --"

11 MS. PERLE: Uh-huh.

12 MS. MERCADO: " -- by funds from a source other
13 than the Corporation in whole." So that means that there can
14 never be any part of the funds won't be LSC funds to --

15 MS. PERLE: If a person is not eligible under --

16 CHAIR BATTLE: Financial eligibility --

17 MS. PERLE: This is under the financial eligibility
18 rules. They can't --

19 MS. MERCADO: Yeah. It would just be 100 percent -
20 -

21 MS. PERLE: I think in the commentary we may have
22 to explain, that, obviously, you have an administrative

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1 structure that the program is set up, in-take and things like
2 that. You can't, sort of, insist that a person who comes in
3 through that and is screened through that, and that's partly
4 supported by LSC funds, that that means you can't have a
5 person come in through that kind of structure, but that the -
6 - any representation that's provided, from the point at which
7 you decided the person is going to be a client of the
8 program.

9 MS. MERCADO: That's what I was --

10 MS. PERLE: So I think we need to clarify that in
11 the commentary.

12 MS. MERCADO: Yeah, because I think that there's
13 some policy in the past regarding that, that if there was any
14 kind of administrative use to determine eligibility of LSC
15 funds, that that was, sort of, part of the income that they
16 looked at. I mean, I know that --

17 MS. PERLE: We might want to say if the
18 representation provided rather than assistance, but, for
19 instance, if a person comes in and is not eligible, but you
20 then refer them or you give them a pamphlet or something,
21 that's assistance, and it's always been -- there's never been
22 any question that you couldn't to those sorts of things, or

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1 even if you have legal education, I don't think most programs
2 would screen people for eligibility.

3 CHAIR BATTLE: I was thinking same thing. Legal
4 representation probably more accurately --

5 MS. PERLE: I think that's right.

6 CHAIR BATTLE: Applies, and at the bottom you would
7 also say, "If the representation provided is supported in
8 whole or in part," the second --

9 MR. MCCALPIN: You're substituting "representation"
10 for "assistance"?

11 MS. PERLE: Two places.

12 MS. BERGMAN: Which two, Linda?

13 MS. MERCADO: It will be line 4 --

14 MS. PERLE: Three places, actually.

15 MS. MERCADO: Three, isn't it?

16 MS. PERLE: Yes.

17 MR. MCCALPIN: Read it.

18 MS. PERLE: In line 3 and line 4 and line 6. So it
19 would say, "Unless authorized by 1611.5, no person whose
20 income exceeds the annual income ceiling established by
21 recipient shall be eligible for legal representation
22 supported with funds provided under the Act, but this part

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1 does not prohibit a recipient from providing legal
2 representation to an applicant for service whose annual
3 income exceeds the annual income level established by the
4 recipient if the legal representation provided to the person
5 is supported in whole by funds from a source other than the
6 Corporation."

7 MR. BROOKS: Well, I wonder if "representation"
8 really is what we need rather than "assistance."
9 "Representation" to me means litigating, assist in litigation
10 or in negotiation." There may be advice, legal research,
11 which is a matter of some substance without having what seems
12 to me to be representation as such. So that "assistance"
13 seems to me to fit this situation better than
14 "representation."

15 MS. PERLE: I guess the issue -- I don't think
16 there's a bright line between what you're allowed to do for
17 an ineligible person who comes and goes through your in-take.
18 I mean, have you provided him with assistance if you send him
19 away with the name of a lawyer who might take their case?
20 Have you provided them with assistance if you send them away
21 with a pamphlet? Have you provided them assistance if you
22 tell them to come to a self-help clinic?

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1 MR. MCCALPIN: I think the answer is yes.

2 MS. PERLE: And then we be able to do those things
3 if the person is financially eligible? And I think that most
4 Legal Services programs should say -- would say, yes, we
5 should be able to do those very limited forms of assistance.

6 MR. BROOKS: But it's the next step --

7 MS. PERLE: It's the next step.

8 MR. BROOKS: -- that is bothering me, whether
9 representation is too far a step.

10 MS. PERLE: In other words, there's too big --

11 CHAIR BATTLE: If you could charge for the service
12 in a -- you know, I think what you're talking about is what a
13 law firm would do. If there's a case they're not going to
14 take, they wouldn't charge a person to say, "Well, I can't
15 take it, but Joe can, and you can go see Joe," but if they
16 decide to write a letter or do some research, they may charge
17 for that, and it seems to me that's the same kind of
18 distinction you're trying to draw here, those kinds of things
19 that you do just as a matter of having your doors open and --

20 MR. ASKEW: It's really a question of whether a
21 person has become a client of the firm. So, if you just
22 added the word "legal" before "assistance" in the third to

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1 the last line, you might solve it, rather than changing all
2 those words to "representation," because the last one, to
3 some reason, just said, "if the assistance provided," if we
4 just add "legal assistance.

5 CHAIR BATTLE: And those things don't necessarily
6 have to be done by a lawyer, and I think that's the other
7 distinction.

8 MR. ASKEW: All those things you mentioned, in
9 terms of referrals or -- and they never become a client of
10 the firm, but you are giving them assistance, not legal
11 assistance, right?

12 MS. PERLE: Well, I guess it depends on how you --
13 I think the problem is that it's too difficult to draw those
14 fine lines, and what we don't want to do is put in language
15 which could be misread to suggest that anything you do for a
16 client --

17 CHAIR BATTLE: Why no handle it in the comments by
18 talking about that kind of assistance and call it
19 "assistance" and distinguish it from "legal assistance" to
20 say "assistance which you may provide," such as giving a
21 referral or a pamphlet we distinguish from "legal
22 assistance."

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1 MS. GLASOW: I think that needs to be may clear.
2 Certainly, if a program got nothing else but LSC funds, they
3 would be using their LSC funds for the people coming in, to
4 do in-take, to determine eligibility, to refer them, to, you
5 know, give them a pamphlet, send them on their way, that
6 should be pretty much understood. I mean, you have to do
7 that to get them in as a client.

8 The only situation I know where this became a
9 problem was in PAI, in the allocation of LSC funds to PAI,
10 and there was a concern at one point that unless the client
11 were actually at some point represented by a PAI attorney,
12 then the money used for in-take could not be allocated to the
13 PAI. When we get to the PAI rule, we need to make that clear
14 that in-take should be allowable.

15 MS. PERLE: I think I also may come up in the
16 context of some of the programs that use hotlines.

17 CHAIR BATTLE: Yeah. That's another issue.

18 MS. PERLE: Where they may not do, sort of, a fine
19 tune eligibility screening on everybody that calls.

20 MS. MERCADO: So we need -- are we taking out the
21 "representation" and just adding "legal" to the second to the
22 last line, "legal assistance"?

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1 MS. PERLE: Well, I think we can do that. I think
2 we can make -- we can make some commentary that makes it
3 clear that what we mean by this is becomes a client.

4 MR. MCCALPIN: Are we staying with "assistance" in
5 the third line.

6 MS. PERLE: Yes.

7 MR. MCCALPIN: And the fourth line?

8 MS. PERLE: I think that what we're doing -- I
9 think the consensus is that we're -- the only change that
10 we're making is that on the next to the last line we are
11 adding "legal" before "assistance." So it says "If the legal
12 assistance provided to the person is supported."

13 MS. MERCADO: And then just have the comments
14 reflect, you know, what some of the routine stuff will not be
15 excluded.

16 MR. ASKEW: Although I don't believe the word
17 "representation" is solely limited to litigation.

18 MS. PERLE: I don't either.

19 MS. MERCADO: I think it doesn't matter that much
20 which word we use as long as we explain it.

21 MS. MILLER: I think it's better to explain it than
22 to do -- to say -- become a client of program, because then

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1 you're justify going to wind up with the same question.

2 MS. PERLE: Right. I think that's right.

3 CHAIR BATTLE: Okay. Does that clear up concerns
4 about subsection E? We're now on 1611.5, Authorized
5 Adjustments to the Recipient's Annual Income Ceiling.

6 MS. PERLE: We changed that because there was some
7 discussion at the meeting in June that you had a maximum
8 ceiling, and then you had exceptions to the ceiling, and that
9 we really couldn't do that. So we changed -- this may be
10 just a semantic change, but I think it does really express
11 the purpose of having this whole section, which is that there
12 are certain circumstances where you look at the person's
13 income and the demands on that person's income, which really
14 make it clear that even though their total income is above
15 the ceiling, that they don't really have that income
16 available to them because of other circumstances.

17 So it's appropriate for the program to be able to
18 deem that person to be financially eligible under those
19 circumstances. I don't know whether Steve actually -- I
20 don't recall whether he actually discussed it in this rule or
21 not, but he said -- I mean, that we need to make it clear
22 that programs don't have to apply these things, they can --

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1 they also don't create an entitlement, that if a program
2 wants to simply say if you're above 125 percent, we can't
3 serve you no make what the circumstances are.

4 CHAIR BATTLE: You used the word "may" here. So
5 I --

6 MS. PERLE: We used the word "may," and that's what
7 I explained to him, but I want the Committee members to
8 understand that from what I understand, and I did not always
9 understand this to be true, but I have learned over the last
10 couple months that, in fact, this section and this whole
11 series of things for many programs are not particularly
12 relevant, because they don't -- they have such demand by
13 those people who are below 125 percent that they rarely have
14 situations where they accept clients who meet these
15 circumstances, but that they have the flexibility to do it
16 inappropriate cases.

17 MR. BROOKS: We do have one problem, that the last
18 line of A should have "or C," because --

19 MR. MCCALPIN: Well, I'm not sure. I've just been
20 thinking about that. I'm not -- if we would not be
21 disqualified on the basis of B, which are mandatory, but C or
22 discretionary, and I think that you may want to permit the

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1 service even if one of the discretionary C criteria is not
2 met.

3 CHAIR BATTLE: But C would be a local
4 determination, wouldn't it?

5 MS. PERLE: Right.

6 CHAIR BATTLE: And once that local determination is
7 made, it becomes a mandatory determination for that program.

8 MS. PERLE: It wouldn't make any sense for a
9 program to say, "We're going to apply these circumstances to
10 people who are under 125 percent but not apply them to people
11 between 125 percent and 200 percent." I don't think that
12 makes any sense.

13 MR. MCCALPIN: Okay.

14 MS. PERLE: In fact, under the current rule, that
15 is not clear. Under the current rule, it's very confusing as
16 to when you have to -- to whom you have to apply these
17 adjustments.

18 CHAIR BATTLE: So I think, John, that's well-taken
19 that you would add the C here because --

20 MS. PERLE: I had "or" to that.

21 CHAIR BATTLE: Okay.

22 MR. MCCALPIN: But it's "or"?

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1 CHAIR BATTLE: It's "or C."

2 MR. MCCALPIN: All right.

3 CHAIR BATTLE: This one is rather lengthy. You've
4 got 1, 2, 3, and then 3 has A through G factors.

5 MS. PERLE: I don't think there's any significant
6 changes in the specific provisions other than maybe some
7 renumbering and reformatting from what you saw in June. Is
8 that correct?

9 MR. MCCALPIN: I'd like to raise a question about
10 3(c) at the top of page 21. I can't quote all the latin, but
11 it starts out, "Inclusio," and so on, but it seems to me the
12 way this is written it may be interpreted as applying to
13 taxes only.

14 MS. PERLE: So we should say "including but not
15 limited to"?

16 MR. MCCALPIN: Yeah, something of that sort. I
17 think it could be interpreted as applying only to taxes.

18 MS. MERCADO: And you actually wanted to apply it
19 any kind of debts or --

20 MS. PERLE: There's a question in the commentary
21 about mortgage payments and rent.

22 CHAIR BATTLE: Right. I saw that.

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1 MS. PERLE: And I think in the past -- and anybody
2 who is a project director has dealt with these, and the
3 audience can correct me, but I think that as a general matter
4 rent is not intended to be included as this kind of -- the
5 kind of debtor obligation, but there have been some questions
6 raised with the general counsel's office as to whether
7 mortgage payments, because they're -- well, of course, rent
8 is contractual as well, but there's a difference between
9 mortgage payments and rent, and that there have been some
10 situations where mortgage payments have been allowed.

11 It strikes me that that's not an appropriate
12 distinction, because whether you're paying rent or you're
13 paying a mortgage payment, it's still a chunk of money that's
14 taken out on a regular basis. So I think we need to make
15 some decision, and I think it's a policy decision. Treat the
16 two of them the same.

17 CHAIR BATTLE: Know that the comments invite
18 comment on this, which I think is good, so that we can get a
19 feel as to how programs feel about this. It seems to me
20 whether you're paying a mortgage or you're paying rent
21 they're substantially the same chunk that comes out --

22 MS. PERLE: Well, the difference is if you're

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1 paying a mortgage you're --

2 CHAIR BATTLE: You're owning.

3 MS. PERLE: You're owning, and you're developing
4 some equity in the property, presumably.

5 MR. BROOKS: Not much at the beginning.

6 MS. PERLE: Not much in the -- right. Now, I
7 think -- but I think it's true and we have to realize that we
8 do permit, sort of, a disregard of rent and/or mortgage
9 payments. That's a big chunk of change. So that would --

10 CHAIR BATTLE: That significantly will impact the
11 qualification of --

12 MS. PERLE: Right.

13 CHAIR BATTLE: -- the client, it seems to me.

14 MS. PERLE: Now, in practicality, it may not, as I
15 said, because there are probably very few clients that come
16 in under this rubric, in most programs.

17 MS. MERCADO: Well, it's generally -- that factor
18 of a mortgage, though, is generally going to be probably more
19 appropriate for your elder client that's coming in.

20 MS. PERLE: That's right.

21 MS. MERCADO: You know, who has been paying on a
22 home for 30 years, 35 years.

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1 MS. PERLE: And it may be more important in certain
2 areas of the country where there's a higher percentage of
3 homeowners among poor people who lived on a farm or a
4 particular piece of land for generations or something.

5 MS. MERCADO: Well, and for example like in a lot
6 of the rural areas in the Southeast there's a lot of farmer's
7 homes initiatives, self-help housing, et cetera, that they're
8 paying a mortgage obviously not to the amount that maybe
9 someone in an urban area would be, but there's more home
10 ownership even though they're poor --

11 MS. PERLE: Yes. Right.

12 MS. MERCADO: -- than there would be in urban
13 areas. So there has to be that balance. The fact is that
14 they're paying out income but just because there's not that
15 much rental property out those areas. It's all home-based,
16 and most of it has been -- if you look at the records, most
17 of it has been through some kind of federal program or the
18 other.

19 MS. PERLE: So there's, really, two parts to this
20 question, about whether we want to take out lodging expenses
21 regardless of how they're characterized as one of the fixed
22 debts or obligations that's permitted to be considered

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1 deducted from income under C. That's one set of questions.
2 Then, the other set of questions is whether we want to treat
3 rent and mortgage payments the same. I think the answer to
4 that latter question is that we should treat them the same,
5 whichever way they're treated.

6 CHAIR BATTLE: Well, one thing, by soliciting
7 comments on this issue, we'll get in what the various
8 positions are of project directors, and I think that will be
9 helpful to us in our assessment.

10 MS. PERLE: And we may decide that we just want to
11 leave it way it is and let that be decided on a local --

12 CHAIR BATTLE: Local basis.

13 MS. PERLE: -- on a local basis.

14 CHAIR BATTLE: Okay. Is there anything else among
15 the factors under 3? We've got C, D, E, F and G. Subsection
16 B.

17 MS. PERLE: This is one of the two places -- in the
18 first draft that you saw, there was an inconsistency in terms
19 of the treatment between the documentation requirements for
20 this and the documentation requirements for the asset
21 sections. So now these two -- both of those sections require
22 documentation. Before, one did and one didn't, and there

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1 wasn't much --

2 CHAIR BATTLE: Now, on this one, when you're
3 documenting the factual basis for taking someone that you are
4 including as a client using this 200 percent ceiling, are
5 those documents to be kept separate from the client's file or
6 with the client's file?

7 MS. PERLE: The previous -- in the current rule, it
8 said that they have to be kept with the client's files. This
9 doesn't specify that. So, presumably, it only depends on how
10 the program keeps its files. I think that they should -- we
11 could specify that they need to document it separate from the
12 files.

13 CHAIR BATTLE: Because we're what we're talking
14 about is informing the Corporation as to the number and the
15 factual basis, and it seems to me --

16 MS. PERLE: I think that's a separate set of -- I
17 think that what it is is that, you know, in terms of the
18 individual determination, that probably should be kept with
19 whatever in-take or eligibility information on that
20 particular person, but then, what you need to extract from
21 that information is just a number and a basis, which is kept
22 in a separate place so the Corporation can have access.

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1 MS. GLASOW: Wouldn't that be port of the normal
2 in-take form that we have under Section 8?

3 MS. MERCADO: Yeah, because most of the in-take
4 forms have a little section you can, sort of, rip off, and it
5 just has the financial information rather than any
6 identifying information on that client.

7 MS. PERLE: But I think what this does is allow the
8 program to determine best manner to keep that, sort of,
9 summary information that's going to be available to the
10 Corporation.

11 MS. MERCADO: I thought we had discussed it at the
12 June meeting because there was that whole problem that could
13 be perceived as far as any violation of attorney-client
14 privilege if you have all that information data information
15 with the client's file or whatever work file that there is,
16 and that the way to protect that is to put financial
17 information without necessarily identifying the particular
18 client in a separate file.

19 MS. PERLE: Right.

20 MS. MERCADO: I think we had discussed this --

21 MS. PERLE: We did.

22 MS. MERCADO: -- with IG's counsel.

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1 MS. PERLE: All that I'm saying is that if the
2 program wishes to keep a copy of that information with the
3 client information, with the client file for its own
4 purposes, that they're permitted to do that as long as they
5 have it in a form where they can provide the Corporation with
6 information regarding the number and factual bases for such
7 determinations separately so that that's available to the
8 Corporation.

9 MS. MERCADO: Yeah. All I'm just saying is that we
10 need to make sure and put that in the comments somewhere so
11 that you at least are alerting them ahead of time so that you
12 don't get into this whole issue of attorney-client privilege
13 there's financial data or information that is being requested
14 whether by the Corporation or by the IG or any other
15 investigative body.

16 MS. PERLE: That's fine.

17 CHAIR BATTLE: When you say "factual basis for such
18 determinations," I read that to mean someone can give an
19 explanation that's separate from the actual financial data
20 that says, "We determined that this person was eligible
21 because we used our secondary guidelines which provide these
22 things, and we determined that they met this." That's the

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1 fact basis. That doesn't give me anything specific about the
2 numbers and the information that was provided.

3 MS. PERLE: Well, I think what they would say was
4 because this person had substantial child care expenses that
5 enabled them to work or go to school, whatever, without
6 being -- you don't have to be that specific in terms of the
7 amounts. I think what it's intended, and maybe we need to
8 specify that, which particular --

9 MR. ASKEW: Which exception you're relying upon.

10 MS. PERLE: Yeah, which factor, you know, A through
11 G.

12 CHAIR BATTLE: As to which factor.

13 MS. PERLE: Instead of factual basis, as to which
14 factor in A was relied upon, something like that.

15 MS. MERCADO: Is basis, "I," b-a-s-i-s?

16 MR. ASKEW: e-s. It's got to be more than one.

17 MS. PERLE: More than one. And also, since this is
18 a record -- I mean, this record could be a page which says we
19 had ten -- in the last quarter, we had ten people who we
20 served under this section. One was based on Section C.
21 Three were based on Section E, and one was based on Section
22 G. That's what that record could show, could be, and they

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1 don't have to be attached to the particulars for an
2 individual.

3 CHAIR BATTLE: What about, "to inform the
4 Corporation as to which factors and factual basis was used
5 for such determinations"?

6 MS. PERLE: Well, I think you won't have the
7 number, because the number doesn't refer to the number within
8 the rule.

9 CHAIR BATTLE: Okay.

10 MS. PERLE: Number of cases or the number of
11 clients that were served under this section, but instead of
12 "factual basis," I think we need to say "to the number of
13 such cases and to the provision of this section on which such
14 determinations are based," something like that.

15 CHAIR BATTLE: Yeah, just kind of clean it up and
16 put something specific which says you're trying to identify
17 the number of cases, and two, the specific factors that were
18 used to make the determinations.

19 MS. PERLE: Okay.

20 CHAIR BATTLE: Okay. Anything else? Does that
21 satisfy your concern, Marie?

22 MS. MERCADO: Uh-huh.

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1 CHAIR BATTLE: Okay. 1611.6, Asset Ceiling. Bill?

2 MR. MCCALPIN: In B, I would have a hard time
3 trying to figure out what asset ceilings are available under
4 state or federal law. That proves imprecise. What are we
5 talking about? Are we talking about the bankruptcy law and
6 the homestead exemption as an example?

7 MS. PERLE: Yes, and it's not -- it's exemptions
8 from asset ceilings or --

9 MR. MCCALPIN: Well, yeah, but the bankruptcy law
10 doesn't really talk of it in terms of an asset ceiling. It
11 talks of it in terms of an exempt asset.

12 MR. ASKEW: How about if we say --

13 MR. MCCALPIN: There are also certain asset which
14 are exempt from -- what do you do to a judgment -- execution
15 under a judgment, but those are assets, not asset ceilings, I
16 think. So I don't know whether you ought to say "may
17 consider assets --" you don't want to say "exempt from
18 execution on bankruptcy" and all that sort of thing, but --

19 CHAIR BATTLE: What about "appropriate exemptions
20 available under state or federal law"?

21 MS. PERLE: Yeah. How about, "may consider asset
22 exemptions which may be available under state or federal

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1 law"? Would that --

2 MR. MCCALPIN: Yeah. I think that's better.

3 MS. PERLE: Okay. And this is the other place
4 where the documentation -- in D where the documentation --
5 because now those two provisions are parallel.

6 MR. MCCALPIN: Yeah.

7 MS. PERLE: And I think we should make the same --
8 although, actually, instead of -- in D, we need to say --
9 instead of "factual bases," we need to make reference to the
10 exempt -- to --

11 CHAIR BATTLE: Document the factors. Because,
12 really, what you're talking about is an unusual situation
13 that is going to be fact specific to this situation that goes
14 beyond all the other factors that are identified --

15 MS. PERLE: So maybe "factual bases" is appropriate
16 to leave in this one, or "the factors considered in making
17 such a determination," something like that.

18 CHAIR BATTLE: "The factor considered unusual" or
19 something. I mean, it needs to tie back into why this
20 particular case should be exempt, and all the other
21 guidelines that we got don't apply.

22 MS. PERLE: Okay.

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1 MS. MERCADO: So you're saying that this provision
2 goes above and beyond the factors which were permissible in -
3 -

4 CHAIR BATTLE: Yeah.

5 MS. MERCADO: -- in which the grantee --

6 CHAIR BATTLE: And so we need to know what the
7 director considered to be unusual about this circumstance.

8 MS. PERLE: Right. It only relates to assets, and
9 it may be that the person has assets, but they're tied up.
10 They're not -- you know, they appear to be available, but
11 when you really look at it, they're not available or, you
12 know, some such thing, and I don't know exactly what kinds of
13 situations that this -- again, I think that there are
14 probably very few situations where, in fact, that's waived,
15 and, basically, you need an explanation of why you waived it,
16 and it's within the discretion of the director.

17 CHAIR BATTLE: The only question I've got about
18 this is does this leap beyond our statute, when we give the
19 director to go beyond the factors and everything else that
20 we've got established everywhere else? I know that you can
21 establish factors that may not be contained specifically
22 within the ones that we've identified, but this leaps beyond

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1 all of those schedules and says we're going to give the
2 director the ability to make a determination.

3 MS. PERLE: The only thing that that act says about
4 assets is that --

5 MS. GLASOW: "We're supposed to ensure that the
6 grantees establish guidelines to ensure the eligibility of
7 clients which" --

8 CHAIR BATTLE: Tell me which page.

9 MS. GLASOW: This is page 8. You've got the same
10 little book?

11 CHAIR BATTLE: Yeah.

12 MS. GLASOW: Upper case B, "Establish. "

13 CHAIR BATTLE: Okay.

14 MS. GLASOW: Okay. "The Corporation, basically, is
15 supposed to ensure that recipients establish guidelines to
16 ensure that eligibility clients will be determined by
17 recipients on the basis of factors which include the liquid
18 assets and income level of the client."

19 MS. PERLE: So it doesn't -- it doesn't really say
20 how you need to consider those things. It just says you need
21 to consider them. So I think that we have the flexibility to
22 permit waiver under those circumstances.

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1 MS. MERCADO: Well, it does because "which will
2 include," it doesn't prevent any other factors that may be
3 out there from being a factor to be considered.

4 MS. PERLE: Right, as long as you consider assets.
5 As long as you don't ignore assets. I think this is correct.
6 In the first versions of the rules, there wasn't ever any
7 mention of assets in the early 1611. Then, the Corporation
8 went beyond that and considered not only liquid assets but
9 not liquid assets as well. So this is, sort of, coming back
10 to I think the place that Congress intended us to be.

11 CHAIR BATTLE: Okay. Is there anything else about
12 B, any other concerns?

13 (No response.)

14 CHAIR BATTLE: We'll move on to 1611.7, Group
15 Eligibility, Subsection A.

16 MR. MCCALPIN: I have two suggestions.

17 CHAIR BATTLE: All right. Bill?

18 MR. MCCALPIN: At the end of 1, I think we ought to
19 say "eligible for legal assistance under the Act and this
20 part." Don't we want to have them eligible under this
21 regulation as well as the Act?

22 MS. PERLE: Yes.

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1 MR. MCCALPIN: And in 2, we talked about this
2 before. An argument could be made on the rising tied raises
3 all ships theory that something that benefits the whole
4 community also benefits everybody in it. I would suggest
5 that we insert the word "primarily" after "that" in the
6 second line, "the furtherance of interests that primarily
7 benefit those persons in the community who would be
8 financially eligible."

9 MS. PERLE: Well, I have a question about that.
10 What if you have a group that wants to bring a case that
11 deals with environmental justice; there's a plan to build an
12 incinerator in a low-income community? Now, if they win
13 that, everyone in that community will benefit.

14 MR. MCCALPIN: Yeah, but if it's in the low-income
15 community doesn't it primarily benefit that community?

16 MS. PERLE: I primarily benefits that community,
17 which is low-income community, but it doesn't necessarily
18 primarily benefit those people in the community who are
19 financially eligible for legal assistance under the Act and
20 regs.

21 MR. MCCALPIN: Interesting you would pick that
22 example. We have something called Times Beach in Missouri,

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1 and an incinerator proposed for there, and while I don't
2 think Legal Services is involved, there certainly is lots of
3 litigation, but it involves the spewing out of dioxin from
4 the incinerator over the whole community. Do we really want
5 Legal Services to get into that kind of group representation
6 where the benefit is so wide?

7 MS. PERLE: Well, I think that if they're
8 representing a group, an eligible group, I don't think
9 there's any reason why they shouldn't be. I mean, obviously,
10 that's a policy decision that -- actually, no. I don't think
11 it's -- I think it's a local -- that's a matter for local
12 priority-setting and local control issue for them to
13 determine whether it really affects the community which they
14 are serving to the degree that it's appropriate for them to
15 use their resources.

16 MR. MCCALPIN: It seems to me you can have all
17 kinds of rationalization.

18 CHAIR BATTLE: But Bill, tell me this, Bill, using
19 the word "principal function," does that cover benefit for
20 you? It says, "have as its principal function or activity
21 the furtherance of interests that benefit those persons in
22 the community who would be financially eligible."

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1 MR. MCCALPIN: Well, that's the function of the
2 group. It's not necessarily related to the specific instance
3 of representation.

4 CHAIR BATTLE: However, this paragraph goes back to
5 that function rather than the representation, it seems to me.
6 The whole thrust of this paragraph is the question as to
7 whether or not the principal function of the group is to
8 benefit low income people, not the specifics as to the
9 representation.

10 MR. MCCALPIN: What you're talking about is the
11 case acceptance criteria --

12 CHAIR BATTLE: Yeah.

13 MR. MCCALPIN: -- rather than the --

14 CHAIR BATTLE: The group accepted. And see, we're
15 looking at group eligibility right now, and if the group's
16 principal -- I think it's cover under principal function --
17 is to benefit low income people, then -- or people that would
18 be financially eligible, then I think that's the criteria
19 that we're really focusing on in this particular reg.

20 MS. WATLINGTON: Hopefully.

21 CHAIR BATTLE: Yeah.

22 MR. MCCALPIN: Okay.

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1 CHAIR BATTLE: Okay? Now can we move on to
2 subsection B?

3 MS. PERLE: I think, too, I would make the same
4 addition that Mr. McCalpin suggested for one, "who would be
5 financially eligible for legal assistance under the Act and
6 this part," which suggests somewhat --

7 MS. MERCADO: In this part?

8 MR. MCCALPIN: And.

9 MS. PERLE: I think we could add that.

10 CHAIR BATTLE: That would be in 2 on the third
11 line, "in the community who would be financially eligible for
12 legal assistance under the act, and this part,"

13 MS. PERLE: I don't think you need the commas.

14 MR. MCCALPIN: I don't think you need commas.

15 CHAIR BATTLE: Okay. "act and this part."

16 MR. MCCALPIN: Maybe a comma then.

17 CHAIR BATTLE: Then a comma. Okay. Then, the
18 second component is the issue that you raised, "and the
19 representation sought relates to such function or activity,"
20 which is, I think, the issue you were getting at. Okay. Now
21 with can he move on to B? "This part does not prohibit a
22 recipient from providing legal assistance to a group that

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1 does not meet the requirements if the assistance is supported
2 in whole by funds from another source," the private funds,
3 corollary.

4 MR. ASKEW: It should be "legal assistance."

5 CHAIR BATTLE: Yes. "Legal assistance"? Okay.
6 1611.8, "Manner of determining financial eligibility,"
7 subsection A.

8 CHAIR BATTLE: Okay.

9 MR. ASKEW: We're all happy with 8. Let's move on.

10 CHAIR BATTLE: No. Let's go through.

11 MR. MCCALPIN: In B, in the last full line, looking
12 at the word "it," does that refer, what, to the word --

13 MS. PERLE: "Information."

14 MR. MCCALPIN: "Financial"? The word
15 "information." I suppose it's an appropriate singular
16 reference.

17 MS. PERLE: We could put "the information," if you
18 prefer.

19 MR. MCCALPIN: Okay.

20 MS. PERLE: Would you prefer that? I said we could
21 put in "the information" rather than "it."

22 MR. MCCALPIN: Yeah.

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1 CHAIR BATTLE: To verify, "the information"?

2 MS. PERLE: Uh-huh.

3 CHAIR BATTLE: Okay. "A recipient, then, shall
4 make appropriate inquiry to verify the information an amount
5 consistent with the attorney-client relationship." Okay.
6 And C? Any questions about C?

7 MR. MCCALPIN: Let me ask a question about C, the
8 second sentence. "The subsequent recipient is not required
9 to review or redetermine the client's eligibility." Is it
10 permitted to do so?

11 MS. PERLE: Yes. We can clarify that in the
12 commentary.

13 MR. MCCALPIN: Now we come to D.

14 CHAIR BATTLE: All right.

15 MR. BROOKS: Do you want to say "may but is not
16 required to"?

17 MR. MCCALPIN: Well, they take care of it in the
18 commentary. I think that's good enough. If I may?

19 CHAIR BATTLE: Okay. We are now on D.

20 MS. PERLE: We've all been sitting here waiting
21 with bated breath.

22 CHAIR BATTLE: Yeah.

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1 MR. MCCALPIN: We considered this at the June
2 meeting. You will recall that I wrote you a letter on the
3 7th of July in which I expressed some reservations about what
4 had been done at the June meeting and offered a -- really, an
5 additional sub E as a proposal.

6 We did not consider this rule at all at the July
7 meeting. So that this is really the first consideration we
8 have had --

9 CHAIR BATTLE: Since then. That's right.

10 MR. MCCALPIN: -- of this subject since the June
11 meeting. I have what I hope will be a relatively simple
12 modification of section D, but I have much bigger problems
13 with the comment, and I ask you to indulge me for a few
14 moments while I explain the background of my proposed
15 modification of D and my concern about the comments.

16 This section is based on ABA Model Rule 1.6, which
17 says, in effect, that a lawyer will not, may not reveal
18 information relating to the representation of a client, and
19 the 11 pages of comment, official comment, to that rule says
20 that there are two bases for that, the attorney-client
21 privilege and the rule of confidentiality.

22 I think that the comment also makes clear that the

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1 rule of confidentiality applies to information "relating to
2 the representation," and the discussion of that phrase, I
3 believe, makes clear that this is information relating to the
4 substance of the legal problem which the client brings to the
5 attorney and the expected assistance from the attorney
6 relating to that particular problem.

7 All the opinions which I have seen relate to that
8 kind of information, the substantive information going to the
9 legal problem and the service expected from the client, and
10 that is the thrust of the D.C. Bar opinion, which was
11 appended to the letter from Martha to me, which was
12 distributed yesterday, and I think that's a perfectly
13 appropriate opinion.

14 I think it's right on the basis of the kind of
15 information that was sought in that particular case giving
16 rise to that opinion. I haven't seen any ethics opinion,
17 maybe I haven't seen any, which narrowly focuses on financial
18 data provided to establish eligibility for a service.

19 Interestingly enough, although clearly not
20 controlling, at the Canadian Provincial Director's meetings
21 ten days or so ago, this was a subject for consideration, and
22 they made it clear that they separate the financial data from

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1 any information relating to the substance of the problem,
2 that the former is not considered confidential or shielded.
3 The latter is.

4 So I believe do the U.S. programs. I have
5 undertaken to obtain from Legal Services of Eastern Missouri
6 the in-take form that they use, and it's clear that the
7 financial data is separate from data relating to --

8 CHAIR BATTLE: Representation.

9 MR. MCCALPIN: -- the representation, and I think
10 that it is not a violation of 1.6 to supply that information
11 to a funder, and my proposal was limited to that information
12 in the narrow case where a complaint was made to the
13 Corporation.

14 Thus, I believe old 1611.7(d) is not inconsistent
15 with ethics or the law. I do believe that Congress has said,
16 "We are urging application of rules of conduct prevailing in
17 jurisdictions where the issue arises," and I think that's
18 exactly right and appropriate.

19 ABA opinions on that subject may be authoritative,
20 but they're not controlling, just like Attorney General
21 opinions are not controlling. Various jurisdictions can
22 interpret the model rules as adopted, and these may vary from

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1 the model rules which are posited by the ABA.

2 In fact, many states modify the model rules from
3 the ABA rules. I also think it's clear that in this day and
4 age that there cannot be a reasonable expectation of
5 confidentiality of this information.

6 I have looked at the AFDC applications, the food
7 stamp applications, the Section 8 rent subsidy applications.
8 All of them elicit the same kind of information that is
9 contained on the Legal Services' in-take form. So that this
10 is generally available information and particularly, if the
11 representation involves a dispute with one of those agencies,
12 as a great volume of our cases do, they already have that
13 information.

14 So both sides have it. It's not confidential, and
15 it just is -- attorney-client privilege is waived on -- when
16 there's a revelation. I think confidentiality is, too. All
17 funders expect access to data to support eligibility, and we
18 are the funder in the particular case.

19 Additionally, if it turns out that the client has
20 given false information, commentary to 1.6 makes it
21 abundantly clear that the information is not shielded or
22 protected under 1.6, the information given is false.

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1 So I would like to suggest that the problem is that
2 there has been a kind of blanket consideration of the
3 confidentiality of information, the availability of client
4 information without considering the precise information that
5 we are talking about here -- data to establish financial
6 eligibility, which, in my judgment, is not protected by 1.6.

7 However, various jurisdictions may decide yes or no
8 on that subject. I would like to subject a modification to
9 paragraph D. If you will look at it, there would be no
10 change five lines down through the word "of the client," no
11 change.

12 Then, turning over to the next page, the top line,
13 I would pull up the words "without the express written
14 consent of the client or applicant," and then I would add
15 "except as such disclosure may be permitted without violation
16 of the attorney-client privilege or the applicable Rules of
17 Professional Responsibility."

18 CHAIR BATTLE: Read that one more time.

19 MR. MCCALPIN: Sure.

20 CHAIR BATTLE: The last thing that you plan to add.

21 MR. MCCALPIN: "except as such disclosure may be
22 permitted without violation of the attorney-client privilege

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1 or the applicable Rules of Professional Responsibility," and
2 that leaves it to the local jurisdiction determination of
3 whether the information is shielded or not without imposing a
4 broad brush determination by us, and I think that it also
5 clarifies the phrase "in the manner that would violate,"
6 because I'm not sure what "manner" means.

7 It's an attempt to clarify or make more specific
8 the phrase at the bottom of page 23 that starts, "In a
9 manner," and allow for the determination yes or no on a
10 state-by-state basis as to whether the information is or is
11 not permitted under 1.6 as adopted in that jurisdiction.

12 MS. BERGMAN: So honoring 1006(B)(3).

13 MR. MCCALPIN: What?

14 MS. BERGMAN: In other words, acknowledging
15 1006(B)(3)'s giving of primacy to state and jurisdictions to
16 make this determination.

17 MR. MCCALPIN: Absolutely.

18 CHAIR BATTLE: And you would -- the last sentence,
19 would you leave that in or take that out?

20 MR. MCCALPIN: No. Leave it there.

21 CHAIR BATTLE: Leave it in. Okay.

22 MR. MCCALPIN: I'm not sure that you need the word

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1 "however," but otherwise I would leave it untouched.

2 CHAIR BATTLE: Okay.

3 MR. ASKEW: Bill, you may have offered a true
4 compromise because I'm sitting here thinking that I may have
5 disagreed with everything you said before you made that --
6 disagree with your proposal --

7 MS. MERCADO: Would you read it the way it's going
8 to read? Because I think I misunderstood --

9 MR. MCCALPIN: I'll start from beginning.

10 MS. MERCADO: Sure.

11 MR. MCCALPIN: "Information furnished to a
12 recipient by a client or an applicant for service to
13 establish financial eligibility shall not be disclosed to the
14 Corporation or to any third party who is neither employed --"
15 and I think maybe that should be "nor."

16 MS. PERLE: Suzanne and I discussed that, but I
17 think when we read the whole sentence it really is an "or"
18 there because it's followed by the "nor." "Nor" is a
19 separate thought.

20 MR. MCCALPIN: Okay. " -- who is neither employed
21 or retained by the recipient nor associated with the
22 recipient as co-counsel in the representation of the client

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1 without the express written consent of the client or
2 applicant except as such disclosure may be permitted without
3 violation of the attorney-client privilege or the applicable
4 Rules of Professional Responsibility."

5 CHAIR BATTLE: Okay. I think that -- I think, as I
6 heard the concerns that you raised, that leaving it up to a
7 state-by-state determination is actually where the issue
8 would end up anyway.

9 MR. MCCALPIN: I think that's what the Congress has
10 said.

11 CHAIR BATTLE: If there were ever a challenge, it
12 would end up in litigation in a jurisdiction, and the Rules
13 of Professional Responsibility in that jurisdiction would
14 specifically apply.

15 MR. MCCALPIN: I think that's true.

16 MS. WATLINGTON: Where was it before?

17 MR. MCCALPIN: Pardon?

18 MS. WATLINGTON: I mean, where was it before? I
19 mean, that was so legal --

20 CHAIR BATTLE: If there was a fight about, for
21 example, the Corporation, if the Corporation said, "I want
22 this information," and the local program said, "I'm not

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1 giving it to you," and there became a fight about whether or
2 not that information should be released, it ended up in
3 court, and in court the local Rules of Professional
4 Responsibility and attorney-client privilege case law in that
5 jurisdiction would apply to determine whether the information
6 would have to come out.

7 MS. WATLINGTON: So it would still be there to
8 protect that --

9 CHAIR BATTLE: Yes.

10 MS. WATLINGTON: -- program which was in
11 Pennsylvania?

12 CHAIR BATTLE: Right. Yeah. That's right.
13 Pennsylvania law would still apply in Pennsylvania.

14 MS. WATLINGTON: Okay. I just wanted to get
15 clarification.

16 MS. PERLE: I think that what we'll do is we'll
17 rewrite the commentary and make it clear that --

18 MR. MCCALPIN: Well, let's go to the commentary. I
19 have a lot of comments to make about the commentary.

20 CHAIR BATTLE: Okay.

21 CHAIR BATTLE: What page are we talking about for
22 the commentary?

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1 MR. MCCALPIN: I think it's 11.

2 MS. PERLE: I think that we all think that the
3 language that you suggested is appropriate? I'm not sure
4 that it represents a substantial change from what's here, but
5 it, perhaps, represents some kind of a clarification of the
6 presumptions, and I think that's helpful. That's fine.

7 MR. MCCALPIN: Well, I would not subscribe to the
8 second sentence in the commentary.

9 MS. PERLE: Where are we? On page 11.

10 MR. MCCALPIN: Page 11.

11 MS. BERGMAN: Under D.

12 MR. MCCALPIN: 8D.

13 CHAIR BATTLE: "The Committee believes that the
14 provisions on access to client eligibility information
15 contained in the current regulations are inconsistent with
16 the applicable Rules of Professional Responsibility and
17 1006(B)(3) of the LSC Act that prohibit LSC from abrogating
18 the authority of states and local jurisdictions to enforce
19 those rules."

20 MR. MCCALPIN: I don't think that the present rule
21 violates 1.6.

22 MS. PERLE: How about if we change the "are" to

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1 "may be"? There are certainly arguments that -- as the
2 Corporation, at least, has --

3 MR. ASKEW: It may be inconsistent.

4 MS. PERLE: -- tried to interpret it in numerous
5 situations over the last ten years. The way they've been
6 trying to apply it has been --

7 MS. MERCADO: Oh, "may be inconsistent" instead of
8 "are inconsistent"?

9 MS. PERLE: Uh-huh.

10 MS. MERCADO: There's definitely been enough work
11 around the area to know that someone thinks there is some
12 inconsistency. I mean, you can't ignore --

13 CHAIR BATTLE: Current regulations may have been
14 inconsistent in application.

15 MS. PERLE: And we could also say that the -- maybe
16 not just the provisions, but we could also say that the way
17 the provisions have been interpreted by LSC, or something
18 like that.

19 MS. MERCADO: LaVeeda --

20 CHAIR BATTLE: I suggested "current regulations may
21 have been inconsistent in application."

22 MR. MILLEMAN: What page are you on?

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1 CHAIR BATTLE: Page 11.

2 MR. MILLEMAN: What line?

3 CHAIR BATTLE: Starting with the second line, the
4 sentence that starts in the second line under 1611.8D.

5 MR. MILLEMAN: Got it. Thank you.

6 CHAIR BATTLE: "The Committee believes that the
7 provision on access to client eligibility information
8 contained in the current regulations may have been
9 inconsistent in application with the applicable Rules of
10 Professional Responsibility and 1006(B)(3) of the LSC Act,"
11 and in order to clarify that, I think we are offering --

12 MS. PERLE: Would we say "may have been applied in
13 a manner inconsistent with the applicable rules"? I think
14 that's a little clearer.

15 CHAIR BATTLE: May have been --

16 MS. PERLE: "may have been applied in a manner
17 inconsistent with"?

18 CHAIR BATTLE: Yeah. That's fine.

19 MR. MCCALPIN: I would agree with that because I
20 think that opinions are inconsistent.

21 MR. TULL: It's not an issue of the application.
22 It's the rule itself.

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1 CHAIR BATTLE: Well, I think what Bill is saying is
2 that his view is that the rule itself is not inconsistent.
3 It is the underlying opinions and application of the rule
4 that have created the inconsistency. In other words, you
5 can -- and that's why we've got lawyers that always say that.
6 Lawyers can take one rule and read it two different ways.

7 So, on its face, one can read it and not find the
8 inconsistency just as well as one can find it until it has
9 been -- and the real problem has been the application of it.

10 MR. MCCALPIN: The critical element is the phrase
11 "information relating to the representation," and it's how
12 you construe and apply that phrase which is the critical
13 point.

14 MS. GLASOW: The current rule only reaches the
15 attorney-client privilege, and therefore it's been
16 misinterpreted, perhaps, in not going far enough to cover --

17 MR. MCCALPIN: The current -- are you talking about
18 1.6 or our rule?

19 MS. GLASOW: No, no, the current rule that's in the
20 CFR right now.

21 MS. PERLE: Why don't you read it.

22 CHAIR BATTLE: 1611.D in the current --

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1 MS. PERLE: No. It's not the same.

2 MR. BROOKS: It would be in 1611.7(C)

3 CHAIR BATTLE: 7(C)? Okay. 7(C) is, "Information
4 furnished to a recipient by a client to establish financial
5 eligibility shall not be disclosed to any person who is not
6 employed by the recipient in a manner that permits
7 identification of the client without express written consent
8 of the client except that the recipient shall provide such
9 information to the Corporation when the Corporation is
10 investigating allegations that question the financial
11 eligibility of a previously identified client and the
12 recipient's representation thereof to information sought by
13 the Corporation relates solely to the financial eligibility
14 of that particular client," and then it goes on.

15 3 and 4, "The information sought by the corporation
16 is necessary to confirm or deny specific allegations relating
17 to that particular client's financial eligibility and the
18 represent's representation thereof," and 4, "The information
19 sought by the Corporation is not protected by the attorney-
20 client privilege. The information provided to the
21 Corporation by the recipient shall not be disclosed to any
22 person who is not employed by the Corporation." I think

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1 that's all we need.

2 MS. PERLE: I think the appoint that Suzanne was
3 making is that it only says that it's subject to attorney-
4 client privilege. It doesn't mention the Rules of
5 Professional Responsibility, which is why we think it's
6 inconsistent.

7 I mean, I think that we stand by the language
8 that's in the commentary now in that sense, but we could
9 soften it if it --

10 MR. MCCALPIN: I don't agree with the language in
11 the commentary now.

12 MS. PERLE: I understand that you don't.

13 MS. MERCADO: Mark and I were discussing yesterday
14 that we should have checked out a video to the firm so that
15 we can talk about the whole issue of attorney-client
16 privilege and professional ethics. As I was sitting there
17 watching, I thought --

18 MR. MCCALPIN: You think we can get some CLE
19 credit?

20 MS. BERGMAN: Especially after lunch we thought it
21 would be good, you know.

22 MR. MCCALPIN: Let me go over to the top of page

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1 12. If this were a legal opinion, I would say that the first
2 three lines are dictum. They don't really relate to what
3 this rule says, and the whole next paragraph, it seems to me,
4 goes off into an exegesis, which is way beyond this rule and
5 what's involved.

6 It's a whole description of some people's view of
7 the application of Rules of Professional Responsibility
8 generally. I don't think it is focused on this rule at all.

9 MS. PERLE: Which paragraph are you talking about?
10 I'm sorry.

11 MR. MCCALPIN: The first full paragraph on page 12.

12 MS. MERCADO: That's where the argument comes in,
13 and this is what we talked about when we had the IG counsel
14 here, about getting financial information that is without
15 necessarily identifying either the individual or --

16 MR. MCCALPIN: But what we're seeing is that it's
17 permitted except as would be a violation of the attorney-
18 client privilege or the applicable Rules of Professional
19 Responsibility, and you know the protection of a client's
20 name is, in many jurisdictions, not covered by the attorney-
21 client privilege.

22 MR. MILLEMAN: It's true in Maryland. It's not

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1 covered.

2 MR. MCCALPIN: Pardon?

3 MR. MILLEMAN: It's true in Maryland. It's not
4 covered.

5 MR. MCCALPIN: It's not covered, and it's not
6 covered in Missouri. There's a federal case in Missouri on
7 it with the Eight Circuit. So that the identification of a
8 client is not ordinarily within the attorney-client
9 privilege. Whether it's within the rule of confidentiality
10 referred to in 1.6 it seems to me is for a local
11 determination.

12 MS. GLASOW: This was, really, an attempt to
13 respond to some very specific questions, but it doesn't --

14 MS. PERLE: And it was also written from the point
15 of view of the ABA's opinions on these, which, as you said,
16 provide guidance to local bars but are not dispositive of the
17 issue.

18 MS. GLASOW: So it doesn't necessarily need to go
19 into the commentary.

20 MS. PERLE: Or, if it goes in, it should go in
21 stating what it is.

22 CHAIR BATTLE: With the caveat that --

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1 MS. BERGMAN: For purposes of LSC's interests here,
2 it seems to me that the act, 1606, correctly -- makes the
3 correct policy judgment about where this determination should
4 be made, that it should not put LSC in the middle of our, you
5 know, local program's attorney's relationships with their
6 clients and their local licensing agencies.

7 So we don't need, I don't think, to take this, you
8 know, grand position on what that should be. We're out of
9 it. The Congress has said the policy should be LSC shouldn't
10 be interjecting itself into that. It should honor that it
11 should find ways to meet its own needs to accommodate that,
12 and that's it, and if Missouri wants to do it one way and
13 Maryland wants to do it another, we will work within those
14 confines.

15 MR. MCCALPIN: We have to. The Congress has said
16 we have to.

17 MS. BERGMAN: So we don't need to be making, you
18 know great rhetorical or exegetical or whatever statements
19 on, you know, the value of the attorney-client privilege or
20 something.

21 CHAIR BATTLE: Given what Bill is proposing to
22 change the rule, what is your feeling about the second

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1 paragraph? He's raising, I think, a legitimate point that if
2 we were using the model rules we'd come out one way. If we
3 are going to leave it up to a state-by-state determination --

4 MS. PERLE: I think that what would be appropriate
5 for us to do would be to maybe give some examples of how it
6 could come out under one state or different places to make it
7 clear that there may be differences from state to state and
8 that our responsibility is to follow whatever the state says.
9 I think you're right that, you know, there's a lot of stuff
10 in here that doesn't necessarily belong in the comment,
11 because it does, sort of, state a general view, and that we
12 should pare this down to what we need in order to explain
13 what the rule says with a few critical examples so that it
14 does explain it. I think that that's right --

15 MR. MCCALPIN: I think you've got to look at the
16 whole comment and not -- I pointed to that paragraph, but
17 there are aspects of the next paragraph and the next
18 paragraph subject to the same -- one specific comment that I
19 have is the last sentence in the first full paragraph on page
20 13 where you say that "if the client as impliedly authorized
21 a sharing of information for representation, disclosure is
22 not authorized beyond that."

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1 I think confidentiality is lost the same way an
2 attorney-client privilege is lost. Once the information gets
3 out of the attorney and the client, it's no longer
4 confidential.

5 MS. PERLE: I did some time ago do some research on
6 this implied disclosures, and I'm not sure that that's
7 absolutely correct, but I'd have to look at it again.

8 MR. MCCALPIN: And especially with the information
9 has been given in the context of seeking another service, and
10 that service has been denied, and now they're going to the
11 Legal Services program to establish their claim for that
12 service where the whole issue in the litigation is the
13 eligibility, it seems to me that the funder, when that
14 eligibility is challenged, has the right to that information.

15 MS. PERLE: But I think it's the same point that
16 you made before, which is that we have to look to whatever
17 the local jurisdiction says is appropriate.

18 MR. MCCALPIN: Right. I agree.

19 MS. PERLE: I think that's the point that needs to
20 be made with respect to all of these things.

21 MR. MCCALPIN: So I think that this area of the
22 comment needs to be substantially rewritten.

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1 MS. PERLE: That's fine.

2 CHAIR BATTLE: The last sentence in the second full
3 paragraph on page 12, when I look at where we were, in terms
4 of the specific instances in 1611.7(C) 1 through 4, in
5 addressing the kinds of situations that Bill raised where the
6 specific issues is someone, Congress or someone comes to us
7 and says, "This client that you're representing in my
8 jurisdiction is not eligible. I want you to investigate this
9 and let me know what the circumstances are," this sentence is
10 getting at that.

11 What we've done in changing 1611, it talks about
12 LSC's responsibility to put together some procedures, to be
13 able to determine financial eligibility, but, in fact, what
14 we're saying is, in some instances, we'll be able to respond,
15 and in other instances we won't.

16 MS. PERLE: I think John may have some thoughts on
17 that. I think that there are procedures that could be
18 developed that would allow us to respond in some fashion in
19 every situation. We may be able to get more information in
20 some situations and less in others, but I don't think there's
21 ever going to be a situation where we can't respond. I think
22 that, in the past, the Corporation has always been able to

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1 respond adequately.

2 CHAIR BATTLE: Well, okay. Well, it also, it seems
3 to me, places the burden on the Corporation at some level to
4 determine exactly where this issue is going to come out in
5 jurisdictions. So whatever procedures we put in place we
6 need to have one for instances where a jurisdiction's local
7 rules prohibit us as to how we're going to carry out our
8 responsibility to assure that clients meet the financial
9 eligibility requirements.

10 MS. PERLE: I'm not sure -- the Corporation could
11 take the position that it's going to develop a procedure
12 which fits within what the model rules say and then tailor it
13 to a particular jurisdiction, if there are differences,
14 rather than having a set of different procedures. I think
15 that's really a matter for the Office of Field Services to
16 OPEAR, excuse me, to determine, and I think John has given a
17 lot of thought to that, and he may want to address it.

18 MR. TULL: Yeah. I think the conclusion that the
19 Committee has come to, if it becomes a regulation, obviously,
20 as we get more clarity in each jurisdiction as to what the
21 jurisdictions require, we may move for what you suggested,
22 which is a set of tailored procedures.

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1 At the outset, I think we would need to proceed
2 cautiously, assuming the most conservative position so we're
3 not asking people to disclose information that their local
4 jurisdiction might then later rule that they shouldn't.

5 Our current procedures are to ask the project
6 director to certify that the person is, in fact, eligible,
7 and both in terms of what I've seen happen at OPEAR, the
8 director of OPEAR and what I've seen happen over the course
9 of my legal service experience is adequate for a couple of
10 reasons.

11 One is this is a circumstance in which there is
12 simply no pressure on a program to keep representing a client
13 who is not eligible or for a project director to -- other
14 than the ethical requirements that they have. They have a
15 professional responsibility to the client, but our experience
16 has been when we inquire of a project director as to the
17 eligibility of a client about whom a complaint has been
18 filed, that in the circumstances where the project director
19 finds that the client is ineligible, they move quite quickly,
20 if they can, professionally, consistent with their
21 professional responsibilities, move quite quickly to either
22 have other funding pay for the client until the

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1 representation is terminated or find another counsel for
2 them.

3 The experience, in terms of what the complainants
4 have said over course of the years indicates that that's been
5 adequate as well.

6 CHAIR BATTLE: And there are instances when judges
7 won't let you out. I mean, if you find that out and there
8 becomes a responsibility from a financial eligibility
9 standpoint of view, if you're involved in litigation, you may
10 not be able to get out.

11 MR. TULL: Right, which is consistent with what the
12 act requires, but this is not -- I mean, interestingly
13 enough, this is an area in which there is a lot of concern on
14 our part, certainly, because of this issue, the fact that
15 it's the nexus of a rather difficult ethical question. On a
16 practical level, it's not been an area of controversy.

17 Under both policies of the Corporation, what we now
18 pursue, which is a fairly restrictive approach, in terms of
19 what we feel we can approach and what was -- and the approach
20 under the former 1611.7(D) or 8(D) or whatever it was that
21 you just read --

22 CHAIR BATTLE: (C) 1 through 4.

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1 MR. TULL: Some programs simply refuse to comply
2 with that citing, 1006(B)(3), and the Corporation effectively
3 acceded to that position. Some provided information.

4 Under all those types of procedures, there's been
5 very few follow-up -- very few cases in which there has been
6 follow-up by the complaining party claiming that the
7 procedures that were followed were inadequate and complaining
8 about what the result was. Over a ten-year period, it's only
9 3 percent of the complaints was there any follow-up.

10 So I think, on a practical level, we have a lot of
11 leeway to move into this slowly and carefully to make certain
12 that we don't unartfully push someone into acting
13 inconsistent with their local rules.

14 MS. MERCADO: Well, I mean, in a practical sense,
15 though, the number, percentages of people that are actually
16 analogable, that we had represented is almost nil. We're
17 turning away millions of people that we can't represent.

18 MR. TULL: Oh, right. Right.

19 MS. MERCADO: Even though they're eligible.

20 MR. TULL: Precisely, yeah.

21 MS. MERCADO: Because we haven't got the personnel
22 or anything to do. So, I mean, obviously, we're trying to

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1 prevent any kind of violation of professional responsibility,
2 but, you know, to assume that there's this huge monster of
3 people that we're representing, that we're having wealthy
4 people that, you know, Legal Services's lawyers are turning
5 away thousands every month is a little tantamount to, maybe,
6 like hysteria, I think.

7 I know we have to deal with Congress, but, in any
8 event, at the same time we need to make sure that we're
9 protecting everybody generally that comes in and does qualify
10 and that we do have time to represent.

11 MR. TULL: And the percentage of complaints
12 reflects what you just said. By far the highest volume of
13 complaints we get were people who were turned away and
14 claimed that were eligible, as opposed to the opposite.

15 It's a very small number of cases, and very few of
16 them come from Congress either or are initiated there, and
17 there's almost no -- I think no instance in this time period
18 we keep records of Congress then coming -- or a Congress
19 person coming back and saying, "We don't like what you found
20 in this one."

21 CHAIR BATTLE: What with can do, then, in how we
22 articulate in the comments discharging our responsibility is,

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1 basically, to communicate that we do intend to discharge the
2 responsibility that we have as it meets whatever state
3 requirements there are out there with regard to those two
4 things that are screening devices for how we do it, I think.

5 I guess my concern is I don't want it to appear
6 when we publish this that somehow our hands are tied, and we
7 can't do what we're supposed to do. So that needs to be
8 expressed in a way that gives confidence to us being able to
9 discharge our responsibility, and at the same time
10 acknowledge what state law says about both attorney-client
11 privilege and professional responsibility as it intersects
12 with this.

13 MS. BERGMAN: And I think we can make that case,
14 and I hope we can make it to our OIG as well. I want to ago
15 knowledge the OIG's difference of opinion with management,
16 and we'll get to that issue again as we move to
17 reauthorization, of course.

18 I firmly believe that what's in the act now
19 reflects the correct policy judgment by the Congress, but I
20 do also acknowledge that we have an accountability
21 responsibility as well, and that we need to demonstrate that
22 we can meet it given those constraints, though I anticipate

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1 we'll have further discussion with our OIG and Renee on this
2 set of issues.

3 CHAIR BATTLE: Yeah. Is there anything more?

4 MR. MCCALPIN: All I want to do is acknowledge the
5 lobbying expertise of the executive vice president of the
6 Corporation.

7 MS. BERGMAN: Thank you, Bill.

8 MR. TULL: Been consistent with 1612.

9 CHAIR BATTLE: John, I'm sorry. For the record,
10 just state your name and position.

11 MR. TULL: I'm John Tull. I'm the director of
12 OPEAR, and I can tell you later what those letters mean.

13 CHAIR BATTLE: I see Ed Quatrevaux's our inspector
14 general, hand up. Would you come forward to the mike,
15 please?

16 MR. QUATREVAUX: Martha's comment prompts me to
17 point out to you that our statutory responsibility for
18 commenting and for reviewing and comment on legislation,
19 regulations comes from a logic that the Congress wanted to
20 have people who come from our perspective review proposed
21 legislation out of a concern that they don't do anything
22 inadvertently that they -- well, that would not be wise.

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1 I believe they thought that the leadership of the
2 federal agencies would want that same kind of review for
3 their benefit as they went about their business. So all of
4 this is an aid of saying the only reason we comment on these
5 regulations is for your benefit. It's information to you for
6 you to use as you deem appropriate, and that's all.

7 MS. BERGMAN: And I'd like to say, too, that the
8 process I think we've used internally is working well. We've
9 had some good meetings about all these regulations and gone
10 over lots of concerns and made changes where appropriate. So
11 I think that process is working.

12 MR. QUATREVAUX: I agree. Thank you.

13 CHAIR BATTLE: Okay. I think this may be a good
14 time to take a break for just a moment.

15 (A brief recess was taken.)

16 CHAIR BATTLE: We are now back on the record.
17 After just a brief break, we're going to continue with 1611.
18 We have, really, just two sections left. What I hope we can
19 do is to get through them, then we'll take a lunch break and
20 take up 1609 and 1610 this afternoon.

21 I think we completed all the concerns about
22 1611.8(D). Is that right? 1611.9 has to do with retainer

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1 agreement, and there are several subsections, A through E,
2 and then E has two subsections, 1 and 2. We'll start with A.
3 Are there any concerns about A?

4 (No response.)

5 CHAIR BATTLE: "A recipient shall execute a written
6 retainer agreement in a form consistent with the applicable
7 Rules of Professional Responsibility and prevailing practices
8 in the recipient service area with each individual or group,
9 client or named class representatives who is represented by
10 the recipient," or "named class representative who is
11 represented by the recipient."

12 MR. MCCALPIN: Put an "s" in parentheses after
13 "representative." Do they do that frequently these days?

14 MS. PERLE: It says "each."

15 MR. MCCALPIN: Pardon?

16 MS. PERLE: It says, "each."

17 MR. MCCALPIN: Oh, each. Okay.

18 CHAIR BATTLE: B, "The retainer agreement shall be
19 executed when representation commences or as soon thereafter
20 as is practicable." C, "The recipient shall retain the
21 executed retainer agreement and shall make the agreement
22 available for review by the Corporation in a manner that

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1 protects from disclosure any information protected by the
2 attorney-client privilege and the applicable Rules of
3 Professional Responsibility."

4 MR. BROOKS: Can that be an "or" there, "protected
5 by the attorney-client privilege or the applicable Rules of
6 Professional Responsibility"?

7 MR. MCCALPIN: Yeah. I think so.

8 CHAIR BATTLE: Okay. D, "A recipient is not
9 required to execute a written retainer agreement when only
10 providing limited advice and/or consultation that does not
11 obligate the recipient to provide additional service or
12 undertake continued representations."

13 MS. GLASOW: I would just like to point out that we
14 have received an early comment on this very provision, and I
15 believe I provided it to the Committee last night.
16 Basically, this phrase "that does not obligate the recipient
17 to provide additional service or undertake continued
18 recommendation" would, apparently, cause a problem for some
19 of the hotlines.

20 The comment from Texas Legal Services Center
21 pointed out that sometimes a person will come back and ask
22 for additional or follow-up of some sort, but it is still

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1 part of the hotline service. Our comments on this provision,
2 basically, ask for comments specifically for this from the
3 field. So we can either consider this now or wait to see
4 what type of comments we get in from the field.

5 MS. PERLE: The working group proposal had added
6 some language. I think it said only providing limited
7 advice, brief service or consultation to suggest that there
8 were circumstances where they did provide some actual service
9 where the retainer agreement wouldn't have been required, and
10 I believe that that language was taken out after discussions
11 within the management.

12 I think the issue of hotlines and telephone advice
13 generally is one that may be a little problematic with
14 respect to what situations require written retainer
15 agreements and which ones don't, because there are often
16 situations where you do provide some limited assistance to a
17 person who you never see face to face. You've only dealt
18 with them over the telephone. I think that we may need, in
19 the final analysis, to change this to take into account the
20 needs of those programs.

21 MR. MCCALPIN: Is it too imprecise if we say "when
22 only providing limited advice, consultation or brief

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1 service"? Is that too imprecise?

2 MS. PERLE: That's, basically, what we had
3 originally. That's what the working group propose.

4 CHAIR BATTLE: And what was the thinking of
5 management in taking out "brief service"?

6 MS. GLASOW: I think there's just been a concern
7 about what that meant, and I think this was an effort to add
8 more to, kind of, explain what brief service was, but when we
9 did that, the issue of the hotlines did not come up. We had
10 not taken that into consideration. So management hasn't
11 considered that issue, and I think that is an important
12 issue.

13 MR. MCCALPIN: Can't we describe what's brief
14 service in the commentary?

15 MS. GLASOW: Yes, and we can either specifically
16 refer to hotlines --

17 CHAIR BATTLE: And put a period after
18 "consultation"? Is that what you're suggesting and not have
19 "does not obligate the recipient to provide additional
20 service"?

21 MR. MCCALPIN: I think we ought to say "limited
22 advice, consultation or brief service."

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1 MS. GLASOW: And just end it there?

2 MR. MCCALPIN: I think the "advice, consultation"
3 and then "brief service" --

4 CHAIR BATTLE: With a period after?

5 MR. MCCALPIN: Yeah.

6 MS. PERLE: Yeah.

7 MR. MCCALPIN: Yeah.

8 MS. PERLE: Yeah. That's --

9 MR. MCCALPIN: Then, in the comment, we describe
10 what's brief service.

11 CHAIR BATTLE: Brief service.

12 MS. PERLE: Martha, did you hear that discussion?

13 MS. BERGMAN: I'm sorry. I did not, no.

14 CHAIR BATTLE: We're on D, 1611.9(D), and the
15 question -- this is probably critical, because management
16 took out the proposal that we got from the working group to
17 include in the retainer agreement restriction that one is not
18 required when there is only the provision of limited advice,
19 brief service or consultation, and we took out "brief
20 service" and then tried to give an explanation as to what
21 limited advice or consultation was by adding "that does not
22 obligate the recipient to provide additional service or

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1 undertake continued representation."

2 We've already gotten a comment that, essentially,
3 says, for hotlines, oftentimes after the first telephone
4 call, you might get a follow-up call, which would be
5 additional service, and would that then mean that we have to
6 go find this person that we've never seen and have them sign
7 a retainer agreement.

8 MS. BERGMAN: Well, could we -- I mean, I'd be
9 interested to see what sort of comments we're going to get
10 about this issue, because, you know, it's hard to cut this
11 one in just the right place, isn't it? I mean, one wants to
12 provide enough flexibility not to have it just be crazed, you
13 know, retainer collection. On the other hand, you know, we
14 need to say it some way.

15 MS. GLASOW: We may find that we want to provide a
16 specific reference to hotlines in this at some point, but
17 that would depend on the comments --

18 CHAIR BATTLE: Well, but then you also have
19 instances where someone comes in, they say, "Should I get
20 benefits? I'm looking at the possibility of getting this
21 job," and they get some advice from an attorney, and that
22 issue may cause them, "Well, I went down there, and they told

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1 me I couldn't get thus and so. What should I do?" Would
2 that second call, would that third call, at what point do you
3 cut off the brief, and at what point do you consider it --
4 what Bucky said this morning is, in my mind, the distinction.

5 It's real easy when you're in a paid situation
6 because when you're giving out this kind of limited advice,
7 or someone comes in and you say, "Well, I think you've got a
8 case, but I'll tell you this about it, and you can go down to
9 thus and so and do it," and I don't charge you for it and I
10 don't take a retainer agreement, at the point in time that
11 one would ordinarily take an agreement and begin to charge
12 for your services, in my view, is the cut as to what one
13 would distinguish between what's brief and what's -- you
14 know, for some firms that don't charge for every single
15 consultation, that would be the cut that I would make, but I
16 don't know how we do it --

17 MS. BERGMAN: So is there a change proposed here?

18 MS. MERCADO: It would be "limited advice," take
19 out the "and/or, consultation or brief service," and then
20 take out of the rest of the stuff, just period, offer your
21 service.

22 CHAIR BATTLE: Then maybe we can, as we did before,

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1 elicit comments in this area and find out.

2 MS. PERLE: I think we should still elicit comments
3 and find out whether that -- I mean, I think that leaves some
4 flexibility. We're also dealing with a situation where we
5 have, in A, a mention of prevailing practices in recipient
6 service area. That may vary in different parts of the
7 country as to what lawyers consider to be the appropriate
8 point at which you have to get a retainer agreement.

9 I think it gives programs some flexibility to
10 consider those initial practices without having the
11 Corporation come in and say, "As soon as you get somebody on
12 the phone, you need to have a written retainer agreement,"
13 which is, as we know, administratively impossible, probably,
14 in most situations. I'm comfortable with that and then to
15 ask for comments as to whether we needed to do anything else.

16 CHAIR BATTLE: All right. E. I'm just reading
17 them because we don't have much more. "When one recipient
18 has executed a retainer agreement with a client, another
19 recipient may extend legal assistance or undertake
20 representation on behalf of that client in the same case or
21 matter at the request of the original recipient without
22 executing a separate retainer agreement so long as the

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1 additional legal assistance or representation is within the
2 scope of the original retainer agreement and the client has
3 received written notification that another recipient is
4 providing additional legal assistance or representation in
5 the matter."

6 It seems to me that the retainer agreement, we
7 ought to have a model retainer agreement that has some
8 language in it that covers this prospect and informs the
9 client up front that if there is a need that this is the
10 procedure. I'll contact that other person, and we will let
11 you know in writing if someone else is retained to assist us.

12 MS. MERCADO: I think John is working on that,
13 looking at and modeling retainer programs so that we don't
14 have a lot of problems.

15 MR. MCCALPIN: I have a problem with the interplay
16 between the phrase "undertake representation" in the
17 introductory portion, and two, "the client has received
18 written notification that recipient is providing additional
19 representation."

20 My understanding of the ethical rules is that you
21 cannot impose another lawyer on a client without the client's
22 consent. This only calls for notification, and I think if

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1 you're going to substitute counsel you've got to have
2 consent.

3 MS. PERLE: What if we co-counsel?

4 MR. MCCALPIN: Well, sure, but when you say
5 "undertake representation," that doesn't imply co-counsel to
6 me. That suggests to me a substitution of counsel.

7 MS. MERCADO: I think it was meant to do either
8 one.

9 MS. PERLE: Either one, right.

10 CHAIR BATTLE: We need some language in the
11 retainer agreement.

12 MS. GLASOW: A lot of the retainer agreement that
13 we are reviewing in our office have that type of language
14 where the client's notified from day one that another
15 attorney may be asked to co-counsel early on.

16 MR. MCCALPIN: Well, basically, you're asking the
17 client to buy a pig-in-a-poke. You can impose anybody under
18 that, even though the person may be -- the other counsel may,
19 for some reason or other, be objectionable to the client.

20 MS. MERCADO: Well, but I think that that language
21 goes to more of a historical situation that Legal Services,
22 as an entity, as a firm, may have attorney A that starts

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1 representing. Attorney A leaves this job position and
2 attorney B takes it over.

3 I mean, that's part of where you initially begin
4 with, as far as retainer, because a judge may not agree --

5 MR. MCCALPIN: But this is talking about another
6 recipient.

7 MS. PERLE: This is talking about a support center.

8 MR. MCCALPIN: It is talking about another
9 recipient, not another attorney within the recipient.

10 MS. MERCADO: Yeah, I know, but the retainer
11 agreements hat she's talking about, some of those dealt
12 with -- originally dealt with having different attorneys
13 within the same office or recipient taking the cases, because
14 a lot of the local rules will not allow attorney Y to get out
15 and attorney B stepping in even if they're from the same
16 program.

17 So that was what it initially dealt with, and now
18 we're talking about -- in addition, we're talking about
19 different recipients in it. I mean, there's, actually, two
20 categories of attorneys in that particular representation.

21 MR. BROOKS: What we're talking about here is a
22 retainer agreement and not substitution or succession of

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1 counsel, and all this provision, I believe, is getting at is
2 that if there is a succession of counsel, one originally
3 retainer agreement will suffice.

4 MS. PERLE: Right.

5 MR. BROOKS: Now, we shouldn't, in this provision,
6 be saying that one recipient can foist another recipient on
7 the client. I think if there is the substitution, then this
8 should apply to the continuity of the retainer agreement,
9 period.

10 MR. MCCALPIN: Well, except that this says "Another
11 recipient may undertake representation if the client is
12 notified."

13 MR. BROOKS: Without a separate retainer agreement.
14 That's the point. I think it might --

15 MS. PERLE: And it's from the perspective of the
16 Corporation. Now, if local rules require something else,
17 then I think that would prevail, and maybe we need to say
18 that in this.

19 MR. BROOKS: But I think it needs to be rephrased
20 slightly to make it clear that this retainer agreement --

21 CHAIR BATTLE: In accordance with state law, local
22 law.

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1 MR. BROOKS: -- survives if there is, not that
2 there may be.

3 CHAIR BATTLE: But I hear Bill actually raising
4 another policy consideration, from our vantage point, as to
5 whether, as a policy, we want retainer agreements to require
6 that clients give their consent before another lawyer enters
7 a case from another recipient or co-counsel --

8 MS. MERCADO: Well, there's nothing --

9 MS. PERLE: Is that a matter that's dealt with
10 under local rules?

11 MS. MERCADO: Uh-huh.

12 MS. PERLE: If it is --

13 MS. MERCADO: And we're all guided by the
14 professional ethics and --

15 MS. PERLE: I mean, I think the point that we
16 wanted to make with respect to this rule was that, in the
17 past, the Corporation has taken the position that a Legal
18 Services support center had to have a new -- from the
19 Corporation's perspective, that the 1611 required them to
20 have a new, separate retainer agreement.

21 Now, that doesn't go to the question about whether
22 it may be required under the local rules, but they were

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1 imposing something on the recipient that wasn't, I don't
2 think, explicitly provided for in 1611 and wasn't necessarily
3 required by the circumstances and wasn't necessarily required
4 by the local rules. So I think if the rules require it, then
5 it's required.

6 MR. MCCALPIN: I just don't think that you can use
7 a retainer agreement and say if you have a retainer agreement
8 with the local program the local program can bow out, and the
9 support center can take over the representation without the
10 consent of the client.

11 MR. BROOKS: But I don't think this provision ought
12 to provide that permission. I think that's an entirely
13 different issue.

14 MR. MCCALPIN: But it says that the original
15 retainer agreement will suffice to provide representation by
16 the successor.

17 MR. BROOKS: That's why I say I think it could be
18 rewritten to make it clear that this is only relating to the
19 survivability of an original retainer agreement if, in fact,
20 there is a second recipient to becomes counsel, not that this
21 gives permission to the original recipient to hand over the
22 client to another recipient.

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1 CHAIR BATTLE: And really what controls is the
2 language in the retainer agreement. I don't think that we
3 can statutorily say simply because you execute a retainer
4 agreement that executing that retainer agreement, regardless
5 of the language contained therein, will allow you to include
6 subsequent counsel or other counsel.

7 MS. PERLE: Well, that's why we put in No. 1. Now,
8 maybe that's not sufficient.

9 MS. GLASOW: I'm wondering if 1 is sufficient
10 without 2, because they couldn't do it at the local level if
11 it weren't within the scope of the original retainer
12 agreement. Number 2 raises the issue that somehow the
13 client's rights are being violated, and --

14 CHAIR BATTLE: 1 may be all that you need.

15 MS. GLASOW: 1 may handle that.

16 CHAIR BATTLE: We just need to have the scope of
17 the retainer agreement allow for the additional
18 representation.

19 MS. PERLE: Do we need to make a reference to
20 applicable rules regarding substitution of counsel?

21 CHAIR BATTLE: Yeah, and just to assure that the
22 retainer agreement complies with local rules.

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1 MS. PERLE: Well, that's -- I think that's implicit
2 in A.

3 MS. MERCADO: Okay.

4 MS. BERGMAN: So strike 2? Okay.

5 MS. MERCADO: Yeah, you're right. A already covers
6 that concern that Bill had about the substitutions. Strike
7 2.

8 MR. MCCALPIN: I'm not so sure that the original
9 retainer agreement ought to survive where there's a
10 substitution of counsel.

11 MR. BROOKS: Well, that's a separate issue, I think
12 and a legitimate question.

13 MR. MCCALPIN: But that's what this rule says.

14 CHAIR BATTLE: Substitution. Not substitution but
15 additional co-counsel.

16 MR. BROOKS: Well, if it's --

17 MR. MCCALPIN: But that's the issue -- undertake
18 representation may be substitution.

19 CHAIR BATTLE: What if we put in a reference to "in
20 accordance with the applicable Rules of Professional
21 Responsibility regarding substitution of counsel"?

22 MR. MCCALPIN: I'm not sure, as I try to think

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1 about it, and I can't remember all the rules, the rules are
2 quite specific in terms of substitution of counsel in a court
3 case. I'm not sure that the Rules of Professional
4 Responsibility talk about the substitution of counsel in a
5 nonlitigating sense.

6 MS. BERGMAN: But, you know, isn't LSC's interest
7 here only in whether the retainer agreement is about a case
8 that meets the eligibility requirements, meets the rest of
9 the issues in this section?

10 And all this is saying is that so long as this is
11 really about the same case, that it, sort of, arises out of
12 the same case and so forth, if the recipient's policy
13 comports with that, it may simply have the retainer agreement
14 go forward to the -- because, in other words, we're not
15 requiring that a support center have a separate retainer
16 agreement or that another recipient in a neighboring
17 jurisdiction have one if it's covered by this case, and
18 therefore original program is satisfied that the client's
19 eligible and that this is a case they can handle.

20 That's, I think, the extent of LSC's interest in it
21 and not, you know, whether the program's, you know, retainer
22 policies -- it's up to the program, I think, to make sure

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1 that its retainer policies comport with, you know, local
2 jurisdictional rules.

3 MS. MERCADO: That's in A. I mean, that's in A.

4 MS. BERGMAN: I would think. I mean, I'm concerned
5 about just how far into it we're getting here for what
6 purpose, and what is LSC's interest that we're trying to
7 protect here.

8 MS. MERCADO: Because this is the only -- the LSC
9 interest here is to make sure that if that client is
10 continued to be represented by LSC funding, that the criteria
11 to find whether or not that person was financially eligible
12 and whether the type of case that they had was a case that
13 was another priority or that particular program is continued.

14
15 MS. PERLE: Actually, I'm not sure that's what
16 precipitated the retainer agreement requirement.

17 MS. MERCADO: No. A lot of it is just bureaucratic
18 paperwork.

19 MR. MCCALPIN: Statute is --

20 MS. PERLE: There's no statutory language in a
21 retainer --

22 MR. MCCALPIN: Well, but the reauthorization --

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1 MS. PERLE: The reauthorization will require -- the
2 reauthorization proposals both require retainer agreements,
3 but they don't deal with this situation.

4 MR. BROOKS: To be sure that the recipient has a
5 real client.

6 MS. PERLE: That's the concern.

7 MS. BERGMAN: And that it's not being referred off
8 to a support center on some other issue, you know, or other
9 case under the guise of having been covered by the original
10 agreement.

11 MR. MCCALPIN: Martha, I'm still troubled. You say
12 that all we need to say is that if the original recipient
13 gets a retainer agreement and the subject matter remains the
14 same or that different recipient is going to do the
15 representation, that the original retainer agreement ought to
16 suffice, and I'm not sure that I agree with that.

17 MS. PERLE: So long as that it's within the scope
18 of the original retainer agreement, so long as that there's
19 something in the original retainer agreement which would
20 anticipate that this is a possibility.

21 CHAIR BATTLE: But are we getting ahead of the
22 entire matter in trying to statutorily fix a problem that

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1 arises out of representation and has many shades to it? In
2 other words, to extent, for example, that a case grows to the
3 point that a particular program decides that they need
4 additional help, the scope of what's needed and how they
5 ought to consider whether a separate agreement needs to be
6 executed or whether the one with the language that they've
7 got suffices it seems to me is more a case-by-case
8 determination rather than a statutory determination.

9 So I think we're better off talking about how that
10 language ought to be crafted and having some models in the
11 area of how the retainer agreement ought to be stated,
12 because different jurisdictions are going to have different
13 requirements, and just being assured that either the original
14 retainer agreement or a subsequent retainer agreement states
15 the nature of the relationship between the secondary counsel
16 and the client, but leave that determination up to a case-by-
17 case determination and not statutorily say that if you've got
18 a case, then you've got to, in that first retainer agreement,
19 cover the prospect.

20 MS. PERLE: I don't think it says that. They're
21 saying if you don't, then you have to have another retainer
22 agreement, if you don't cover it, but that you can cover it

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1 in the original retainer agreement.

2 CHAIR BATTLE: Well, let's see. When one recipient
3 has executed a retainer agreement with a client, another
4 recipient may extend legal representation on behalf of the
5 them without executing a second one so long as 1, 2, which,
6 without being stated would be the case if you've got a
7 retainer agreement with that language in it.

8 In other words, the retainer agreement is going to
9 govern whether we say this statutorily or not. If the
10 retainer agreement has language in it that says, "At this
11 point, as a client, I am contenting to additional
12 representation if needed. I must receive notice. I have the
13 opportunity to reject it."

14 MS. PERLE: The Corporation's position in the past
15 has been regardless of what the initial retainer agreement
16 says that another recipient has to have a separate retainer
17 agreement, and that's been the problem, where the Corporation
18 has come into a support center and said, "Well, where's your
19 retainer agreement?"

20 That was the ill that this was intended to address.
21 I'm not sure that I understand exactly what you're suggesting
22 we ought to do with this. I think that's what I'm having

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1 some trouble --

2 CHAIR BATTLE: And I didn't know that history. So
3 that's helpful to me, but I guess what I was saying is that
4 it seems to me that the language in the retainer agreement in
5 local rules will govern how that relationship is formed
6 ultimately, because even if we said here statutorily that you
7 can do it, I think that when you construct a retainer
8 agreement between an attorney and a client you can build that
9 into the language in your retainer agreement, and it's going
10 to govern that relationship and subsequent relationship
11 whether we've got a provision or not.

12 MS. MERCADO: And you do that in private practice,
13 too, if you think that you're going to co-counsel and need
14 somebody else to bring a different kind of expertise to the
15 particular issues that that client has. I mean, if that's
16 already put in your retainer agreement --

17 CHAIR BATTLE: Okay.

18 MS. MERCADO: -- additional counsel may be needed
19 to deal with this issue -- and the client is agreeing with
20 it. So it goes back to retainer agreement doing that. We're
21 just being a little bit more specific here, I think.

22 CHAIR BATTLE: And I think what Linda is saying is

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1 that somehow we want to send a message that that particular
2 methodology no longer exists where each -- where you cannot
3 build that language into the initial retainer agreement.

4 MS. MERCADO: That's where your model agreement, I
5 think, would come in, but I think that because of the nature
6 of legal services, that we have, in structure, these
7 different backup centers that are experts in different issues
8 that are relevant to the client community that we represent
9 that part of the model language that you ought to have in
10 those retainer agreements is that there is -- that the client
11 is agreeing that if it is necessary to have co-counsel, from
12 whether it's the National Consumer Law Center or whether it's
13 your state, you know, legal services center that work
14 specifically with this issue, because that young attorney in
15 that area needs help on that case, which has now become, you
16 know, very protracted with a whole lot of discovery and
17 everything.

18 I just know from my own personal experience and
19 backup centers that I have used when I was a Legal Services
20 attorney that you incorporate that language from the very
21 onset, that you know the backup centers are there. You know
22 that there is a likelihood that you could co-counsel with

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1 other Legal Services programs who have the expertise.

2 We've called in lawyers from other states that are
3 experts in a particular area of law to help us with some of
4 the co-counseling, but that that language is provided at the
5 very beginning to the client to let them know that these are
6 additional support systems that we, as Legal Services
7 attorneys have, and we are putting you on notice that if we
8 need that assistance we would like your approval, that when
9 you sign this that you're approving to that co-counseling.

10 MS. GLASOW: What if we had a provision -- we could
11 either discuss it in the commentary to make that clear, but
12 what if we had a provision that said if the initial retainer
13 agreement anticipates involvement of the national support
14 centers? Then there would no need for a separate retainer
15 agreement to be created by the support centers.

16 MS. PERLE: I think that's what it says, though.

17 MS. GLASOW: That's what we've been trying to say,
18 but it might solve Bill's problem.

19 CHAIR BATTLE: Well, at some point, and I'm going
20 to recognize Bill next, but at some point -- and then John.
21 At some point part of what we're talking about here is how
22 can one be assured, number one, that the client has been

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1 notified, and two, that there's some documentation as to when
2 and how another attorney entered representation on a matter.

3 The notification provision that we talked about
4 striking is one component of assuring that at least that a
5 client is aware of the fact that someone else has been
6 retained.

7 MS. GLASOW: This language could be done after the
8 original -- this notification could come at any time with
9 this language. So it's not clear in this language that would
10 be early on.

11 CHAIR BATTLE: Yeah. If you're going to take the
12 approach that the attorney has the judgment call on who
13 they're going to retain as additional counsel, that there
14 ought to be language in the retainer agreement giving the
15 client the ability to fire, I mean, hire and fire authority
16 somewhere, clearly delineating how that ought to be done.

17 MR. MCCALPIN: I have two points I want to make.
18 One, I have no problem in the case where the initial
19 recipient retains responsibility and seeks assistance by a
20 support center, expert counsel from another jurisdiction,
21 whatever. I have no problem with that. This discussion, I
22 think, has glossed over the other situation where original

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1 recipient, in effect, turns the lawsuit, the representation
2 over to an entirely different counsel.

3 I think that is a fundamentally different situation
4 and requires more than simple notice to the client as
5 contained in 2.

6 The second situation I want to raise is what
7 happens when the client goes in to the recipient and the
8 recipient uses the service of a pro bono lawyer? With whom
9 is the retainer agreement, the recipient, who for all
10 practical purposes, is out of the picture or the pro bono
11 lawyer under the Volunteer Lawyer Program of Legal Services
12 of Eastern Missouri?

13 Is the retainer agreement with the recipient who,
14 for all practical purposes, is largely eliminated from the
15 picture, or is it with the pro bono lawyer?

16 MS. PERLE: I think it's with the pro bono lawyer.

17 MR. MCCALPIN: We don't say that.

18 MS. PERLE: Well, I think that is something we
19 address in the --

20 CHAIR BATTLE: John, did you have a point you
21 wanted to raise?

22 MR. BROOKS: Well, I had a point which goes to

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1 Bill's first point, which seems to me that if we put in co-
2 counsel here in the main text on page 24, co-counseling, I
3 think we'd all agree, would be really within the discretion
4 of the original recipient to call in assistance and should
5 not need a separate retainer agreement.

6 I think beyond that I agree that if it's another
7 recipient there should be a separate -- substitution, there
8 should be a separate retainer agreement, and I think that
9 would be solved -- that problem would be solved if we used
10 co-counsel language.

11 CHAIR BATTLE: Can we, in the comments, then,
12 distinguish between co-counseling and substitution and --

13 MS. BERGMAN: And I think we're likely to get
14 comments from support centers. I mean, the reason -- as
15 Linda describes it, the reason this went in here at all -- it
16 wouldn't even be here were it not for LSC having taken the
17 position in spite of the absence of any regulation about it
18 insisting on new retainer agreements when, perhaps or perhaps
19 not, that made any sense.

20 So whether or not this needs to be here at all I
21 think is a question, and, if so, how? We probably need to
22 know a little more about how that comes about, but I tend to

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1 agree that if it's a complete switch of counsel, you know, if
2 one recipient is just out of it, you know, and another one is
3 in it that a new retainer agreement is probably appropriate,
4 but it would be interesting to hear what we get back
5 particularly from support centers on how they work those
6 things out with local programs.

7 MR. MCCALPIN: I have heard a discussion involving
8 the programs in Missouri where they talk about the client
9 applying to one program but being served by the other
10 program, a total switch in representation. It seems to me
11 that that can only be done with the consent of the client.

12 MS. MERCADO: And I think it usually is.

13 MR. BROOKS: Should be.

14 MR. MCCALPIN: Yeah, but all we've provided for
15 here is notice.

16 CHAIR BATTLE: Really, I think we're dealing with
17 a co-counsel.

18 MS. PERLE: Right. We didn't distinguish between
19 situations where they're just associating somebody else to
20 work with them and where they're turning the case over.

21 MR. BROOKS: Well, note that paragraph 2 refers to
22 additional legal assistance, which, sort of, implies co-

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1 counselship.

2 MS. PERLE: I think that we were actually thinking
3 about it in terms of the co-counseling, and I think the only
4 thing we really need to do to fix that is to add a reference
5 in E to co-counseling situation and maybe, then, leave
6 everything else the way we've had it but then inquire in the
7 commentary --

8 MR. MCCALPIN: Make it clear that this is not the
9 situation applicable to a substitution of counsel.

10 CHAIR BATTLE: That would handle it. Would that
11 fix your concern, Bill? Okay. All right.

12 MR. MCCALPIN: What about my second concern?

13 CHAIR BATTLE: Substitution concern?

14 MR. MCCALPIN: Where the client goes to the
15 recipient and the recipient turns it over to the pro bono
16 adjunct of the recipient, with whom is the retainer?

17 CHAIR BATTLE: If it's fully turned over in a
18 substitution mode, then it seems to me the co-counsel pro
19 bono lawyer has it.

20 MS. PERLE: I think that's right, yeah. I don't
21 think that the client would ever sign a retainer agreement
22 with the recipient if they're referred to someone else.

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1 MR. MCCALPIN: Are we requiring a retainer
2 agreement with the pro bono counsel?

3 MS. MERCADO: Uh-huh.

4 MS. PERLE: Does our rule specifically require
5 that?

6 MS. MERCADO: Oh, I don't know about the rules. I
7 know that --

8 MS. PERLE: A rule does not specifically require
9 it, but it may be required in a jurisdiction. In the
10 District of Columbia, retainer agreements are now required in
11 every situation where you have representation.

12 CHAIR BATTLE: I would hate for us to statutorily
13 handle that, because you have volunteer legal referral
14 programs and all kinds of ways that cases come in through
15 Legal Services and potentially get referred out, and the
16 local rules need to govern how that retainer agreement -- if
17 we retain no further responsibility for the case, then local
18 rules should govern.

19 MR. MCCALPIN: The standards adopted by the ABA
20 address this issue, as I recall, about what responsibility,
21 if any, does the program retain when the case is turned over
22 to a pro bono adjunct.

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1 CHAIR BATTLE: I think probably the wisdom for us,
2 though -- though the ABA standards may address it, to leave
3 that determination up to local law.

4 MR. MCCALPIN: Well, it seems to me that maybe at
5 least we need to say in the commentary that this provision
6 requiring a retainer agreement does not require the recipient
7 to execute a retainer agreement when the case is referred to
8 pro bono counsel.

9 MS. MERCADO: Okay. I think that there does
10 probably need to be a comment on that or definition.

11 CHAIR BATTLE: Okay. Are there any further
12 concerns about 1611.9?

13 MR. MCCALPIN: Can I tell you something that
14 bridges 9 and 10? One of the miscellaneous items of
15 information I picked up at the Canadian meeting a bit ago is
16 that they include in the retainer agreement the obligation of
17 the client to advise the program when there is a change in
18 circumstances.

19 CHAIR BATTLE: That's a good idea.

20 MS. PERLE: I think most of them have that.

21 MR. MCCALPIN: And I understand -- I read
22 somewhere, and I can't find it, that we are working on a

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1 model retainer agreement?

2 MS. GLASOW: Actually, we sent one out a little
3 over a year ago to the programs. We pointed out those things
4 which are really general statements of what were required to
5 be in, but we also provided a model retainer agreement that
6 reached a lot of other issues that we had found to be
7 helpful, and it was just a guideline.

8 OPEAR may now be in the process of reviewing that
9 and updating it, and of course they're aware of the fact that
10 we're deleting the requirement that LSC approve these
11 retainer agreements. So we won't have to be looking at them,
12 but still it would be helpful to, perhaps, update that
13 guideline that was sent out, but they have been sent a model
14 retainer agreement.

15 MR. MCCALPIN: It seems to me, given the
16 relationship between that and what we're dealing with here,
17 you ought to at least send us a copy of the --

18 MS. GLASOW: I'd be happy to.

19 MR. MCCALPIN: -- model retainer agreement so we
20 can see what we're talking about.

21 CHAIR BATTLE: Okay. 1611.10, Change in
22 Circumstances. Are there any questions about this? "If an

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1 eligible client becomes ineligible through a change in
2 circumstances, a recipient shall discontinue representation
3 if the change in circumstances is sufficient and is likely to
4 continue to enable the client to afford private legal
5 assistance and the discontinuation is not inconsistent with
6 applicable Rules of Professional Responsibility."

7 MS. PERLE: This is essentially what's in the rule
8 now. We made one change. I think Mr. Brooks raised, or
9 either Mr. McCalpin or Mr. Brooks suggested that we change
10 the language that said "sufficiently likely to continue" to
11 "is sufficient and is likely to continue" -- we made that
12 change.

13 And we added, instead of "with the attorney's
14 professional responsibilities, we said "with applicable rules
15 of professionally responsibility" just to be consistent.
16 Otherwise, it's essentially the rule that's been -- the
17 language that's been in the rule for 15 years, or whatever,
18 and we haven't really -- I don't think we've had any problems
19 with the rule, and I think we can ask in the comments for
20 programs to let us know if there's anything in this that's
21 problematic, but we think it's worked --

22 CHAIR BATTLE: The way it is.

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1 MS. PERLE: -- the way it is.

2 CHAIR BATTLE: So don't fix it if it's not broken,
3 as somebody told us. Okay.

4 MR. BROOKS: I think we can fix it by putting in
5 two commas --

6 MS. PERLE: Okay.

7 MR. BROOKS: -- in the third line, so it will read,
8 "Change in circumstances is sufficient, and is likely to
9 continue, to enable" Otherwise, the "sufficient" kind
10 of dangles and you're not quite sure what it means.

11 CHAIR BATTLE: Now, it's totally fixed.

12 MS. PERLE: I think that's fine. I think that
13 those are helpful clarifications that don't represent any
14 sort of basic, substantive change, and I think the reason is
15 because we didn't feel that one was necessary; but we're
16 certainly open for comments.

17 CHAIR BATTLE: Okay.

18 MS. GLASGOW: I would like to point out the article
19 I included after this rule, early on when the committee was
20 discussing this rule, and we were talking about the factors
21 that Congress wanted us to look at for eligibility, the
22 Corporation, the first time they did this rule, found that

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1 information simply wasn't available nationwide; it would be
2 too expensive. So they did the best they could and gave
3 local programs basically the discretion to look at certain
4 factors.

5 But, apparently, the federal agency who does the
6 federal poverty guidelines every years is now considering
7 whether to take into account geographical cost of living
8 differences. If they do so, it will be reflected in those
9 figures we get every year that we take 125 percent of, and it
10 would be helpful, in essence, to do that. I just wanted to
11 point that out to you.

12 CHAIR BATTLE: Okay.

13 MR. McCALPIN: John, may I have back my publication
14 that I passed around this morning?

15 CHAIR BATTLE: Is this it?

16 MR. McCALPIN: Yes.

17 MR. BROOKS: Oh, yes.

18 CHAIR BATTLE: Did it ever get to you?

19 MR. BROOKS: It's on its way back to you.

20 CHAIR BATTLE: Okay. This is a wonderful time for
21 us, I think, to take a luncheon break. It's 12:23. We have
22 two new rules to consider this afternoon -- 1609 and 1610.

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1 I'm sorry. Bill?

2 MR. McCALPIN: May I suggest that we are not ready,
3 with respect to 1611, to approve it for publication subject
4 to some editing and that sort of thing. I want to see
5 another version of 1611 and the comment, before authorizing
6 publication.

7 CHAIR BATTLE: Okay. Is that --

8 MR. McCALPIN: And I don't expect that in two
9 weeks, along with the other things we've given you to do in
10 two weeks.

11 CHAIR BATTLE: Okay. We can do that.

12 MS. GLASGOW: Of course, you're not meeting again
13 until November.

14 MR. McCALPIN: First week in November.

15 CHAIR BATTLE: This is where we are. We've got two
16 more rules to consider this afternoon. We will still have in
17 our hopper and in the process several others, and I think
18 that it's healthy for this committee to feel comfortable
19 before we send the rules to the full Board, and I respect
20 your request and I think we can acknowledge it and we'll just
21 simply take up the final review of 1611 in October when we
22 have the opportunity once again to review.

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1 MS. GLASGOW: But you're not meeting in October.

2 CHAIR BATTLE: Well, that's right, because we're
3 meeting at the end of September.

4 MR. McCALPIN: I suppose there's always the outside
5 possibility that we could have an interim meeting of this
6 committee. I don't urge that but there is that -- as we did
7 this time.

8 CHAIR BATTLE: That's right, if need be.

9 MR. McCALPIN: If need be.

10 CHAIR BATTLE: But at the next meeting, whenever it
11 occurs --

12 MR. McCALPIN: Right.

13 CHAIR BATTLE: -- we'll take up 1611 and take
14 another look at it. Okay?

15 I was just about to say that we have been almost
16 right on the clock with our deliberations today and, having
17 completed 1611 this morning with 1609 and 1610 in the hopper
18 for this afternoon, let's take a one-hour lunch break, from
19 12:25 to 1:25, and come back and take up those two regs.

20 (Whereupon, at 12:25 p.m., a luncheon recess was
21 taken.)

22

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

(1:20 p.m.)

CHAIR BATTLE: We're about four or five minutes early, but I think the sooner we get started, the sooner we can take a break on this Saturday afternoon, and all of the members of the committee are now present.

We have on our agenda for this afternoon 1609 and 1610. We also have members of the public who have some comments that they would like to raise about our considerations, which we will integrate into our discussions about these two regulations.

We'll get started first with 1609, which addresses fee-generating cases, with Part 1, and we'll use the same procedure that we've used so far. I'll first read the provision, and then we'll start our discussion, since this is our first impression and first reading of this regulation.

The first section is 1609.1, "Purpose."

This part is designed, (a), to ensure that recipients do not compete with the private bar using scarce Legal Services resources when private attorneys are available to provide effective representation; and (b), to guarantee that eligible clients are able to obtain appropriate and

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1 effective legal assistance. Okay?

2 Are there any questions about this?

3 (No response.)

4 CHAIR BATTLE: The particular changes here were
5 made, as I recall, due to a comment that Bill made about the
6 fact that we're interested in not only protecting the private
7 bar's interest in handling those cases that they desire but
8 also ensuring that eligible clients get effective and
9 appropriate representation, as well.

10 If there are no questions about 1609.1, let's move
11 to 1609.2 which is "Definition."

12 1609.2 has but one definition. "Fee-generating
13 case" means any case or matter which, if undertaken on behalf
14 of an eligible client by an attorney in private practice,
15 reasonably may be expected to result in a fee for legal
16 services from an award to a client, from public funds or from
17 the opposing party, that is sufficiently large to attract
18 private counsel, except that the following cases shall not be
19 deemed to be fee-generating. And we have some exceptions to
20 the general rule.

21 Before we go on to the exceptions, are there any
22 questions about the statement of the preliminary definition

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1 for fee-generating cases?

2 MR. McCALPIN: I wonder if this one could be stated
3 as an exception. I think maybe you have to go ahead and do
4 the whole thing.

5 CHAIR BATTLE: Okay. There's nothing about the
6 original -- I mean, the preliminary -- statement and the
7 definition. We're now going to deal with the exceptions to
8 fee-generating.

9 (A). A court appoints a recipient or an employee
10 of a recipient, pursuant to a statute or court rule or
11 practice of equal applicability to all attorneys in the
12 jurisdiction, and the recipient or employee receives
13 compensation under the same terms and conditions as are
14 applied generally to attorneys practicing in the court where
15 the appointment is made; or

16 (B) An eligible client is seeking only statutory
17 benefits, such as subsistence benefits under subchapter 2 of
18 the Social Security Act, 42 USC 401, et seq., as amended,
19 Federal Old Age Survivors and Disability Insurance Benefits
20 or subchapter 16 of the Social Security Act, 42 USC 1381
21 et seq., as amended, Supplemental Security Income for Aged,
22 Blind, and Disabled, and the recipient does not seek or

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1 accept any fee the effect of which is to reduce the client's
2 recovery below what the client would otherwise receive in
3 retroactive benefits.

4 Okay? Now, this gets us into some questions that I
5 think have been raised, and I know that we've gotten some
6 comments about the fact that there are programs that do a
7 significant amount of SSI work and they don't take the total
8 25 percent or whatever the statutory amount is, they take
9 some amount less than that; and they see this provision as
10 potentially limiting income to their programs.

11 MR. McCALPIN: Let me say that I'm troubled by a
12 definition which says that a case which generates a fee but
13 in which the recipient agrees not to reduce the award is not
14 a fee-generating case. It, you know, is sort of is contrary
15 to logic. It is a fee-generating case; but what you are
16 saying -- and I'm sure we'll have a lot of discussion about
17 this -- is that the program shouldn't take the fee, which
18 isn't to say that it isn't a fee-generating case. It's just
19 a separate provision.

20 CHAIR BATTLE: Right. We're deeming it. And it
21 seems to me what we're attempting to do is give a definition
22 of fee-generating with some exclusions to that condition.

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1 MS. PERLE: For the purposes of this rule, the
2 restriction on fee-generating cases, court appointments and
3 these statutory benefits cases are not deemed to be fee-
4 generating, but only if you agree not to take the fee for the
5 statutory benefits.

6 MS. GLASGOW: Bill's logic is really correct, and
7 we may want to throw in language -- "Except for the purposes
8 of this part, the following cases shall not be deemed to be
9 fee-generating." We're just basically trying to pull out, at
10 the first blush, those cases that are not subject to the rest
11 of the requirement of the rule.

12 MS. PERLE: I think we probably should add, "as
13 used in this part," which we've used in other places.

14 MR. McCALPIN: I'm troubled by seeing, "A fee-
15 generating case is not a fee-generating case if it generates
16 a fee which you don't take." It seems to me to be a peculiar
17 way to go about it.

18 MS. GLASGOW: That's a valid concern.

19 MR. McCALPIN: I also think that the introductory
20 to (A), it seems to me, is rather ineptly stated, that it
21 will not be deemed fee-generating -- "a court appoints a
22 recipient" -- you know, is that really a logical sequence to

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1 "shall not be deemed fee-generating" -- "a court appoints a
2 recipient"?

3 MS. PERLE: It probably should say "when."

4 MR. McCALPIN: Well, there's no "when" here.

5 MS. PERLE: No. There probably should be a "when."

6 Or put the "when" before the colon.

7 MR. McCALPIN: Maybe. Yes.

8 MS. PERLE: And that would help fix it with both.

9 MS. WATLINGTON: Does this eliminate or limit the
10 amount of cases that programs can take, or fee-generating
11 cases, like those SSI and Social Security?

12 MS. PERLE: No. Congress has said that, when
13 they're statutory benefits cases, that they don't think that
14 the programs should be required to refer them out as fee-
15 generating cases, that the programs can take the cases.

16 The Corporation has always said that the
17 legislative history of the LSC Act also requires that, when
18 they take those cases, programs don't take the fees.

19 MR. McCALPIN: May I stop you right there --

20 MS. PERLE: Okay.

21 MR. McCALPIN: -- and say, I want to see that
22 legislative history. I am not persuaded.

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1 MS. PERLE: It's in there.

2 MR. McCALPIN: Okay. I am not persuaded one way or
3 another by what I have seen up to this point, but I want to
4 see the actual legislative history.

5 MR. ASKEW: Linda, can you finish your explanation
6 for Ernestine, to make sure that she understands?

7 MS. WATLINGTON: I understand that.

8 MS. PERLE: Okay. All I'm saying is that what it
9 says is that programs may take those cases, may take the
10 statutory benefits cases -- the Social Security, SSI cases --
11 and the only restriction is that they can't take the fees.

12 MR. McCALPIN: The statute doesn't say that.

13 MS. PERLE: The statute is --

14 MR. ASKEW: The client keeps the fees.

15 MS. PERLE: -- the client keeps the fees.

16 MR. McCALPIN: But the statute doesn't --

17 MS. WATLINGTON: But that's not what's been
18 happening.

19 MS. PERLE: In most cases, that's what's been
20 happening. There are some programs around the country where
21 we have discovered it has been happening, that they have been
22 taking the fees.

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1 MS. WATLINGTON: But it's been going to the program
2 and not the client.

3 MR. MCCALPIN: In some instances.

4 MS. PERLE: In some instances. But the general
5 rule has been that the programs may handle the cases,
6 represent the clients, but they may not take the fees out of
7 the client's recovery. The client's recovery goes to the
8 client.

9 MS. GLASGOW: What happened in 1977, when Congress
10 amended the Act, Congress, I think, in the legislative
11 history, made it very clear that the reason they were making
12 an exception for these cases, to the prohibition on taking
13 certain fee-generating cases, was because the issue had
14 arisen that private attorneys were taking some of these cases
15 and they were taking the fee of the client, and they weren't
16 too happy with that and, also, they wanted Legal Services to
17 take taking these cases.

18 But it was the understanding -- for some reason,
19 Congress was under the impression at that time that our rule
20 already prohibited Legal Services attorneys from taking fees
21 out of the statutory benefits. That's in the legislative
22 history. I agree it's never been really clear in either the

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1 prior rule or this rule, because of the way the rule was
2 written. It's a very kind of bootstrapping --

3 CHAIR BATTLE: It is.

4 MS. GLASGOW: -- kind of a rule and we're trying to
5 clarify that and make it much clearer. What happened,
6 however, was that whenever a request for an opinion would
7 come into the Corporation, we would say, "You cannot take
8 fees out of statutory benefits." That opinion would go out
9 to one grantee. What has happened is, because the rule
10 wasn't clear, and that opinion was never sent to everybody,
11 some recipients never got the word, in essence.

12 We admit that there has been confusion out there as
13 to what has been allowed but it has been a consistent
14 interpretation of the intent and meaning of the statutory
15 language that fees could not be taken from the statutory
16 benefits.

17 MR. McCALPIN: Isn't it the fact that --

18 CHAIR BATTLE: Wait just a minute. Let me do
19 something. Because it gets to be very difficult for our
20 court reporter to take down when I've got five people
21 speaking, so let me first recognize you. And I'll try to
22 look around to make sure that I know who wants to speak, and

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1 then you can speak.

2 I think John was first? I'm sorry. Go ahead,
3 Ernestine.

4 MS. WATLINGTON: I'd like to follow through so I
5 get an understanding here, as best I can. So this is the way
6 that a lot of programs have been able to bring in monies to
7 be able to provide more service to the client community, and
8 it was done on a statewide level.

9 So I mean -- so it was definitely not clear,
10 because we never had private attorneys wanting to take those
11 cases, so it's been like they worked out systems statewide in
12 doing it, so this is the first I've ever heard that you could
13 -- you were not allowed to take the fees in programs; so I'm
14 trying to get a clarification on this.

15 MS. PERLE: We have a stack of general counsel
16 opinions, dating back, probably, to 1977, that say you can't
17 take these fees; and then another stack dating back to when
18 the Act was passed that say you can't take fees out of
19 clients' recovery, generally. So it has been a consistent
20 position. It has never changed, never wavered. It wasn't a
21 factor of who was the general counsel or who was in charge.
22 It was always the position of the Corporation.

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1 CHAIR BATTLE: Okay. Let me let John pose his
2 question. I understand the concern that you're raising.
3 You're getting a consistent response about what the general
4 counsel opinions have been with regard to how to interpret
5 those provisions of the statute and the rules. But John,
6 what is your question?

7 MR. BROOKS: I'd just like to throw in the problem
8 which you have directly alluded to. I know it's come up in a
9 lot of situations, where you've come to a settlement in a
10 potentially statutory fee case.

11 And I know it's been true in Massachusetts that the
12 Attorney General has taken a consistent view that he will
13 settle on a lump sum figure or he will advise his client and
14 have his client come up with a figure for a settlement,
15 knowing -- either knowing ahead of time what the attorney's
16 fee would be, agreed to, statutorily based; but the
17 difficulty has been the conflict between the ethical duties
18 of the counsel who cannot prejudice the client's amount of
19 recovery in any way by collecting a fee out of it.

20 If it's a judgment for the client, and then the
21 statutory fee computed by the court, that's easy, but where
22 it's a lump sum settlement, as far as the state agency is

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1 concerned, then can the program take a fee out of that;
2 should it take a fee out of that? How does that tie in with
3 the regulation?

4 MS. GLASGOW: That can happen whether or not the
5 fees are coming either from the defendant or statutory
6 benefits. We call it the "Jeff D. problem" because that was
7 the Supreme Court case that dealt with that.

8 Different district courts and states are
9 interpreting the Supreme Court decision as either allowing it
10 to be done under certain circumstances -- for instance, if
11 it's taken care of up front in the retainer agreement -- and
12 we just received an article that I believe was published in
13 "Clearinghouse" where an attorney seems to have come up with
14 a very creative way of dealing with it, and we're looking
15 into that right now.

16 In terms of retainer agreements, what we're telling
17 our recipients is, if they have a provision dealing with that
18 issue in their retainer agreement, we're saying we will
19 approve that as long as it is in accord with your local state
20 law, whether it be law interpreting "Jeff D." or professional
21 code, or whatever. But that's almost a separate issue, but
22 it could encompass this, too.

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1 CHAIR BATTLE: Tell me what "Jeff D." stands for.
2 What is the proposition in that case?

3 MS. GLASGOW: Basically, it's an issue of the
4 client is supposed to make the decision whether or not to
5 settle a case, and what happens is, if defendants are coming
6 in and offering a settlement on the grounds that there will
7 be no attorney's fees for the plaintiff's attorney, and
8 plaintiff's attorneys, of course, would like to get
9 attorney's fee and their responsibility to their client is to
10 settle if the client so wants to settle, and they're
11 basically having to give up any chance of attorney's fees.

12 And the court basically said, "Your duty is first
13 to your client. If that means giving up your attorney's
14 fees, you must give it up." But there was some discussion in
15 that case about retainer agreement language.

16 Now, where that's going to come out, eventually,
17 with challenges to that, I don't know, but right now, LSC
18 doesn't want to be in the position of trying to interpret all
19 of the different state laws on this issue so we're basically
20 saying, you know, handle it according to your state law.

21 MR. BROOKS: What's the citation on that?

22 MS. GLASGOW: Do we cite that in here?

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1 MS. PERLE: I don't think -- there's a discussion,
2 on the bottom of Page 10 and 11. I don't think the "Jeff D."
3 case -- I mean it's --

4 MS. GLASGOW: I can provide you with the
5 "Clearinghouse" article on this, too, which I think comes up
6 with some very creative solutions to the problem.

7 MS. PERLE: It's very creative. There may be some
8 ethical problems with some of the solutions that were
9 suggested in that "Clearinghouse" article.

10 But that is a serious set of concerns, and we have
11 not dealt with all of those very complicated concerns in this
12 rule, but it's not, I don't think, directly related to the
13 issue under the Social Security cases that we started to deal
14 with.

15 MR. BROOKS: I just think it ought to be alluded to
16 somewhere --

17 MS. PERLE: It is alluded to, if you read the
18 footnotes.

19 MR. BROOKS: -- in the commentary, if we don't have
20 a specific part in the regulation.

21 MS. PERLE: If you read Footnote 17, it discusses
22 it. It doesn't resolve it.

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1 CHAIR BATTLE: Did you want to review that, and if
2 you've got a followup question --

3 MR. BROOKS: No, I just wanted to raise the issue
4 to be sure that we don't miss it in the shuffle.

5 CHAIR BATTLE: Okay. Bill.

6 MR. McCALPIN: I read 1609.5 to say that a
7 recipient may seek and accept a fee for awards that are
8 approved by a court or administrative body or included in a
9 settlement, if the conditions -- which include, in point
10 4(d), a Social Security case. Am I not reading that
11 correctly?

12 I'm at 1609.5 in the present regulation. Doesn't
13 that specifically authorize a recipient to take a fee in a
14 Social Security case?

15 MS. GLASGOW: It would. Linda sort of did the
16 original opinion on this. It would if it weren't for the
17 fact that it is considered to be -- this is talking about the
18 cases --

19 MS. PERLE: This rule never addressed, in terms,
20 the issue of recovering fees in Social Security cases. It's
21 not in the rule.

22 MR. McCALPIN: Isn't that what it says?

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1 MS. PERLE: There is another guiding principle that
2 has been the policy and, we would say, the interpretation,
3 the legal interpretation, by the general counsel's office,
4 that said, despite the fact that it's not addressed in this
5 rule or specifically in the Act, that the Act prohibits the
6 taking of fees out of clients' recovery, whether it's in the
7 Social Security context or any other context.

8 CHAIR BATTLE: This might be helpful, and I'm
9 following up on you -- let's go back to, I think you cited
10 earlier the legislative history. Is there something specific
11 in the legislative history to the statute that gives general
12 counsel's office its basis for determining that the fees are
13 not to be recovered from Social Security?

14 MS. GLASGOW: Yes, that's basically --

15 MR. McCALPIN: Is there a specific provision in the
16 Act?

17 MS. PERLE: No.

18 MS. MERCADO: No.

19 CHAIR BATTLE: I wanted to look at the legislative
20 history.

21 MR. McCALPIN: So now, we're going to legislative
22 history.

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1 MS. GLASGOW: Yes. The statutory language isn't
2 clear as to why they put it in there. You really have to go
3 to the legislative history to see what they were attempting
4 to do, and that is very clear, that is why we've always
5 interpreted it that way.

6 CHAIR BATTLE: I just wanted you to read it to us
7 so that we can see --

8 MS. GLASGOW: The statutory language?

9 CHAIR BATTLE: No, the legislative history that
10 you're relying on in your opinions.

11 MS. GLASGOW: "Section B provides that no funds
12 made available by the Corporation shall be used to provide
13 legal assistance with respect to any fee-generating case or
14 any criminal proceeding or to provide" -- and it goes on.

15 "The guidelines that the Corporation issues with
16 regard to fee-generating cases should ensure that staff
17 attorneys do not unnecessarily compete with private attorneys
18 for guaranteeing that eligible clients are able to obtain
19 adequate legal assistance in all cases.

20 "Generally, the private bar is eager to accept
21 contingent fee cases. However, there may be instances in
22 which no private attorney will be willing to represent such

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1 an individual, either because recovery of the fee is unlikely
2 or the fee is too small."

3 This is basically the reasoning.

4 MS. PERLE: This is 74.

5 MS. GLASGOW: Yes, this is 74. I haven't had a
6 chance to kind of -- I brought it with me, but let me find
7 the 77 stuff. I brought it all with me. If you give me just
8 one minute, I'll find it.

9 CHAIR BATTLE: Okay. That's fine.

10 MS. GLASGOW: We have quoted it in the footnotes.
11 Which footnote?

12 MS. PERLE: This is from a letter that was written
13 to a Legal Services project director in June of this year.
14 Oh, wait a minute. I'm sorry.

15 All right. This is the Senate report. "Current
16 law provides" -- this is the Senate report for the Legal
17 Services Corporation amendments in 1977.

18 "Current law provides the use of Corporation funds
19 to provide legal assistance with respect to any fee-
20 generating case except in accordance with guidelines
21 promulgated by the Corporation. The Corporation has adopted
22 a regulation defining what constitutes a fee-generating case.

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1 This part of the amendment clarifies the definition
2 promulgated by the Corporation.

3 "The language added by Section 9(A) and Section 10
4 of the amendments would require the Corporation to exclude
5 from the definition of fee-generating Social Security and
6 Social Security Income cases and such other cases that the
7 Corporation deems appropriate because the only recovery
8 sought by the eligible client is the amount of subsistence
9 benefits to which he or she is statutorily entitled. In such
10 cases, Legal Services lawyers would not be required to
11 attempt referral to a private lawyer before providing
12 representation.

13 "The Corporation has treated such cases as fee-
14 generating because the Social Security Act can be interpreted
15 to contemplate payment to an attorney of a fee to be deducted
16 from the award to the client. When Legal Services lawyers
17 provide representation in such case, Corporation regulations
18 prohibit the program from accepting the statutory fee.

19 "They must, nonetheless, first attempt referral to
20 a private attorney who would accept the fee. Such a referral
21 requirement is anomalous, because referral of a private
22 attorney is not required by the Corporation in any other

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1 situation in which a fee would be paid from an eligible
2 client's subsistence benefits.

3 "It should be understood, however, that this is a
4 very narrow exception, not intended to intrude upon the
5 private bar's prerogative in fee-generating cases such
6 Workman's Compensation and tort liability suits and the
7 like."

8 I think, while this may not be as artfully drafted,
9 what it does is it says to us that, when Congress adopted the
10 change in 1977, it was its expectation that it would permit
11 programs to take these fees so long as they didn't take the
12 fees out of the client's recovery because --

13 MS. BERGMAN: Take the cases.

14 MS. PERLE: -- take the cases, excuse me, pardon me
15 -- take the cases, upon the understanding that they would not
16 take the fees because, to force them to refer them out to
17 private attorneys who might handle them and not handle them
18 as well as a program would handle them and also take the fees
19 out, the client would clearly be in worse position if it was
20 required that they be referred to the private attorneys.

21 CHAIR BATTLE: First of all, let me just follow up,
22 because I asked for them to read to us precisely the

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1 legislative intent language so that we could come to
2 understand why it has been interpreted that the statute
3 requires it.

4 What I'm hearing is that there was potentially an
5 underlying assumption that the regs, prior to the
6 implementation of the statute, prohibited Legal Services
7 attorneys from taking a fee from the recovery, and that may
8 or may not have been the consistent reading of that reg prior
9 to the implementation of the statute.

10 MR. McCALPIN: That was not the reg.

11 MS. PERLE: It was not written in the reg. but it
12 was the way the rule had always been interpreted. The fact
13 that Congress said it was in the reg, I guess, is maybe
14 problematic but I think what they meant was they understand
15 that that has been the Corporation's interpretation all along
16 and we approve of that, and we make this amendment to be
17 consistent with what we believe the Corporation has stated
18 all along. That's always been our understanding.

19 MS. GLASGOW: I think we admit up front that the
20 language of the regulation has never clearly said that.

21 MS. PERLE: I think the point is that Congress
22 adopted the change which allowed the Corporation to treat

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1 these cases as not fee-generating cases because they felt
2 that this was recovery of subsistence benefits, that clients
3 should not be required to go to a private attorney and have
4 the private attorney recover fees. And it doesn't make any
5 sense if we then turn around and say, "Okay, but it's okay
6 for you programs who take these cases, but you can take the
7 fees."

8 MS. WATLINGTON: What really happened -- and I'm
9 talking about with the implementation -- is that the bars
10 didn't want -- you know, private bar and legal programs
11 worked together, and this was the way the monies came back
12 into the program because this is when the private bar really
13 started working with the Legal Services program, because the
14 case has never been that the state program worked with the
15 bar, and this has been a way that monies have come back into
16 the programs to provide more monies for service to other
17 programs. So it's never been a true interpretation.

18 MS. PERLE: The working group had a long discussion
19 about this. It took a couple of hours, I think. And I
20 think, while everybody that was there agreed that the
21 Corporation had always interpreted it the way that we're
22 interpreting it, there were those who said, "Let's leave the

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1 language the way it is because it gives a program an
2 opportunity to get this," so they do at least argue that
3 they're not forbidden from taking these fees.

4 And there was some sympathy within the working
5 group for that position, but the majority -- and it was quite
6 a clear majority of the people within the working group --
7 said, "No, that's not the law as it's always been interpreted
8 and we need to have a consistent interpretation of this," and
9 we feel that, from a moral perspective, or whatever, that
10 it's just simply not appropriate for Legal Services programs
11 to charge clients fees, especially when they're dealing with
12 cases where they're trying to recover subsistence benefits
13 when the whole purpose of the rule is to say that the person
14 doesn't have enough -- the representation is intended to get
15 these people enough money to live at a subsistence level and
16 that we shouldn't take fees which will then require them to
17 live at below that.

18 CHAIR BATTLE: We've had one other person join the
19 table. Would you please state your name and, for the record,
20 the program that you come from?

21 MR. MCCOLLISTER: Roger McCollister. I'm the
22 director of Kansas Legal Services.

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1 CHAIR BATTLE: What we're going to do, Roger, is
2 integrate public comment into the discussion, so if there's a
3 concern that you want to raise, please feel free at the
4 opportunity that you need to raise that concern.

5 Maria, did you have a question?

6 MS. MERCADO: No. I just have a feeling that some
7 of the discussion -- and I'm not sure whether I understood
8 Ernestine correctly or not, whether her comments about
9 attorneys getting attorney's fee from Legal Services, whether
10 that was dealing with statutory fee cases where the
11 attorney's fee were not coming from the lump sum settlements,
12 or Social Security, or whatever other kinds of benefits that
13 were being awarded to the client.

14 There is a distinction, because many programs have
15 used attorney's fee for statutory fees but not necessarily
16 from the benefits, as you say, of a Social Security case, and
17 there are those two distinctions.

18 MS. PERLE: Just to make it clear, this does not
19 affect statutory or attorney's fee which are paid by a
20 defendant or paid by an agency. These are only dealing with
21 those situations where the fee, if it was handled by a
22 private attorney, where the fee comes out of the money that

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1 would be awarded to the client.

2 CHAIR BATTLE: There was just one point I was going
3 to make along that line. The way that (A) and (B) differ, it
4 seems to me, is that in (A) we don't talk about where that
5 fee will go because it's dealt with, I'm assuming, somewhere
6 else, whereas, in (B), when we start talking about certain
7 specific Social Security supplemental, insurance benefits --
8 that kind of thing -- we specifically here in (B) talk about
9 the disposition of the fee.

10 I think the point you're raising is that if you're
11 court appointed and there's a statutory provision as to how
12 you get your fee, that's different. Programs do have a
13 right to utilize those fees as part of what they use.

14 MS. PERLE: But the client is not paying those
15 fees.

16 CHAIR BATTLE: Yes.

17 MS. PERLE: The court is paying those fees.

18 CHAIR BATTLE: Yes. And that is the distinction, I
19 think, that Maria was pointing out.

20 MR. McCOLLISTER: Madam Chair -- I'm sorry.

21 CHAIR BATTLE: Go ahead, Roger. I'm sorry.

22 MR. McCOLLISTER: I'm one of the programs that has

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1 charged a fee, so to speak, under 1609, and has chosen to
2 read 1609 as clear statement of federal law.

3 It might be helpful if I could explain what we've
4 done so that you can understand in the discussion of this
5 what some programs have interpreted this to mean and what
6 they've done with it, and then you can, of course, go on with
7 the discussion about what you think it ought be in the future
8 but, at least, you can understand what we've done to date, if
9 I could have a few minutes to do that.

10 CHAIR BATTLE: Sure. Okay.

11 MR. MCCOLLISTER: Let me hand out some things.
12 Here. I'm sure you all have them. I sent this to the
13 Corporation. I have a paper that I did to try and set out
14 some general guidelines on this.

15 I'm here with my deputy director, Mr. Larry Rute,
16 and I'd like to tell you that, in our interpretation of 1609,
17 it goes way back to some things that go beyond the discussion
18 here.

19 We both started in Legal Services back in 1970 for
20 me and 1973 for Mr. Rute, and we built up our local program.
21 I've given you a little brochure that shows something about
22 it, if you have an interest in looking at it. We are a

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1 statewide program.

2 We built that program up and we were in existence
3 when the layoffs occurred in 1981, and we were forced into a
4 situation where we were the people who personally laid people
5 off. I know you've heard from many people about that, but
6 we're one of those people that were in that situation.

7 We saw the number of people being served being cut
8 back dramatically and, way back then, we decided that we
9 would find some way to serve clients, serve high-priority,
10 poverty clients, using other funds. We had a wide array of
11 different types of funding sources we went after, but two of
12 the big areas were advocacy in Social Security and advocacy
13 in Medicaid applicability. In both areas, we used 1609 and
14 the Title II attorney's fees as an intermixture in this
15 process.

16 Basically, to sum it up -- and if you want to read
17 about some of the details of it, it's in this report -- we
18 had a system by which we got grants from the state to do
19 ZEBLI advocacy and to do adult and children Social Security
20 advocacy for SSI benefits, and that now is close to \$1
21 million.

22 We found, in the process, that many of those are

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1 dual awards, that they're SSI and SSDI. I'm sure some of you
2 maybe don't deal specifically in that area. Social Security
3 disability has two sides to it. It has the public
4 entitlement program -- SSI -- and it has SSDI, where many
5 times you're a poor person but have a work history and you
6 can apply for that. But the law, the disability law is
7 exactly the same and, of course, the same thing for
8 disability for children.

9 So we found a way to do that and we built that up
10 into a rather extensive service that has served almost 3,400
11 people with new monthly benefits since we started that in
12 1985. Intermixed with that are Title II cases which our
13 contract requires us to take, and we also take some low-
14 income people who come in outside of that contract and, now,
15 we have about \$500,000 a year in Title II fees that comes in
16 along with the \$900,000 from state money.

17 Now, it all mixes together to make it work because,
18 if somebody comes in with a disability problem, they also
19 have a landlord-tenant problem, an abuse problem -- so on
20 down the line. So we developed a system where we just serve
21 everybody, take the fee, and make it all work and pay
22 financially. Now, we don't take 25 percent; we take 20

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1 percent. We waive the fee in special circumstances. We have
2 a cap so that we never take over a certain amount.

3 There may be a \$30,000 back award but the most
4 we'll ever take is \$4,000 -- the very most -- and usually
5 it's a few hundred dollars up to maybe 12-13 hundred dollars.
6 But it all works, and the benefit to the client has been
7 substantial.

8 Since the beginning in 1985, when we started this,
9 we've gotten new monthly benefits for 3,400 people. We've
10 got \$20.7 million in retroactive awards in the pockets of
11 low-income people. We've gotten \$46.8 million in cumulative
12 new monthly benefits, and that is just cash money that goes
13 to them each month.

14 This does not include the food stamps and all the
15 other things, and the medical cards we got for them. In
16 total transfer payments since 1985, in the pockets of low-
17 income clients, \$67.5 million.

18 Now, most, if not all of these people would not
19 have been served because there's not federal money. You can
20 say, "Well, you can do it with federal money and not take the
21 fee," but we can't do the case, because we don't have the
22 funds to do the case unless you go out and get the outside

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1 money. We're now representing close to 2,000 people a year.

2 The other side that we went to was our hospital
3 services. We developed a system by which we could get low-
4 income people access to health care. We went to hospitals.
5 Hospitals have self-pay admittees that don't have Medicaid
6 cards. The reason they don't have Medicaid cards is the
7 process is just too darn complicated.

8 So we hooked up with hospitals who pay us to get
9 people Medicaid cards. We now have 65 hospitals that we
10 contract with and we've gotten close to 3,000 Medicaid cards
11 for people since 1991 and we're now at the rate of about
12 1,300 to 1,500 a year.

13 Many of these cases turn into disability cases and,
14 if they are a Title II case, we take it and take the fee and
15 it makes the whole thing work because everybody that is in
16 the hospital also has -- many of the people also have --
17 landlord-tenant problems, consumer problems, abuse problems,
18 and so on and so forth.

19 And so we're able to do the whole service. It's
20 much like going out and finding a package of funding. Some
21 of it is within client participation. But it's a package of
22 private and public funding to do legal aid work.

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1 If you put the \$835,000 in revenue that we're
2 getting with the hospital services, \$900,000 in state money,
3 and the \$500,00-plus in Title II fees together, it funds a
4 substantial service to low-income people. It's as much or
5 more as the federal grant that we get. We are, of course,
6 grateful for the federal grant, but it expands that. It was
7 our effort to find new services, despite the fact federal
8 money was declining.

9 Quite frankly, when we took a look at this, we
10 said, "The only thing vague to us is the legislative
11 history." We're lawyers who have gone before administrative
12 tribunals forever, and they're always bringing out opinions
13 that say, "I don't care what the regulations says but our
14 internal opinion is this." The Welfare Department does that
15 to us all the time.

16 We say, "I'm sorry; the law -- the published law --
17 says this." And the published law, up until now, has said,
18 "You may seek and accept a fee, and Social Security is an
19 exception." So we did it. I might even say that we were
20 even monitored and that the monitors felt that we had the
21 authority to do this.

22 Now, I'm not going to get into that, because we

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1 know something about the monitoring in the past, but --

2 (Laughter.)

3 MR. MCCOLLISTER: -- I'm not going to argue with
4 that sort of thing. Now, I know people mean well and I know
5 what Congress probably meant is they did not want the private
6 bar to be infringed upon but, if you go to New York City or
7 Boston, there's a lawyer on every street corner that wants to
8 do a Title II case and take the fee. That's fine.

9 If you go to Kansas, you can't find them. If you
10 go to Missouri or Nebraska or Iowa, you can't find them.

11 MS. MERCADO: Or Texas.

12 MR. MCCOLLISTER: Or Texas. Oh, there's some, and
13 there's so much business, now. Back when these things were
14 discussed in the '70s, Social Security was just a minor
15 thing. But it's a big thing and, with all the cutback in the
16 general assistance at the state level and everything, it's so
17 critical that that advocacy remain in SSI and SSDI, because,
18 as the states cut back in their programs, the only thing left
19 is the federal program, there's not a big increase in federal
20 money to cover that need.

21 As we saw what happened with the last congressional
22 session, we got \$415 million. There's no way to do this

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1 without going out after some other creative approach. My
2 message is, for Heaven's sake, don't cut us off right now,
3 because it will be the worst thing. It will be worse than
4 what we did in 1981 if you block the door.

5 Now, I know 1610 is also on your agenda. I think
6 it's a mistake to change 1609 because I think it goes in the
7 right direction today but, if you have to, at least put 1610
8 in there as it's proposed, because it does take this out of a
9 prohibition on private funds and so, even if you would
10 restrict it from federal funds, if you accept 1610 as
11 amended, as has been submitted to you, it solves our problem.

12 But, from the philosophical standpoint, I really
13 think the future is -- and if you go to every state
14 legislature -- it's some way to find a composite way to
15 contribute, and some of that is from participant
16 contributions. This is not necessarily out of the
17 mainstream.

18 All I'm saying is, we've struggled over the last
19 years and I think we've been extremely successful in finding
20 ways to serve clients. Give us a chance to keep doing that
21 some way or another.

22 MS. PERLE: I just want to clarify one thing.

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1 CHAIR BATTLE: I'd like to first say that we
2 certainly do appreciate your careful thought to this issue,
3 and you bring to bear specific experience that is very
4 helpful to this committee in its deliberations on this issue,
5 and we take the points that you have raised extremely
6 seriously because we do understand that, with our fight to
7 try to increase the funding directly that we can provide to
8 recipients, that there are meager dollars available from
9 Congress and that there are going to have to be some other
10 ways made to be able to increase creatively how we're able to
11 service our clients.

12 So we appreciate your comments, I wanted to let you
13 know, before we launch into all the different positions that
14 various people maintain on these issues.

15 MS. GLASGOW: I would just like to briefly say, and
16 then I'd like Linda to respond to that, I just want to frame
17 this. There's a legal issue and there's a policy issue.

18 We have felt that our interpretations conform to
19 Congressional intent. Although Justice Scalia probably
20 wouldn't agree with our referring to legislative history,
21 that seems to be the only place where the congressional
22 intent is really clear. So we see it as a legal issue rather

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1 than a policy one, as to what we are able to presently allow.

2 The policy issue may be quite different than it was
3 in 1977 but I will point out that, in the latest
4 reauthorization bill, Congress itself is going to make it
5 very clear that fees cannot come out of statutory benefits,
6 so it may be that this committee and/or Board would want to,
7 if they decide the policy should be otherwise, to be aware of
8 that and do whatever you would choose to do. But I think we
9 need to keep the legal versus the policy separate.

10 CHAIR BATTLE: Okay.

11 MS. PERLE: I just wanted to make sure that the
12 committee understands that Roger is talking about a whole
13 combination of programs, most of which would be unaffected by
14 this.

15 CHAIR BATTLE: I think you sent us a letter, too,
16 Roger. I just want to acknowledge that I did receive a copy
17 and I think that Bill also may have received a copy of a
18 letter -- and I don't know if all the other members of the
19 committee did -- in which he pointed out a percentage that
20 would be affected by this.

21 MS. BERGMAN: I have, actually, a question about
22 that.

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1 CHAIR BATTLE: Yes. I did hear you mention several
2 different -- that you'd done some creative things in other
3 ways, so that you've gone to hospitals and got a contract and
4 you've got a contract from the state. And those are other
5 ways, other than just direct recipient funds from Legal
6 Services that you have --

7 MR. McCOLLISTER: Right.

8 CHAIR BATTLE: -- but that what portion -- can you
9 give us a percentage? -- of the private funds or non-Legal
10 Services funds that you get as a result of doing the Social
11 Security work?

12 MR. McCOLLISTER: Well, the actual Title II fees
13 are about \$500,000 a year.

14 CHAIR BATTLE: Okay.

15 MR. McCOLLISTER: The grants from the state are
16 \$900,000 a year, plus. The contracts from our network of
17 hospitals produces about \$835,000. The Title II's are all
18 mixed up and are probably -- we probably do 600 or 700 of
19 those, plus, a year, as far as hearings and decisions mixed
20 up in about somewhere around 2,500 to 3,000 total SSI/SSDI
21 cases.

22 Our total budget is about \$6.2 million. The

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1 federal portion of it is about 36 percent. When we started
2 this journey, it was about 90 percent. Back in 1981, the
3 federal portion of our budget was about 90 percent.

4 It's not that we don't like the federal money; it's
5 just that the federal money has not increased and, I'll be
6 darned -- Larry and I both sat back and said, "Well be darned
7 if we've ever going to do this again, lay people off. We're
8 going to find a way to expand."

9 The other thing I'd like to point out, I pointed
10 out what's happened for our clients, which I think is
11 extremely important, but for our staff, we've added 50 people
12 since 1990. We have a staff of 150. Our funding has
13 increased since 1986 by 58 percent. Our overall services to
14 clients has gone, in 1986, from about 15,000 to 1993, about
15 24,000. It will be about 30,000 this year. We've averaged 7
16 percent raises for the last seven or eight years.

17 So I wanted to emphasize the fact that we're doing
18 something for clients. It's substantial what we're doing for
19 clients. I don't know of any other program that can say they
20 have an increase in services, and these are low-income
21 clients that are reported on your CSRs.

22 We have increased in all categories -- and that's

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1 part of a sheet that I've handed out there -- from '86 to
2 '93, by approximately 62 to 63 percent; but the impact on the
3 rest of the programs has been substantial.

4 We are not a program that is constantly declining.
5 We have had steady growth since we started this process, not
6 only in services to low-income, high-priority clients, but
7 also in our staff, and development, and everything else.

8 CHAIR BATTLE: Now, one other comment that you made
9 that I just want to clarify, you did say that if we consider
10 the legal and policy considerations that have been raised by
11 our examination of 1609, that, to the extent that you now, as
12 a program, have private funds available, if we implement what
13 has been proposed in 1610 for yes, Your Honor Your Honor,
14 specifically, at least, the problem will we taken care of?

15 MR. MCCOLLISTER: Yes. Linda and I had some
16 conversation on that and we have a difference of opinion on
17 this, but she has been gracious, also, to see that 1610 has
18 been set in at the same time so that that does remove the
19 problem, it solves the problem for us. We can then go do it
20 with private and public funds. We won't lose the 500,000, so
21 to speak.

22 But I think it's a mistake, philosophically. I

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1 disagree philosophically. I think it's a mistake, that if
2 you would just do on paper, 1610 solves it for us.

3 MS. BERGMAN: I have a question. I know several
4 states around the country have Legal Services programs who
5 have contracts with their states to do SSI and sometimes
6 related SSD work. If I understand you correctly, your state
7 contracts would go on.

8 In other words, you could continue to contract with
9 the state. What happens to SSI benefits? Does the state
10 attempt to recoup those from the client or does the client
11 get the entire SSI back benefit?

12 MR. MCCOLLISTER: No. The way that works is, if,
13 for instance, you're on a state general assistance program or
14 something like that, while you're waiting, while you're
15 appealing SSI benefits or SSDI benefits, the state is
16 entitled to recover back their medical expenses they put
17 forward and the cash assistance they put forward, et cetera.

18 MS. BERGMAN: Which is why it's in their interest
19 to contract with you to try to get these benefits to begin
20 with?

21 MR. MCCOLLISTER: Yes. And that was our
22 philosophy. The days of just saying, "We're Legal Aid; we do

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1 good things; give us money," are over.

2 MS. BERGMAN: But you don't ask the client for -- I
3 mean, fees can be collected in SSI cases.

4 MR. MCCOLLISTER: Yes.

5 MR. BROOKS: The difference is they are not
6 withheld; they can be -- a private attorney can take a case
7 for somebody on an SSI basis --

8 MR. MCCOLLISTER: Yes.

9 MS. BERGMAN: -- and collect a fee. It's just that
10 the Social Security Administration is not holding it for you,
11 for the attorney.

12 MR. MCCOLLISTER: Right. In SSDI --

13 MR. RUTE: In SSI, you can collect.

14 CHAIR BATTLE: Tell us your name.

15 MS. BERGMAN: A private attorney can collect a fee.
16 It is simply not withheld. It can go into the fee petition,
17 it's not withheld.

18 MR. RUTE: You're right about that.

19 CHAIR BATTLE: Larry, when you speak, come up to
20 the mike, please, and state your name for us. Thank you.

21 MR. RUTE: For the record, my name is Larry Rute
22 with Kansas Legal Services.

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1 CHAIR BATTLE: You can pull a chair up and join us,
2 please.

3 MS. BERGMAN: I'm just asking, in other words, a
4 client who has SSI back benefits, you're not taking any of
5 that money?

6 MR. MCCOLLISTER: No. No.

7 MS. BERGMAN: This is strictly SSDI --

8 MR. MCCOLLISTER: Strictly SSDI.

9 MS. BERGMAN: -- and the money you collect from the
10 state is just for the SSI work or is it also for the SSD
11 work?

12 MR. MCCOLLISTER: Well, just for the SSI work, but
13 the contract anticipates that we'll also do SSDI work and
14 take the fee to make it work from a physical basis, and that
15 stemmed from the fact that many of the awards are do-ables.

16 People have eligibility for maybe half SSI and half
17 SSDI, so the fee is very small, and the state is not involved
18 with the SSDI cases but may be involved with the SSI, but
19 you've got to do the case anyway. So we got into it that
20 way.

21 It makes sense, fiscally, for us to do us to do it
22 because we've found that the state is not paying us, for

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1 instance, to do the landlord-tenant problem and to do the
2 consumer problem and everything else, and so we developed
3 this other service so we could then have the resources to do
4 the other cases because, for every 10 people who come in with
5 an SSI or SSDI case, three of them have some other problem --
6 their landlord is evicting them, their husband is beating
7 them up, something. And, as a Legal Aid attorney, you can't
8 just sit there and do it.

9 Now, if those people are going to get SSDI work
10 done, they're going to have to pay somebody. If they pay the
11 private bar, they won't find anybody to do it, and they won't
12 do the landlord-tenant case, and they won't do the consumer
13 case, and they won't help them get Food Stamps, and they
14 won't education them as to how to maintain their eligibility.

15 But, what's most likely happening is, other
16 nonprofits are getting into this and moving into this area,
17 and they have no philosophical problem with it, and our
18 competition is becoming not the private bar but other not-
19 for-profits who are funded under disability funds -- you know
20 something about that -- who are sitting there saying, "We can
21 do this and we can bring in extra money."

22 The private attorneys, in Kansas anyway, are not

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1 that interested in it. Who is interested in it is other not-
2 for-profits. So it's not a clear-cut "bar versus us"
3 situation.

4 CHAIR BATTLE: Let me see if I can crystallize at
5 least where we are, given the various positions that have
6 been stated.

7 As I understand it, the history as to why the
8 general counsel's opinions have been consistently that
9 Supplemental Security Income -- SSI -- and SSDI, or cases in
10 which Legal Services attorneys are not allowed to take a fee,
11 has to do with the legislative intent language that we had
12 read to us a little bit earlier on.

13 However, the statute itself and, if one were to
14 read the regulation without reading that legislative intent
15 in tandem, is at present at a point that one could interpret
16 the ability -- which is what Roger has done -- to be able to
17 do the SSDI work and take a fee.

18 Now, we are at a point where we are re-examining
19 our regulation. We have before us, as well, the potential
20 next year in reauthorization that this provision will be
21 examined by Congress as well and that its unexpressed intent
22 that shows up in the interpretation that we have from the

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1 legislative intent language that was read to us, we are told
2 may become part of express language in the statute next year.

3 My interest is this: I'd like for us to see -- I
4 know, Linda, you've told us in the working group that there's
5 been a division that, by and large, people agree that there
6 should not be a fee taken from SSDI and SSI work that is done
7 by the program.

8 But, there are programs like Roger's that are at a
9 pivotal point that potentially 1610 corrects the problem for
10 him; and I'm wondering, to the extent that there are other
11 programs out there, exactly where we are because, let me tell
12 you what I'm concerned about.

13 I agree philosophically that I would much rather
14 see a client empowered to get their money in SSI and SSDI.
15 However, I recognize the need for programs to be creative and
16 to be able and willing to look for other funds, other sources
17 of funds, and, in an effort to really promote the use of
18 private funds, and seeking private funds, if we could get a
19 better feel, before we finish this particular regulation, for
20 what the cut is in those programs that are, in fact,
21 potentially reading this regulation the way that Roger is, so
22 that we can enable them with private funds, either through

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1 1610 the way we've proposed it, to continue their work, and
2 to look to make sure that our cut doesn't completely have a
3 devastating financial impact on someone.

4 If there's some way for us to do that, I think that
5 what's happened has been extremely helpful. The fact that
6 Linda has sat down with Roger, talked with him and we've
7 looked at the regulations, and that keeps him in a place that
8 he doesn't lose a half million dollars, I that you know it's
9 a critical question that we really need to look at.

10 So that's my understanding of what the issues are.
11 I think we are going to need some additional information to
12 feel comfortable with whatever it is that we come up with
13 languagewise.

14 I think, too, that we should at this point clarify
15 what our position is. I don't think that leaving it to
16 inconsistent readings in our population is the appropriate
17 position that this committee should take but, at the same
18 time, I'd like to see us not hurt anybody with how we do it
19 because I think it's critical for people to do what Roger has
20 done, which is to be creative and to look for ways to do
21 things.

22 MS. GLASGOW: Are you anticipating getting that

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1 information through the comment process on the rulemaking or
2 before that?

3 CHAIR BATTLE: I'm really saying I'd like to see if
4 there's a way to do it before that. If we have that
5 information here at the Corporation, I don't know.

6 MS. GLASGOW: I think we found out piecemeal about
7 these programs that are taking attorney's fees.

8 CHAIR BATTLE: Okay. Bill?

9 MR. MCCALPIN: I think maybe other members of the
10 committee may not have the benefit of the Wayne County
11 correspondence which some of us have. That is, apparently,
12 another program which is doing essentially what Roger is
13 doing, so that we know of at least one other program
14 operating or purportedly, or attempting to operate in this
15 area.

16 I wonder --

17 MS. WATLINGTON: And Pennsylvania.

18 MS. BERGMAN: Pennsylvania, I think, doesn't
19 collect money from its clients. They do have contracts.

20 MS. PERLE: That would be unaffected by this.

21 MS. GLASGOW: I'd like to point out on the middle
22 paragraph on Page 4 of the rule -- and we have a general

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1 counsel opinion that has gone out to a grantee on this --
2 that there are some situations where the recipients have
3 contracted with states to handle Social Security cases for
4 clients who are on some form of state assistance.

5 The state pays the recipient from retroactive
6 benefits that it receives on behalf of clients in successful
7 cases. While those benefits technically belong to the
8 client, the state takes them to reimburse itself for payments
9 it made during the period that the client should have been
10 receiving Social Security payments.

11 The recipient is paid from funds that would not go
12 to the client basically, because they went to the state at
13 some point, and we have allowed that to happen because,
14 basically, the Legal Services attorney is not taking the
15 money from the client, the state did, at some point, the
16 state is now paying the program to handle these cases; and we
17 have allowed that.

18 MR. McCALPIN: So that it's net to the client?

19 MS. PERLE: It's net to the client but the point is
20 that, no matter who did the representation, the client
21 wouldn't see that money.

22 CHAIR BATTLE: I think it's net and prospective

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1 benefits to the client, right?

2 MS. PERLE: Oh, sure.

3 CHAIR BATTLE: The client ends up in a better
4 position than they would have had the state not contracted,
5 because they've got prospective benefits, as well. Bill?

6 MR. MCCALPIN: A couple of other questions. I
7 agree with you, completely, Suzanne, that there is a legal
8 issue and a policy issue and that we may be inhibited in
9 getting to the policy issue if we are precluded by the legal
10 issue if we are precluded by the legal issue. That's why I
11 think it's important to examine the legal issue first.

12 While I understand and appreciate the fact that
13 there has apparently been a consistent thread of general
14 counsel opinions on the subject, I repeat what I said very
15 early in this, that I would like to see the original of that
16 legislative history myself so that I can form an opinion on
17 that legal issue which you say is before us.

18 Let me ask you, if my initial interpretation of
19 1007(B)(1) is right, that basically what the Congress has
20 said is that no federal funds may be used to support a fee-
21 generating case except under guidelines promulgated by the
22 Corporation, but those guidelines may not prohibit Social

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1 Security cases -- Social Security and other cases -- isn't
2 that essentially what that statute says?

3 MS. GLASGOW: Well, it says other statutory
4 benefits. They don't use the term Social Security in the
5 statute.

6 MR. McCALPIN: I understand, but I've abridged to
7 Social Security. So that all the Congress has said is, no
8 federal funds for fee-generating cases except under
9 guidelines established by the Corporation and those
10 guidelines cannot prohibit recipients from handling this
11 class of cases.

12 MS. GLASGOW: Yes.

13 MR. McCALPIN: It doesn't say anything about where
14 the fee goes?

15 MS. GLASGOW: Right, that is correct.

16 MR. McCALPIN: One last question. Reference has
17 been made to the possibility of using 1610. To use Roger's
18 situation, assuming that the funds he gets from the hospitals
19 are private funds, can they be used to support these cases
20 if, indeed, the statute is properly read to prohibit the use
21 of federal funds for that purpose?

22 If these are private funds, can they be used to

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1 subsidize SSDI cases if the statute is read to prohibit the
2 use of federal funds for that purpose?

3 MS. PERLE: It depends on how you read Section
4 1010(C), whether you consider that 1010(C), which says that
5 prior funds can't be used for things that are prohibited
6 purposes. It depends on how you read that.

7 I have always taken the position that fee-
8 generating cases are not prohibited purposes because there
9 are --

10 CHAIR BATTLE: Guidelines.

11 MS. PERLE: -- because programs may take fee-
12 generating cases subject to guidelines that the Corporation
13 promulgates. So it's not like abortion or desegregation
14 case, which the Congress has said, "These are prohibited; you
15 can't do these under any circumstances. " What Congress has
16 said is that you have to set out guidelines under which you
17 allow certain fee-generating cases to be taken and you don't
18 allow others to be taken.

19 So I've never -- agree with Roger that this will
20 solve his problem. That's not the reason that I took the
21 position on 1610. It's the reason that we proffered 1610 at
22 this time to deal with the issue that you just raised. But I

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1 have always felt that it's been inappropriate to include in
2 1610 fee-generating as prohibited purposes, for purposes of
3 1010(C).

4 MS. GLASGOW: It's the same kind of situation with
5 class actions.

6 MS. PERLE: Right.

7 MS. GLASGOW: It's a type of litigation that you
8 would undertake and Congress has said you can't take class
9 actions except if you follow certain procedures, but we
10 didn't put that in under the private funds restriction.

11 MS. PERLE: Or appeals. There are a whole number
12 of other things that are restricted in some sense in the Act,
13 but not prohibited.

14 MS. PERLE: It's the difference between kind of a
15 cause of action versus the type of litigation that you're
16 undertaking.

17 MS. BERGMAN: And, also, the state funds would not
18 be subject --

19 MS. PERLE: Public funds are used.

20 MS. BERGMAN: -- so there are public funds used for
21 that purpose, which could also be used for support for --

22 MS. PERLE: I think that Congress has said -- if

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1 you accept, at least, the possibility of our interpretation
2 of the legislative history -- what Congress has said is, "We
3 don't want Legal Services funds, federal funds, to be used to
4 support litigation where the client pays the fee.

5 "Whatever private funders want to do, if private
6 funders or the states or other local jurisdictions want to
7 set up some system where there's a co-pay system or whatever,
8 that's their business but, as a philosophical and as a sort
9 of public policy position, we don't want Legal Services
10 programs to charge clients fees for those cases which are
11 supported by these funds."

12 So I think that that -- if we were to take it out
13 of 1010(C), it's consistent with that position. Whatever
14 other funders wish to do with their money, that's fine.

15 MS. BERGMAN: That raises sort of the fundamental
16 policy question here is not just one, obviously, of whether
17 money should be taken by programs from clients' back benefits
18 under Social Security.

19 I think the reason this occupied so much time in
20 the working group was because it really, fundamentally goes
21 to the questions about the mission of this program; and the
22 policy question for LSC is, it's going to deal with not just

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1 the relatively few, probably, programs who are raising this
2 question but programs have been enormously creative all over
3 the country about how to deal with the fiscal constraints
4 we've had over the last several years.

5 They've done everything from direct appeal fund-
6 raising, as in Atlanta and Georgia. You know, hugely
7 creative work has gone on in that arena.

8 But does this Corporation wish to draw a line? I
9 mean, the other -- we could also charge money to clients for
10 cases. There could be co-payments; there could be other
11 sorts of recovery from fees. There could be sliding fee
12 scales. All of those things are possible, and you will find
13 proponents for all of them in the Legal Services community.

14 MS. PERLE: We could allow programs to take
15 personal injury cases and take a fee out of it if they can't
16 find a private attorney who is willing to take the case.

17 MS. BERGMAN: Right. So the question is, at the
18 national level, does one -- does the Legal Services
19 Corporation wish to put any sort of restrictions on that at
20 the national level that would guide or restrict in any way
21 what programs do locally?

22 Because you're going to find a complete array of --

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1 you know, you are not alone, Roger, in having reduced the
2 percentage of your LSC funds coming to your program very
3 substantially, you know, over the last several years, and the
4 way programs have done it, I think, for the most part, has
5 not been by way of taking money from clients. That's not
6 been the majority approach to it, but that's the policy
7 question I think this Corporation ultimately faces.

8 MR. McCALPIN: But we can't get to it, until we
9 decide what the Congress has permitted us to do by way of
10 policy.

11 CHAIR BATTLE: Yes. And what I'd like to see, why
12 I think we need some additional work on 1609, is because as
13 you say that, Martha, I'm pretty sure, had Roger not come
14 forward to tell us about this, we would have been making a
15 decision about this in a vacuum that would have had an impact
16 but for the dialogue that the implications may not have been
17 picked up in 1610 to clear.

18 So it's important for us to get the background
19 information on 1609 before we make a final decision and to
20 encourage people both at the time that they can comment, and
21 at any point in the process, to bring these issues to us so
22 that we can address them as we make our decisions about them.

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1 MR. McCOLLISTER: There are other programs doing
2 this, maybe not as extensive as we've done it, but I do know
3 there are other programs doing it. Whether they want to come
4 forward or not is their own business.

5 CHAIR BATTLE: And the scope of the policy
6 decision, it seems to me, has to do with the scope of what we
7 intend LSC funds to be used for, because we've made a
8 decision about private and public and LSC funds, and we have
9 said, by and large, that we want public funds or private
10 funds that are not LSC funds to be used in accordance with
11 the funding source. To the extent that we can unencumber
12 them, that's been our policy determination with regard to
13 that.

14 So there is a way that those two things can exist
15 in tandem while preserving the policy on LSC funds, it seems
16 to me.

17 MR. McCALPIN: May I address two questions to
18 Suzanne?

19 CHAIR BATTLE: Just a minute. After John.

20 MR. McCALPIN: After John.

21 CHAIR BATTLE: We have to make sure we get
22 everybody in the mix.

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1 MR. BROOKS: The course of the discussion seems to
2 me very clear, that we believe that the attorney's fees
3 should not reduce the client's recovery. In Social Security,
4 I think that's pretty clear. I've raised the question before
5 about settlements in cases where there is a clear statutory
6 fee available in addition to any relief to the client, and
7 the settlement situation still bothers me.

8 Whether we should take a philosophical position
9 that, unless there is a clear judgment for the client and a
10 clear judgment for the lawyer, the recipient should take no
11 fee which might impinge on the client's recovery -- that
12 would be one way to do it.

13 But while we have Roger here to illuminate us on
14 the practices, I just wonder if you've had any experience in
15 Kansas with this problem of having a statutory right with a
16 statutory legal fee available in case of a straight judgment,
17 and you come to a settlement and the public authority, being
18 the Attorney General, or whoever, says, "I'm not going to
19 break this down between the client and the whether lawyer.
20 I'm going to advise my Welfare Department to pay
21 X dollars, and you figure it out."

22 On the other hand, the Legal Services program says,

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1 "We don't want to do that because it might impinge on the
2 client's recovery.

3 Now, as a practical matter, you run into that
4 situation, and how do you handle the allocation, if any, on
5 settlement as distinct from judgment?

6 MR. McCOLLISTER: I don't know. Larry, can you
7 take that one?

8 MR. RUTE: Yes. It's kind of the "Jeff D."
9 business that you were talking about earlier. What we've
10 done -- we heard some mention of the 8th Circuit a little bit
11 ago -- what we're doing in the 10th Circuit under "Jeff D."
12 is, this is the quandary for the attorney.

13 The attorney, let's say I've got a class action
14 right now that deals with juvenile rights of -- or with
15 children in a detention center. And they're going to come to
16 me at some point and they're going to want to settle that
17 detention center case through a consent decree but they're
18 also going to, somewhere down the line, suggest that we waive
19 our fees and, you know, we're caught in it.

20 So what we tend to do in the 10th Circuit is we
21 tell opposing counsel this, that if you're going to approach
22 us on settlement of the case, we're going to bifurcate and

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1 we'll talk to you about the settlement of the case and, as a
2 separate issue, then we'll talk to you afterwards about
3 attorney's fees, but we will not try to intermix the two for
4 fear of getting a conflict situation going with our clients;
5 so we'll break it up into a two-step process.

6 Now, every circuit has a little different way of
7 trying to deal with the "Jeff" problem. I would urge very,
8 very strongly, from a litigation director's standpoint, that
9 through regulation you be very careful in how you deal with
10 that, or we will find ourselves in conflict with our own
11 clients on these attorney's fees, the award issues or 1983
12 award issues, and tread very, very softly, I would say.

13 My impression is to leave it more to the individual
14 program to work that out through its rules of professional
15 responsibility, rather than try to dictate it from the LSC
16 level. These are extremely delicate problems when they
17 occur, and it can be a tough situation.

18 But we bifurcate in the 10th Circuit. We just say,
19 "We'll talk to you about settlement and we'll talk to you
20 about fees. We don't mix the two."

21 MR. BROOKS: Can you do that? In Massachusetts,
22 the Attorney General said, "Absolutely not, I'm not going to

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1 bifurcate."

2 MR. RUTE: Yes. Well, are we going to settle or
3 are we not? Because we never get to that settlement
4 question, then. We don't get that far.

5 MS. PERLE: It's interesting. When I first came
6 back to class from 1988, I spent a lot of time working on an
7 article on the "Jeff D." situation which was sent out to all
8 the litigation directors all over the country; and most
9 people, you know, had had the experience, but there were
10 places around the country where they said, "This is never a
11 problem for us."

12 So it really does, you know -- that we never have
13 the situation where the Attorney General or even a private
14 party on the other side says, "I'm going to just talk about a
15 lump sum. They understand that there's a separate provision
16 for the statutory fee."

17 So I think the answer is that this varies all over
18 the country and I think that you're right, that we have to
19 make sure that there's nothing that we write in here that
20 decides that issue in a way that precludes programs from
21 getting fees in these -- generally, we're talking about
22 class action cases --

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1 CHAIR BATTLE: Class action.

2 MS. PERLE: -- and common fund cases, also has a
3 set of issue where this arises.

4 CHAIR BATTLE: But I hear John saying that somehow,
5 in how we handle this issue, we need to either clarify in
6 comments or otherwise how the settlement issue falls out.

7 MS. PERLE: Yes. If you read, I think it's
8 Footnote 17, and we've discussed the issue there and I don't
9 think that we've fully resolved it, but -- I mean, I know
10 that we haven't resolved it -- except that it's a situation
11 which is sort of problematic and we need to think about how
12 we need to address it, if at all, or what to do with it.

13 CHAIR BATTLE: Bill.

14 MR. McCALPIN: As I said, I have two questions to
15 put to Suzanne, now I'm going to add a comment at the end.

16 Suzanne, Roger said to us that this subject had
17 arisen in monitoring visits that they have had over the past
18 years. I wonder if an examination of the monitoring reports
19 at the LSC would indicate to us which other programs may be
20 engaged in this kind of an activity, if that's one source
21 that we could use to find out what other programs may be
22 taking attorney's fees in SSDI cases.

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1 My second question is --

2 CHAIR BATTLE: Can we leave that up to Martha to
3 look into that, along with Suzanne, to find out?

4 MR. McCALPIN: Some or other. The second question
5 I would ask is, do you know or would you undertake to find
6 out if there is any legislative history within the
7 Corporation leading to 1609.5, the present regulation?

8 MS. GLASGOW: The regulatory history?

9 MR. McCALPIN: Yes.

10 MS. GLASGOW: Yes.

11 MR. McCALPIN: The regulatory history -- how we got
12 to 1609.5 in the face of what you say has been a consistent
13 contrary position.

14 MS. GLASGOW: The regulatory history pretty much --

15

16 CHAIR BATTLE: You're talking about 1609.5 in the
17 current regulation?

18 MR. McCALPIN: In the current regulation.

19 CHAIR BATTLE: All right.

20 MS. GLASGOW: The regulatory history, I think,
21 pretty much mirrors the legislative history, if my memory
22 serves me correctly. That's why we revised the rule.

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1 Congress, in the legislative history, assumed we were going
2 to change the definition of fee-generating case. We didn't
3 do that. Instead, we put the Social Security part under when
4 other representation was not available.

5 I mean, the rule is just a very badly written rule.
6 All of the attorneys in the office got in trouble with it.

7 MR. McCALPIN: I'd like to see the regulatory
8 history of 1609.5.

9 MS. GLASGOW: Okay. Would you also like some of
10 the old opinions? The legislative history, regulatory
11 history --

12 MR. McCALPIN: I want to see the -- I'd rather go
13 to the primary source than the general counsel's opinions.

14 MS. GLASGOW: Okay.

15 MS. PERLE: I can read it to you. This is what it
16 says.

17 MR. McCALPIN: What?

18 MS. PERLE: This is from August 1, 1978. It says:

19 "Legal Services Corporation published for notice
20 and comment a proposal to amend Part 1609, 'Fee-generating
21 Cases,' by adding a new 1609.4(D). The proposal is designed
22 to implement statutory change permitting the exclusion of

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1 Social Security and supplemental income cases from statutory
2 prohibition on accepting fee-generating cases.

3 "After reviewing the comments that were received,
4 the Board of Directors has authorized publication of the new
5 1609.4(D) in final form."

6 MS. GLASGOW: The discussion is actually in the
7 proposed rule rather than the final rule, and this just has
8 the final rule.

9 MR. McCALPIN: Is that the whole regulatory
10 history?

11 MS. GLASGOW: That's the regulatory history in the
12 final rule. The proposed rule to this final rule has a
13 lengthy discussion of --

14 MR. McCALPIN: That's what I'd like to see. John,
15 let me say to you, if, as, or when we get to the policy
16 issue, I am now not prepared to close the door on the
17 possibility of clients in some circumstances paying a fee.

18 And I guess, in that respect, I am influenced by
19 what I know about the practice in the other English-speaking
20 countries which share our common law traditions. And I just
21 -- I won't take a position on it now one way or another, but
22 I am not prepared to close the door on that possibility.

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1 CHAIR BATTLE: Rosie, I think you had your hand up
2 some time ago. I want you to have an opportunity to come to
3 the mike, state your name and your comments.

4 MR. MCCALPIN: Here, Rosie.

5 MS. NEWSOME: This is fine. Rosie Newsome is my
6 name. I'm from South Bend, Indiana, and I'm a client.

7 In the state of Indiana, Social Security or SSI can
8 only be collected in a fee from a private attorney if it's
9 sent to Social Security before it has been filed for. If an
10 attorney files for a client on either Social Security or SSI,
11 without getting a clearing from Social Security, they cannot
12 get any money. They will not be paid one dime.

13 The only way the state takes money from Social
14 Security or SSI is the factor that they have paid medical,
15 doctor, or any bill pertaining to that client. Other than
16 that, nobody gets one dime out of Social Security monies, for
17 the reason that I can see, if I get sick, if I'm trying to
18 get Social Security, it comes through portage trustees, which
19 is state funds, and the only thing that you have to put back
20 into that fund is what you have taken out.

21 Now, I feel that someone getting SSI or disability,
22 whatever they get, they have set a rule now that they won't

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1 go as far back as they have. We have not been able to get
2 but like six months lately. We got -- I take that back.
3 About three weeks ago, we got them to go back a year-and-a-
4 half.

5 That was because this particular man had a
6 pacemaker, and he had been living from one place to the
7 other, different people keeping him, trying to keep his check
8 in contact so he would be able to buy him a pacemaker when he
9 got his back funds. Well, they went back that year-and-a-
10 half. Okay.

11 Then we had an attorney from Legal Service at the
12 support center in Indianapolis, Indiana to get him a medical
13 card, but he did not take any money.

14 It's a hardship as is when you're living on a fixed
15 income. Social Security, there is one family -- one mother
16 now; she don't have her kids any longer -- she's only getting
17 \$382 a month and she had worked all her life. She worked 42
18 years on one job. She's 88 now, and she's only getting \$388.
19 And we had to get a lawyer from Indianapolis to get her a
20 medical card. They were giving her \$10 a month Food Stamps.
21 It's just not fair.

22 I understand Legal Services attorneys need to be

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1 paid, just like any other attorney. I would like to see them
2 get \$150 an hour for just walking in the door, if they could.
3 They go to school. They have to pay their bills just like a
4 private attorney. But the thing about it is, we are
5 not helping our seniors and our children that are already on
6 the bottom, and to take their money is just not right.

7 MS. GLASGOW: I have found the regulatory history
8 and the proposed rule, and it does go through an analysis of
9 congressional intent, and the committee agreed with that.
10 And it was the committee's intent to revise our rule to
11 prohibit the taking of fees and statutory benefits. It
12 wasn't very well done, I agree, in the rule, but the
13 regulatory history of the current rule shows that was the
14 intent, and --

15 CHAIR BATTLE: Can we get a package of that?

16 MS. GLASGOW: Certainly. I'll provide you with
17 everything I can find.

18 CHAIR BATTLE: Everything that you can find,
19 including -- even that I have the letter to Linda Bernard, I
20 don't have the letter from Linda Bernard, and it would be
21 helpful in our package to have it.

22 MS. GLASGOW: Okay.

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1 MR. MCCALPIN: I didn't have it until yesterday.

2 CHAIR BATTLE: Yes.

3 MS. GLASGOW: Linda Bernard's letter. Okay. We
4 have two.

5 CHAIR BATTLE: Just so that we'll have a total
6 package.

7 MS. GLASGOW: Okay.

8 CHAIR BATTLE: I think we're going to -- I really
9 think that, even when we get the information on this, that
10 we're going to have to take some time, and we'll have some
11 discussion, because we've got some decisions to make around
12 how we want to structure the language in 1609.

13 MS. GLASGOW: Okay.

14 CHAIR BATTLE: So we're going to have to come back.
15 I think we've had good discussion on this. We are going to
16 have to come back to it. I think we have expressed and
17 identified what information we're going to need in order to
18 have that comprehensive discussion. Once we've done that,
19 then, I think we can re-examine alternative language to go in
20 1609.

21 MS. WATLINGTON: I wanted to be clear, with no
22 misunderstanding. The same program I was referring to as

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1 Roger, there is no way that I was endorsing taking monies
2 from the client. I was trying to explain the same program.

3 I'm very glad he was here, because no one seemed
4 to understand what I was trying to get to, the point. And
5 it's the same type of program, and I just wanted to make that
6 clear, because it seemed to be we were trying to say it's two
7 different programs, but it is not. We work with the state.

8 What I'm saying is that I want to also advocate, as
9 he was saying, look at the people that you've gotten monies
10 to, that if those monies had not gone in those programs to
11 get those other resources, how many people they have served,
12 and that's what we're about, is serving the client community
13 and getting those dollars out there, and that makes a program
14 more effective to have more clients, the same way as that.

15 So I've never, at any time, been advocating for
16 taking the client's money, but working to make the state pay
17 for Legal Services programs to increase it, to provide more
18 service in the client community.

19 CHAIR BATTLE: And I think that's acknowledge in
20 the note in the middle of the page on Page 4, the issue of
21 the state providing funds, which is a little bit different
22 from directly taking funds from a client. So we see and

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1 acknowledge that in contract situations in that note, I
2 think. Roger.

3 MR. MCCOLLISTER: Thank you. I'll let you go on.
4 But we're just a couple of Legal Aid lawyers from Kansas
5 trying to be aggressive, not trying to cause problems, but
6 just doing our job.

7 CHAIR BATTLE: Do we need to go through the rest of
8 1609 today? We are going to have to revisit it. I'd like to
9 -- I know that John -- how much time do we have?

10 MS. PERLE: It's 2:50 right now.

11 CHAIR BATTLE: Well, 1610 is not long. What's the
12 pleasure of the committee? I'm thinking we are going to have
13 to revisit the whole thing again. Do we have other knotty
14 problems that we need to address in 1609?

15 MR. MCCALPIN: I don't have any knotty ones, but I
16 have a couple things that they may want to think about, if
17 they're going to bring us back -- I don't know whether
18 they're going to bring us back a redraft or whether they're
19 just going to come back to us with a lot of material to
20 discuss the two basic issues that Susan referred to.

21 MS. PERLE: I think our intention is to do the
22 latter, but if you have some smaller issues, I don't know --

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1 I know people are in kind of a hurry to leave, but I think it
2 might be good to discuss them briefly now so that we could,
3 when we come back, come back with a product that you're more
4 happy with.

5 CHAIR BATTLE: Because my thought is, when we go
6 back through this the next time, it will be, as we usually do
7 with the first impression, and really fine-tooth-comb the the
8 whole thing.

9 MS. PERLE: Okay.

10 CHAIR BATTLE: Because the final -- before we get a
11 final, I want to make sure that we've looked at all the
12 issues.

13 MS. PERLE: Okay. I do want to point out, in the
14 same provision, a new change we have, and I don't want it to
15 get lost in the discussion of the other.

16 CHAIR BATTLE: Okay.

17 MS. PERLE: The current rule only reaches those
18 type of statutory benefit programs that are Social Security.
19 I mean, we specifically name Social Security cases. We've
20 included here language that said, "An eligible client is
21 seeking only statutory benefits such as" -- and we go into
22 the citations of the Social Security.

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1 When the committee revised the rule in 1977, they
2 were under the impression that the only type of program, to
3 their knowledge, that fit this description were the Social
4 Security cases. There may be other types of cases that would
5 fall under the Act's language, and we thought it might be
6 appropriate to bring that to your attention and/or ask
7 comments from the field, whether there are other cases in
8 addition to Social Security that should come under that
9 statutory language.

10 CHAIR BATTLE: Veterans' benefits.

11 MR. McCALPIN: The question was really -- a point
12 was raised a while ago --

13 MS. MERCADO: What page are we on?

14 CHAIR BATTLE: Go back to 2, I think.

15 MS. GLASGOW: Page 2, Paragraph (B.)

16 CHAIR BATTLE: The second line in (B).

17 MR. McCALPIN: I guess when the point was made a
18 while ago about the possibility of a program taking on a tort
19 case, was that with other than federal funds? A program, I
20 gather, could not take on a fee-generating tort case using
21 federal funds, that the guidelines which called for it in
22 1007(B)(1) would not permit that. It only permits what's in

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1 (A) and (B) here. Is that right?

2 MS. GLASGOW: No. These are the --

3 MS. PERLE: If other representation was
4 unavailable, if there was a tort -- programs don't take tort
5 cases, but I mean --

6 MS. GLASGOW: Yes. Usually, they have other
7 priorities.

8 MS. PERLE: -- presumably, if a tort case came in
9 where there were -- it could be considered to be a
10 contingency fees case, but if the amount that would be
11 recovered would be so small that no private attorney would be
12 available to take it, then a program presumably could take
13 that.

14 Under the rule, we're saying they could take it but
15 they couldn't take the fee.

16 MR. McCALPIN: They could take the case --

17 MS. PERLE: They could take the case, they could
18 handle the case on behalf of the person, they could represent
19 the person in that case, but they couldn't take the fee.

20 MS. BERGMAN: They couldn't take the contingency
21 fee.

22 MS. PERLE: They could not take it as a contingency

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1 fee case.

2 MS. BERGMAN: Right.

3 CHAIR BATTLE: (B) only takes about the subsistence
4 and statutory benefits. If you read this --

5 MS. PERLE: Right. But there are other situations
6 where programs can take cases that are -- that could be
7 defined as fee-generating cases, if there are no private
8 attorneys available to take those cases.

9 CHAIR BATTLE: Okay. So that's the two turndown
10 letters.

11 MR. McCALPIN: Is that the 1609.3?

12 MS. PERLE: Yes. And then, what it says is, in
13 1609.4, if they can take the case, if it's a fee-generating
14 case but they are permitted to take it because they've gone
15 through the hoops that are laid out in 1609.4, they can take
16 the fee as long as it's not deducted from an individual's
17 recovery of compensatory damages or retroactive benefits.

18 In other words, they can only take a fee if it's
19 awarded or approved by a court or included in federal limits
20 above what the --

21 CHAIR BATTLE: The fee is not deducted from the
22 recovery of compensatory or retroactive benefits. If you get

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1 punitives, if you get --

2 MS. PERLE: Punitives, you probably could, under
3 this language. But I think that there are so few situations
4 where programs actually take those cases -- is that true,
5 Roger?

6 MR. McCOLLISTER: Yes. But your talking about the
7 proposed regulation versus the current regulation.

8 MS. PERLE: That's correct.

9 MR. McCOLLISTER: The current regulation, I can't
10 see any way that you could take a contingent fee, and it also
11 does say you can take the Social Security fee, under the
12 current regulation. But I don't think it's really an issue
13 --

14 MS. PERLE: I don't think it's an issue.

15 MR. McCOLLISTER: -- whether to do tort cases. I
16 don't see that as an issue out there and I don't think you're
17 going to find programs --

18 MS. PERLE: No, I don't think -- I mean, there may
19 be some tort cases --

20 MR. McCALPIN: If you want to make the big money.

21 MS. PERLE: No, I think that there may be some
22 cases that programs take which have a tort component but also

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1 have a civil rights --

2 MS. MERCADO: Like a policy brutality case.

3 MS. PERLE: Police brutality case, that's a perfect
4 example, yes. There are some cases like that that are
5 handled by Legal Services programs, but they're really the
6 exception.

7 MR. McCOLLISTER: Yes. Well, usually where you get
8 the fee is in either Social Security or we've been building
9 jails in Kansas, you get access to justice, and now they're
10 building a youth center, so, overcrowding and that sort of
11 thing. So we have a lot of class actions.

12 MS. PERLE: Or 1988 cases, where you can get these
13 under the Civil Rights Act.

14 MR. BROOKS: I don't see where it says that the
15 program can't take a fee on a tort case. The provision in --

16

17 MS. PERLE: Because tort cases are generally fee-
18 generating cases.

19 MR. BROOKS: Yes. Given a fee-generating case, but
20 it's not under subparagraph (B) here, where it says fees
21 shall not reduce the client's recovery.

22 But then, the other, .3, says that you can take

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1 cases that have been rejected by two other attorneys, and so
2 forth and so on, but I don't see that, in that kind of a
3 case, there is any limitation on taking a fee.

4 MS. PERLE: That appears later, in 1609.4(A)(2).

5 CHAIR BATTLE: Do we want to go through this? It
6 seems that we've already kind of moved into 1609.3 and .4 and
7 .5.

8 MR. McCALPIN: I just have a couple of comments.

9 One, I think Footnote 11 properly should be
10 Footnote 8, because it refers to something which is scratched
11 out up there where Footnote 8 is -- the free referral issue.
12 I think it's misplaced in Footnote 11.

13 MS. PERLE: Okay.

14 MR. McCALPIN: I would also suggest to you that
15 1609.4(B) we talked about yesterday, as I recall, is directly
16 contrary to the Missouri decision.

17 CHAIR BATTLE: You're referencing which one, Bill?

18 MR. McCALPIN: 1609.4(B). This is the fee-
19 splitting case.

20 MS. PERLE: I think we need to read that case,
21 Bill.

22 MR. McCALPIN: What?

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1 MS. PERLE: I think we need to read that case,
2 because I have some recollection of seeing that case.

3 MR. McCALPIN: It's the ACLU case.

4 MS. PERLE: Yes. But I think that there is some
5 distinction between the ACLU and a Legal Services program. I
6 don't remember the details, but I do remember reading the
7 case.

8 MS. MERCADO: But this particular provision, (B),
9 is fairly consistent with most -- I think any -- non-profits
10 that I've ever been involved with, that whatever work or
11 services were done under the auspices of that non-profit,
12 that the fact that that attorney then leaves employment of
13 that facility does not take away from the fact that any
14 attorney's fees or whatever responsibility of the non-profit
15 goes back to the non-profit.

16 MR. McCALPIN: That's exactly what the Missouri
17 case was.

18 MS. PERLE: There is a California case which is
19 exactly consistent with this, where there was a Legal
20 Services attorney that left -- I believe it was the Western
21 Center for Law and Poverty -- and continued in a case where
22 he ultimately received substantial attorney's fees and said

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1 that there was some agreement with the program that said that
2 while he was an employee of the program he would be entitled
3 to keep these fees.

4 And the program said, "No, there was never such an
5 agreement; in fact, it was always understood that if you were
6 an employee and you got fees for the time that you were
7 working it went back to the program." And the California
8 courts agreed with the program.

9 MR. McCALPIN: We may need to explain the
10 divergence of opinion, if that's true, in the commentary.

11 MS. PERLE: Right. But I think we need to read the
12 ACLU case because the California case dealt with a Legal
13 Services-funded program, and I think that there may be
14 differences.

15 MS. GLASGOW: We'll look into this.

16 MS. PERLE: We'll look into it.

17 CHAIR BATTLE: Could there be just differences
18 based on state law or practice?

19 MS. PERLE: There could be. Obviously, there could
20 be. But I have some recollection that there are other
21 differences and there are differences based on the nature of
22 the organization.

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1 CHAIR BATTLE: So can we do some additional, just
2 research, around this issue --

3 MS. PERLE: Yes.

4 CHAIR BATTLE: because this is an issue that can
5 occur if you're working with a firm and you leave, and it
6 would have some similarity in terms of the underlying
7 principles that you would apply, as you would here, that we
8 could expect would be applied in that jurisdiction if it
9 happened with a Legal Services attorney as well. So we
10 really need some additional background.

11 MR. McCALPIN: I suspect this is another one of
12 those instances where the applicable rules of professional
13 responsibility may differ, or the interpretation of them may
14 differ from state to state on what constitutes fee-splitting
15 -- permissible and impermissible fee-splitting.

16 CHAIR BATTLE: That's right. Are there any other
17 points that the committee wants to point out to Linda and to
18 Suzanne that need to be addressed in 1609 -- in any of the
19 other sections of 1609?

20 (No response.)

21 CHAIR BATTLE: Okay. Anything else?

22 MR. McCALPIN: Are we going to do 1610?

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1 CHAIR BATTLE: Yes. I want to move on to 1610.
2 But one other issue, and that is the whole issue as to
3 whether, once there is a recovery, it ought to be deregulated
4 or not as it comes back in, or should it be allocated to
5 Legal Services funds and, therefore, take on all the
6 restrictions that Legal Services funds are required to have?

7 I know there was some discussion about this, and
8 the accounting talks about reimbursement or allocation, and I
9 wonder if there are any specific guidelines given as to how
10 that's to be done, whether it's proportionate share?

11 For example, if you've got an attorney who is
12 funded in whole by Legal Services, and the recovery of the
13 amount of funds is statutory, so it doesn't bear any
14 relationship to the amount of work that was done and, let's
15 say this attorney, after two hours worth of work -- two or
16 three hours worth of work -- goes in, wins a case and wins a
17 fee that would more than compensate the program for the two
18 or three hours of work, do we reimburse the program for the
19 two or three hours and then deregulate the remaining funds
20 or, since that attorney is funded in whole by Legal Services
21 funds, do we reimburse all of the money back to Legal
22 Services?

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1 What's the cut and what are the proposals around
2 how you handle that kind of issue?

3 MS. PERLE: There was a lot of discussion about
4 that very issue in the regs working group. The first
5 proposal that we had for this basically took the position
6 that you reimburse the Legal Services fund for whatever
7 actually came out of the fund and then the rest is
8 deregulated. The working group felt that that was too cute,
9 basically, and that that would raise a lot of red flags with
10 Congress.

11 This position, basically, that's in here now is
12 what is the current derivative income policy of the
13 Corporation, which is that the LSC funds are reimbursed to
14 the extent -- well, in proportion to the amount of LSC. So,
15 in other words, if half the representation was paid for out
16 of LSC funds, half of it comes back to the LSC fund; half of
17 it goes in some other fund.

18 Now, the previous one said that -- the current rule
19 says that you have to return it to whatever fund it came out
20 of, and we felt that it was not appropriate for LSC to
21 dictate derivative income policies for other funders. So, in
22 other words, if half of it's paid with LSC funds and half of

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1 it's paid with IOLTA funds, if the IOLTA fund doesn't have
2 any derivative income requirements, then that proportion
3 could go to a general fund, you know, or it could go --

4 CHAIR BATTLE: Yes, but we aren't going to restrict
5 how other funds do their policy with regard to how they're
6 reimbursed.

7 MS. PERLE: Right. So if the IOLTA or a private
8 funder doesn't have any policy with respect to how you treat
9 attorney's fees that pays for work that was done -- with not
10 going to impose that on another funder. The other funder
11 could do that.

12 We also, there was discussion about whether we
13 should just say we should treat attorney's fees not as LSC --
14 whether we should propose that the Corporation adopt a policy
15 that eliminates the whole derivative income notion. You are
16 certainly free to take that position and nobody in Legal
17 Services would be unhappy if you took that position, but the
18 working group was not prepared to make that proposal.

19 One proposal that the working group did make, which
20 was in the draft up until recently, was to say that
21 attorney's fees, for the purposes of the fund balance
22 regulation, which requires that, if you have over 10 percent

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1 of your LSC fund balance at the end of the year, you have to
2 return it to the Corporation unless you get a waiver, in
3 which case you can keep up to 25 percent.

4 We did propose that, for the purposes of that
5 regulation, that attorney's fees not be considered part of
6 the fund balance. So, in other words, we weren't proposing
7 that they be unrestricted but we were proposing that they
8 shouldn't have to be turned back to the Corporation.

9 We did it in part because we haven't had an
10 opportunity yet to revise, to go back and look at 1628 and
11 revise that, although that's one of the things that's kind of
12 on the agenda. I know that's a little convoluted, and I
13 don't know if people fully understand that issue, but --

14 CHAIR BATTLE: There are a myriad of ways that you
15 can handle it and I just wondered how much thought has gone
16 into it and what the various positions are on how to do that.

17 MS. BERGMAN: The management discussion of this was
18 to the effect that we had some discomfort with treating the
19 sort of account issues around attorney fees in this
20 regulation, that that really belonged in 1630 or 1628 or the
21 audit guide or a variety of other places that deal with the
22 accounting standpoint. And so we made some changes

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1 accordingly, and recommended striking some things from here.

2 But we also recognized that we weren't going to get
3 to everything right away and that, you know, perhaps when we
4 get to those regulations, we may want to fine-tune this reg.,
5 but that, fundamentally, it didn't belong in 1609.

6 MS. PERLE: I don't think the working group really
7 disagrees with that position. We were just concerned that
8 what happens is, particularly in cases that have been going
9 on for a long time, large cases where programs may have
10 worked for years, and suddenly -- a small program works for
11 years on a major class action and suddenly gets several
12 hundred thousand dollars in attorney's fee and in some cases,
13 that might represent 50 percent of their LSC grants, in some
14 case maybe even a larger percentage of their LSC grant.

15 Under the current rules in 1628, they have to give
16 most of that back to the Corporation.

17 MS. BERGMAN: Although we felt that could be
18 handled. That can certainly be handled under waiver policy,
19 so that was not --

20 MS. PERLE: Not the way the rule reads. You'd have
21 to sort of, I think, do some damage to 1628 in order to do
22 that.

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1 CHAIR BATTLE: That's a separate issue from what's
2 actually identified in 1609 as to how the proportions go.
3 And the question I raised had to do with how one might
4 interpret that rule as now proposed, because it seems to read
5 in such a way that you could do the things that I suggested.

6 MR. RUTE: Just a brief comment, as one that has
7 spent a little bit of time working class action cases and
8 trying to collect attorney's fee awards.

9 The one request I would make to the committee is
10 consider a way that the program can be rewarded for
11 collecting attorney's fees. If you set up a system where
12 merely collecting attorney's fees means it has to be all paid
13 back to a funding source, there is absolutely no incentive to
14 collect it in the first place; and attorney's fees are a very
15 important source for many programs -- lots of programs -- for
16 additional revenue.

17 My recommendation, if I had one at all, just
18 hearing about it, is that -- well, let's take an example,
19 that you have a \$50-an-hour attorney handling the case and he
20 receives \$125 an hour as the award, it seems to me that the
21 \$50 amount that LSC covered could be repaid but the remainder
22 of that lode star award could go back to the program as an

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1 incentive to continue to do class action and attorney's fee
2 work.

3 MS. BERGMAN: We're not suggesting that any money
4 go back to LSC --

5 MS. PERLE: No -- well, except under 1628.

6 MS. BERGMAN: -- LSC designated or other.

7 MS. PERLE: There is a lot of history here that you
8 may not be aware of, also. In the McCollum-Stenholm
9 amendment, the amendments that were proposed, there were a
10 variety of proposals that would have eliminated the right or
11 severely restricted the right of Legal Services programs to
12 seek attorney's fees.

13 MS. BERGMAN: And that's not what's being proposed
14 here.

15 MS. PERLE: And that's not what's being proposed
16 here, certainly. But we were afraid that if we changed the
17 rule to say you only had to reimburse the LSC fund for the
18 amount that LSC spent, that would give fodder -- additional
19 fodder -- to the reformers of Legal Services who would then
20 say, "Aha, see, they really are encouraging programs to take
21 these fees and to take these cases, not because of the merits
22 of the case or the substantive issues involved in the case,

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1 but only because would produce additional fees."

2 And so we discussed it again at length but decided
3 that it was not something that the working group wanted to
4 push.

5 CHAIR BATTLE: Suzanne.

6 MS. GLASGOW: I'm in the process of researching the
7 issue of how other federal agencies handle derivative funds
8 from their federal funds and, basically, as a starting point,
9 there's a federal statute that says federally appropriated
10 funds must be used for the purposes for which they're
11 appropriated.

12 The next question is, what about funds that are
13 derivative of that? And the federal government -- federal
14 agencies -- must follow one of two circulars. One is for the
15 ones that are kind of quasi-federal agencies and the other is
16 for federal agencies. And they call -- they use the term
17 "program funds" instead of derivative funds, but it's
18 basically any funds that are earned from the activities that
19 are funded with the federal funds.

20 I've been talking to some attorneys in the General
21 Accounting Office about whether attorney's fees ever fell
22 under this idea of program funds, and the guy basically kind

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1 of laughed and said, "How can you even be asking me the
2 question? If they're derivative of the federally funded
3 activities, then yes, they would be."

4 So the federal government requires, when a program
5 gets these program funds, that it be turned back in to the
6 same activities that are being funded with the federal funds
7 or helps pay the matching fund requirement.

8 There is a third requirement. I'm not exactly
9 sure, because I'm not an accountant, what it means, but it's
10 sort of an offset type of thing.

11 CHAIR BATTLE: That kind of background, it seems to
12 us, is helpful to us in understanding how we can fashion our
13 response to this issue.

14 MS. GLASGOW: Right.

15 CHAIR BATTLE: So if we get additional -- I know
16 Linda is saying there's additional background and history
17 around how the working group put its thought into coming up
18 with the proposal that it submitted to management and we've
19 heard a little bit about how management feels that accounting
20 issues ought to be handled somewhere else other than here.

21 But, at some point, we're going to have to make a
22 determination that's a policy determination, as this

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1 committee, as to which way we want to go and what kind of
2 policy considerations we want to guide us as to what to do
3 with what essentially are derivative funds that programs
4 receive as a result of their work.

5 MS. MERCADO: Suzanne, in this, whenever you're
6 talking about those derivative funds or program funds that
7 they get, that are going to be used for the same purposes
8 that the initial funds were used, though, doesn't that, in
9 and of itself, allow for that particular agency, whether it's
10 in a regional office or whatever it is, to keep those funds?
11 They're just going to have to use it for the same kind of
12 program work.

13 MS. GLASGOW: Right. Actually, they're talking
14 about, in this circular, for the money staying with the
15 grantee. The grantee gets the money, the grantee uses the
16 money for the same purposes. It doesn't necessarily have to
17 go back to the grantor.

18 CHAIR BATTLE: Yes. The issue is no longer whether
19 the money goes back to the grantor. The issue is the
20 proportionality by which you assess and how you assess in
21 which fund balance you place the funds -- whether it can go
22 to general, whether it has to go specifically to LSC with all

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1 the restrictions that go with LSC, or whether there's some
2 other way to divide it up.

3 Do we divide it up based on hours? Do we divide it
4 up based on proportions from the attorney who did the work?
5 We have to come up with some policy consideration that
6 undergirds our decision as to what that split ought to be.
7 We've got one on the table, but I'd like to know some of the
8 history behind other considerations, what the government does
9 in other instances so that, when asked about this and when
10 this issue would come up in reauthorization, we have a sound
11 basis for where we are and what it is we adopt.

12 MS. PERLE: Yes. I think you need to have a packet
13 that includes also the proposed LSC regs that were proposed
14 in the late 1980s on this set of issues also by, not your
15 immediate predecessor board, but two boards back, which
16 started out basically saying that all attorney's fees that
17 were earned had to go back to the Corporation. That's where
18 they started. They didn't end that way and the rule was
19 never implemented because Congress prevented it from being
20 implemented.

21 CHAIR BATTLE: Which is helpful information to
22 have, too. Okay. Does anybody else have any questions about

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1 1609? We know we're not going to finish it. I'd like to see
2 if we can at least take a stab at 1610 today.

3 (No response.)

4 CHAIR BATTLE: Okay. "1610. Use of Funds from
5 Sources Other Than the Corporation."

6 "1610.1 Definition: As used in this part, the
7 phrase 'purposes prohibited by the Act or Corporation
8 regulations' refers to activities prohibited by the following
9 sections of the Act and those provisions of the regulations
10 that implement such sections of the Act.

11 "(A)." And then we start by doing the section
12 numbers. I'll identify, rather than going through all the
13 numbers, the issues

14 (A) -- Political activities;

15 Our new (B) has to do with activities inconsistent
16 with professional responsibilities;

17 Our new (C) has to do with criminal proceedings;

18 Our new (D) has to do with actions challenging
19 criminal convictions;

20 Our new (E) has to do with advocacy training;

21 Our new (F) has to do with organizing activities;

22 Our new (G) has to do with abortions;

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1 Our new (H) has to do with school desegregation;
2 and

3 Our new (I) has to do with violations of Military
4 Selective Service Act or military desertion.

5 What we have had stricken, it seems to me, is
6 legislative and administrative representation, fee-generating
7 cases -- and that's it.

8 MS. BERGMAN: And representation of juveniles.

9 CHAIR BATTLE: And representation of juveniles.

10 Bill?

11 MR. McCALPIN: I would suggest there, I understand
12 why you eliminated 1007(A)(5), but if we have a regulation
13 that says, "use of funds from sources other than the
14 Corporation," and we intend that people get their information
15 about legislative activity from a different part, shouldn't
16 there be some kind of a cross-reference?

17 Somebody could look at this and think that these
18 are the only prohibitions on the use of funds, and not think
19 to go to the regulation on legislative and administrative
20 advocacy or juvenile or whatever.

21 MS. PERLE: But there is no restriction on
22 juvenile. That's why that's struck. That was changed in

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1 1977.

2 MR. McCALPIN: Yes. But it just seemed to me that
3 to say that we're eliminating it because it's set out in
4 1612, unless that appears when the regulation comes out,
5 somebody is not going to look at 1612. I just think that,
6 somehow or other, we ought to flag it.

7 CHAIR BATTLE: In the comments, can we --

8 MS. PERLE: We certainly can do that in the
9 comments.

10 CHAIR BATTLE: Why don't we, in the comments,
11 particularly -- and I hear what Bill is saying. If you
12 strike it here, it will appear, since there is still this
13 provision in the Act, that we have stricken it without any
14 consideration of it being addressed elsewhere and we can, in
15 the comments, it seems to me, address that.

16 MR. McCALPIN: Somehow or other, it seems to me,
17 we've got to do it. Do people read the comments?

18 MS. PERLE: They certainly read them when they
19 first come out. They're not included in the CFR when it's
20 published.

21 MR. McCALPIN: They are not included in the CFR.
22 Do we ever footnote these things?

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1 MS. GLASGOW: I don't know if the CFR does. We
2 could add it here and just say, "See 45 CFR" --

3 MS. PERLE: We could maybe do something, put
4 something at the end.

5 MS. BERGMAN: There's sort of a notice issue. The
6 title of it is "Use of Funds from Sources other than the
7 Corporation" which does imply that this is the section that
8 covers that.

9 MR. MCCALPIN: Yes.

10 MS. BERGMAN: So that a cross reference of some
11 kind, either in the little regulatory reference cite or
12 somewhere, clues you to the fact that you might need to look
13 beyond this --

14 MS. GLASGOW: I will note that 1632 is in the same
15 situation, because that was passed after 1610 was, and it
16 also deals with private funds.

17 MS. PERLE: Right, except it deals with --

18 MS. GLASGOW: However, that may be changed, once we
19 get to --

20 MS. PERLE: At the moment, it doesn't belong in
21 here at all because it's not a prohibited purpose under the
22 Act. That deals with redistricting. There's nothing in the

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1 Act on redistricting now.

2 MR. BROOKS: I think this ought to be left in and
3 the footnote explain that it is also duplicated in the other
4 section, rather than leave it out and say that 1612 covers
5 it.

6 MS. PERLE: The problem we have right now with 1612
7 is that the restrictions that are contained in 1612 are sort
8 of a mish-mash of restrictions that are found in the LSC Act
9 and restrictions that are found in the riders to the
10 appropriations language.

11 The restrictions that are in the LSC Act, under
12 1010(C) of the Act, also apply to private funds. The
13 restrictions that are found in the riders do not apply to
14 private funds, only apply to funds coming from --

15 MR. McCALPIN: Appropriated.

16 MS. PERLE: -- appropriated through that particular
17 Appropriations Act, and so it's really very confusing to say
18 that basically this rule says anything that's prohibited
19 under 1612 is also prohibited to be done with private funds
20 whereas, within 1612, there's a whole set of -- these are
21 prohibited to be done with private funds; these are
22 prohibited to be done with LSC and private funds, these are

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1 prohibited only with LSC funds.

2 It's so confusing, and we've been trying to make --
3 we're working on a redraft of 1612, which will hopefully make
4 it somewhat simpler, but it will still have that inherent
5 confusion if you have it in 1610.

6 I think that the appropriate thing to do, I think
7 the better thing to do is what Bill has suggested, which is
8 to put a reference in here which basically says there may be
9 other activities, and look to the other rules to see what
10 other restrictions there are on private funds.

11 MR. McCALPIN: And maybe we ought to say which
12 rules.

13 MS. PERLE: Right.

14 MR. McCALPIN: Not just, "look someplace."

15 MS. PERLE: Right. "Look at 1612 and 1632 for
16 other restrictions."

17 MR. McCALPIN: Right.

18 MS. PERLE: And I think we can do that within the

19 --

20 CHAIR BATTLE: Yes, that would cover it, I think.

21 MS. PERLE: Right.

22 CHAIR BATTLE: I was looking for something that

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1 would make the definition comprehensive and not exclude
2 consideration of other places where purposes prohibited by
3 the Act might be further defined.

4 MS. PERLE: I think that what we ought to do is
5 just add another section -- 1610.6 or something -- that says,
6 you know, we have to look to these other provisions for other
7 activities that are restricted, for which the use of private
8 funds is restricted. I think we can do that.

9 MS. BERGMAN: I would hate for legislative advocacy
10 to appear as something that's a prohibition. To have it
11 grouped with things which are clearly substantive
12 prohibitions, I think, is also misleading.

13 MS. PERLE: Right.

14 MR. McCALPIN: Yes.

15 MS. GLASGOW: It's very much like fee-generating --

16

17 MS. GLASGOW: It is, but I didn't want to say that.

18 CHAIR BATTLE: "1610.2 -- Prohibition. Funds
19 received from another source for the provision of legal
20 assistance shall not be used by a recipient for purposes
21 prohibited by the Act or Corporation regulations, unless such
22 use is authorized by 1610.3."

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1 So we wait with bated breath for 1610.3

2 (Laughter.)

3 MS. BERGMAN: Luckily, it's short, so we can do it
4 in one breath.

5 CHAIR BATTLE: "1610.3 -- Authorized Use of Other
6 Funds. A recipient may receive public, IOLTA, or tribal
7 funds and use them in accordance with the purposes for which
8 they are provided."

9 What about just plain private? We have public,
10 IOLTA, or tribal, but --

11 MS. PERLE: 1610.2 deals with private funds.

12 CHAIR BATTLE: But it doesn't say private, it says
13 funds.

14 MS. PERLE: It follows the way that the Act sets it
15 out, which basically says you can't use it for any of these
16 other funds for uses prohibited by the Act, but then makes an
17 exception for public and tribal funds.

18 We could write that more directly, which says we
19 could make the prohibition in 1610.2 applicable only to
20 private funds, and maybe that would be --

21 MS. BERGMAN: And yet I think we've tried to stay
22 away from that, because in the case of IOLTA funds, what we

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1 like to avoid is getting caught in every state's decision-
2 making process about this and determination whether they're
3 private or public.

4 It's a distinction that really doesn't quite work.
5 In fact, what we are permitted to authorize is the use of
6 funds that are public IOLTA travel funds for the purposes for
7 which they are given.

8 CHAIR BATTLE: Now, when I read this, let me tell
9 you what I see. And maybe I'm weary. I see a statement
10 which prohibits not just LSC funds but all funds, unless
11 they're in 1610.3. You don't mention private funds, so --

12 MS. PERLE: They're covered by 1610.2.

13 CHAIR BATTLE: So private funds, then, are subject
14 to the prohibitions.

15 MS. PERLE: That's right. That's exactly right.

16 CHAIR BATTLE: Only public funds or IOLTA funds or
17 travel funds are not subject.

18 MS. PERLE: Now, under the reauthorization bills,
19 to varying degrees, those bills deregulate the use of private
20 funds.

21 MS. BERGMAN: But we're not there yet.

22 MS. PERLE: We're not there yet, and there's a

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1 difference between the House bill and the Senate bill with
2 respect to that, but they do, to varying degrees, deregulate.

3 MS. BERGMAN: But this change, alone, would be
4 helpful in clarification about the use of IOLTA --

5 MS. PERLE: In California, the general counsel's
6 office has written a long, involved letter, which concludes
7 that, for purposes of 1010(C) that IOLTA funds are to be
8 considered public funds, and you find in different states
9 that IOLTA funds are considered public for certain purposes,
10 private for certain purposes, and it's very confusing, and we
11 felt that it was really most appropriate to just have the
12 Corporation take a consistent position to treat IOLTA funds
13 as public, in the same way that public funds are treated. We
14 don't want to say that they're public funds.

15 CHAIR BATTLE: We never define public or private.
16 We leave that up to creative thinking.

17 MS. GLASGOW: I believe we do have a definition of
18 public funds right now in 1600. "Public funds means the
19 funds received directly or indirectly from the Corporation or
20 a federal, state, or local government or instrumentality of a
21 government." That's vague enough. I mean, even with that
22 definition, we had trouble determining whether IOLTA funds

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1 were public or private in any specific state.

2 CHAIR BATTLE: Is a state bar an instrumentality of
3 a state?

4 MS. PERLE: Some of them are --

5 MS. GLASGOW: Some are created by statute.

6 MS. PERLE: -- but they have a separate IOLTA
7 commission which is an instrumentality of the state bar which
8 may be an instrumentality of the state government, or the
9 court, but it's very convoluted. I'd forgotten about that
10 definition. But that is a general definition and we felt
11 that we could treat IOLTA funds in the same manner that
12 public funds are treated, consistent with that.

13 CHAIR BATTLE: Okay. "1610.4 -- Accounting. Funds
14 received by a recipient from a source other than the
15 Corporation shall be accounted for as separate and distinct
16 receipts and disbursements consistent with the requirements
17 of Part 1630 and the LSC audit guide."

18 MS. PERLE: This rule was passed before there was
19 an audit guide or Part 1630, and so what we felt was that the
20 Corporation has already directed the manner in which these
21 funds are to be accounted for in those two documents.

22 CHAIR BATTLE: How do you read this, "and

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1 attorney's fees"? Those are funds received by a source other
2 than the Corporation. Are they accounted for as a separate
3 and distinct receipt and disbursement?

4 MS. PERLE: They're accounted for in a manner
5 consistent with the requirements of Part 1630 --

6 MS. BERGMAN: And they're accounted for in Part
7 1609, right now. Unfortunately, there are accounting things
8 in 1614, in 1628, in 1627, so, in one sense --

9 CHAIR BATTLE: So I see now your point about
10 wanting to take all accounting --

11 MS. BERGMAN: I don't think our whole regulatory
12 process should hang up over that, you know, but it would
13 certainly be a preferable result to get there so that the
14 accounting pieces of this are in one place and the substance
15 is elsewhere.

16 MS. PERLE: This set of regulations we've put
17 together at various times in our history under various sets
18 of circumstances and with differing degrees of care.

19 MS. BERGMAN: I think right now, though, you just
20 have to be consistent with LSC regulations and the LSC audit
21 guide.

22 CHAIR BATTLE: Yes, that's a good way to say it.

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1 Waiver. "1610.5 -- Waiver. Any provisions of this
2 part may be waived by the president of the Corporation when
3 necessary to permit the Corporation to make a contract or
4 other arrangement for the provision of legal assistance with
5 any private attorney, law firm, state or local entity of
6 attorneys or a legal aid organization that has a separate
7 public defender program."

8 I think that's fine. You're not really adding --

9 MS. PERLE: We're not adding anything. We're just
10 clarifying that's the president of the Corporation, not the
11 President of the United States or some other president.

12 CHAIR BATTLE: Bill?

13 MR. McCALPIN: May I end my day by engaging in my
14 favorite sport of nit-picking?

15 MR. ASKEW: Can we vote on that?

16 (Laughter.)

17 CHAIR BATTLE: The day wouldn't be complete without
18 it, Bill.

19 MR. McCALPIN: In 1602, the second line, I would
20 suggest that, for "a purpose" or "any purpose", is better
21 than the plural, because if you just have one purpose, it's
22 not purposes --

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1 MS. PERLE: How about "any purpose"?

2 MR. McCALPIN: I would think "a purpose" or "any
3 purpose." And, in the last full line of Footnote 6, I think
4 I remember from grammar school that you would not have a
5 possessive on the section number -- 1010(C)'s.

6 MS. BERGMAN: They taught you that in elementary
7 school?

8 (Laughter.)

9 MR. ASKEW: You had to use "McGuffy's Reader" back
10 then.

11 MR. McCALPIN: Didn't everybody?

12 MS. PERLE: How about if we say "would not be
13 subject to the Section 1010(C) restrictions"?

14 MR. McCALPIN: Or "the restrictions of 1010(C)."

15 MS. PERLE: Whatever. We get the drift.

16 MR. ASKEW: Consider those nit-picked.

17 CHAIR BATTLE: Well, we are earlier than we
18 expected but, again, since we're going to have to go back
19 through 1609, we're at a good point, I think, to close out
20 this session.

21 MS. PERLE: We haven't made any decision on 1610,
22 have we? Or have we?

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1 CHAIR BATTLE: Well, in 1610, are there any other
2 questions? I think we can take 1610 --

3 MR. McCALPIN: Do you want to keep 1610 in tandem
4 with 1609?

5 CHAIR BATTLE: In the process, yes. When we send
6 them out for comment, I think we need to sent it for comment,
7 but it's okay if the few corrections that we have, we get
8 them back, I think that doesn't hurt the process, because
9 1610 is short, to the point, and we didn't have much
10 discussion around the issues there.

11 MS. PERLE: I found another nit.

12 CHAIR BATTLE: Okay.

13 MS. PERLE: There's a colon and it should be a
14 semicolon at (D). I just want to make sure that everybody
15 understands that the reason for all of these changes in
16 1610.1 is because this was never revised after the amendments
17 to the LSC Act in 1977.

18 For example, the Congress repealed the restrictions
19 on the representation of juveniles, but it's still in this
20 rule, and the numbers are all off. It's just a cleanup,
21 something that should have been done a long time ago.

22 CHAIR BATTLE: I'd like to especially thank the

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1 members of the public that have been here with us, the folks
2 from Kansas, Rosie and Mimpie. We always appreciate your
3 presence.

4 In coming to participate in this process, I think
5 it has enriched our discussion today and I certainly, as
6 always, thank the two of you at the table for all your hard
7 work.

8 We are about to call this session to a close, but
9 we've got to get one last word from Bill, first.

10 MR. McCALPIN: Could we just have a recapitulation
11 of where we are in terms of the meeting the week after next,
12 what we expect there for that and what we don't expect for
13 that?

14 CHAIR BATTLE: Okay. As I understand it, we
15 expect, at the meeting at the end of the month, that,
16 quickly, 1602 would be presented, that we don't expect 1611
17 --

18 MS. GLASGOW: I would like to suggest that we might
19 have that available. If we do, would you be interested in
20 considering that, if we can get to that?

21 CHAIR BATTLE: We're going to have a short meeting
22 of maybe about an hour and a little bit over an hour.

1 MS. PERLE: Why don't we say that we will see if we
2 can get it to you? You don't have to discuss it. But if we
3 can get it to you in advance, then you'll have that much more
4 time to consider it.

5 CHAIR BATTLE: If you can get 1611 to us, we'll be
6 happy to look at it earlier.

7 MR. MCCALPIN: Aren't we going to have 1607?

8 CHAIR BATTLE: I was about to get to that. 1607
9 should be in its final, revised form to review, with the
10 changes that were identified and should be on the transcript
11 of this meeting. And outside practice of law, 1604?

12 MS. GLASGOW: I don't think we decided we'd do that
13 in two weeks.

14 MS. PERLE: That may be difficult, because there
15 are a lot of research issues that we need to do.

16 CHAIR BATTLE: Okay, well, then, 1610 --

17 MS. GLASGOW: 1602 and --

18 CHAIR BATTLE: Yes. Okay.

19 MR. BROOKS: Are we going to be able to have a
20 transcript between now and September 30?

21 CHAIR BATTLE: Pat?

22 MS. BATIE: Yes.

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1 MR. BROOKS: Okay.

2 MR. McCALPIN: As I understand, what we intend to
3 do on the 30th is to send 1602 and 1607 to the Board for
4 adoption as final regulations -- is that right -- send it to
5 the Board on October 1?

6 CHAIR BATTLE: No. 1602 is going to be
7 republished, but it has to go to the Board first. I thought
8 on 1602, Bill -- let's go back and think about our
9 discussion. I thought 1602, we were going to at least send
10 back through our process -- not all the way back to the
11 working group but through our process -- to review carefully,
12 because it's never been done.

13 MS. PERLE: We talked about January or something.

14 CHAIR BATTLE: Yes, in January, because we've got
15 gender issues to go back through and comb through that
16 regulation.

17 MR. McCALPIN: Right. That's why I --

18 CHAIR BATTLE: We found some delegation issues that
19 we wanted them to look at. The real issue now that I'm
20 thinking about it, 1602 is going to be handled in a
21 notational vote before we ever get to that meeting.

22 MR. McCALPIN: That's right.

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1 CHAIR BATTLE: So, to the extent that that's the
2 case, we really aren't going to be dealing with 1602.

3 MR. MCCALPIN: That's right. That's right.

4 CHAIR BATTLE: That information will already have
5 been voted on by the full Board, so 1602 is out, so we're
6 having a shorter meeting as we go.

7 1607 will not be --

8 MS. PERLE: Excuse me. You did talk about that
9 this committee would look at 1602 when we came back, right?

10 CHAIR BATTLE: Yes, but I'm not certain --

11 MS. GLASGOW: I think the vote is just to withdraw
12 it out of the "Federal Register" in a timely fashion. That
13 doesn't mean you cannot then consider it --

14 CHAIR BATTLE: But my view is that we can't do it
15 in the one hour we've got.

16 MS. GLASGOW: Okay.

17 CHAIR BATTLE: 1602, in my view now, needs to be
18 reviewed, just like all the rest of the regulations, as a
19 proposal of a rule.

20 MS. GLASGOW: Okay.

21 CHAIR BATTLE: We want you to go back and look at
22 gender and delegation initially but we need to review it.

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1 MS. GLASGOW: Okay.

2 MR. McCALPIN: Okay.

3 CHAIR BATTLE: 1607, with the changes, should be --

4

5 MR. McCALPIN: That we will send to the Board for
6 adoption as a final regulation.

7 MS. PERLE: 1607.

8 CHAIR BATTLE: 1607, yes, should be prepared for
9 our final review; 1611, if you have it; 1604, if you have it;
10 1609, we know you will be getting additional information to
11 us on that.

12 MR. McCALPIN: But probably not until the November
13 meeting.

14 MS. PERLE: Probably November.

15 CHAIR BATTLE: 1610 is probably the only thing.

16 And 1610, we've also agreed will not go out for comment until
17 it's in tandem with 1609. So we have a very short meeting.
18 We will probably be able to get done what we need to do in an
19 hour.

20 So now, I'll finish my -- I always have a final
21 statement that Bill participates in.

22 Thanks to all my committee members for your hard

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1 work and taking your time to come to Washington on an off
2 schedule to try to get this work done. I feel we're making
3 progress.

4 One thing that we can consider, the agenda that we
5 got and proposal for where we need to be going and what we
6 need to be looking at, give some thought to that at the
7 beginning of each meeting until we actually have some time
8 that we can set aside to really chart out where we want to go
9 and how we want to consider it.

10 I want the committee members to give some real
11 thought to what we have ahead for us, so we can set some
12 realistic goals for next year that, hopefully, we can achieve
13 as a committee. Thank you very much. I will not entertain a
14 motion for adjournment.

15 M O T I O N

16 MR. McCALPIN: So moved.

17 CHAIR BATTLE: Bill has moved.

18 MR. BROOKS: Second.

19 CHAIR BATTLE: It's been seconded. All in favor?

20 (A chorus of ayes.)

21 CHAIR BATTLE: Any opposition?

22 (No response.)

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