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LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

JUN 22 1994

Executive Office

OPERATIONS AND REGULATIONS COMMITTEE MEETING

OPEN SESSION

**RETURN TO CORPORATION
SECRETARY ARCHIVES FILE**

Monday, June 20, 1994

9:10 a.m.

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

Diversified Reporting Services, Inc.

918 16TH STREET, N.W. SUITE 803

WASHINGTON, D.C. 20006

(202) 296-2929

BOARD MEMBERS PRESENT:

LaVeeda Morgan Battle, Chair
Maria Luisa Mercado
F. Wm. McCalpin
Ernestine P. Watlington

STAFF PRESENT:

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

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P R O C E E D I N G S

(9:10 a.m.)

1
2
3 CHAIR BATTLE: Why don't we go ahead and call the
4 meeting to order. Suzanne, there was one thing that you
5 mentioned to me that I think we can, based on having noticed
6 and discussed yesterday the issue of reprogramming, I think
7 you did some research over last evening and had some more
8 information to share with us with regard to that. And we can
9 go ahead and get that out of the way.

10 MS. GLASOW: It's a related issue. Just prior to
11 the section on reprogramming is the section on rulemaking,
12 and it's section 22 and it's paragraph 8.

13 MR. McCALPIN: Wait just a minute, Suzanne. Okay.
14 I was having trouble hearing you.

15 MS. GLASOW: The committee seemed to be concerned
16 yesterday about the expansion in the reprogramming
17 requirements, and I wanted to point out that there's also an
18 expansion in the rulemaking requirements for the corporation.
19 Currently, we are required to promulgate for public notice
20 and comment rules, regulations and guidelines.

21 Under the current proposed language for
22 reauthorization, that would be expanded to instructions and

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1 grant conditions under the title, and all policies or changes
2 in policy directly affecting recipients shall be adopted by
3 the board after notice and comment.

4 Then they do describe what policies or changes in
5 policies would be, and that would be -- "any policies and
6 changes in policy include increasing or decreasing funding
7 to, imposing new terms and conditions on, or making changes
8 in, the classes of recipients which provide and support the
9 delivery of legal assistance.

10 "This subsection shall not preclude the staff of
11 the corporation from imposing, without notice and comment,
12 specific conditions on a grant or contract to an individual
13 recipient which are not applicable to other such recipients,
14 if the conditions relate specifically to a prior
15 determination; that the recipient has not complied with the
16 provisions of this title, or the rules, regulations,
17 guidelines or instructions issued under this title; or has
18 failed to provide high quality, effective and economical
19 legal assistance."

20 Basically, what that means is, if the board makes a
21 new policy or a change in policy that affects a class of
22 recipients, then it would have to be noticed for public

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1 comment. If they -- if the staff of the corporation imposes
2 a new police or grant condition on a specific grantee because
3 of some problems with that specific grantee, that would not
4 require notice and comment.

5 CHAIR BATTLE: Can you explain to us the
6 implications of this broader definition? Number one, it
7 seems to me, whereas instructions in the past have not had to
8 go out for notice and comment, they will now.

9 MS. GLASOW: That is correct.

10 CHAIR BATTLE: And they'll basically have to go
11 through the same kind of procedure after notice and comment
12 of a final determination being made following it rather than
13 preceding it. Is that correct?

14 MS. GLASOW: That is correct.

15 MS. SZYBALA: It's -- basically, everything is
16 rulemaking. And every rulemaking requires congressional
17 advice. If -- I just want to point out that I think the
18 inspector general suggested yesterday, the board has our
19 reauthorization comments on this new bill. We've written
20 about that. This is something we pointed out to management
21 in the course of discussing the regs.

22 When management says, let's take it out of the regs

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1 so we can be more flexible, under this reorganization, there
2 isn't nothing more flexible. Everything is basically
3 rulemaking.

4 CHAIR BATTLE: So let's take, for example, bylaws,
5 which we have now taken out of the regs. If we were to make
6 a change in a bylaw, which really directs the internal
7 structure and organization of the corporation itself, would
8 it, under this scenario, have to go out for notice and
9 comment?

10 MS. GLASOW: Not unless you could show that it
11 affected the grantees. If it's just internal board
12 procedures, no, unless there's something more specific, and
13 Victor cited some background information yesterday that may
14 be specific to bylaws that would require that. Under this
15 language, I don't think it would affect the bylaws, because
16 it's talking about policies or changes that would affect the
17 funding of a grantee or impose new conditions or terms and
18 conditions on grantees. So I don't think the bylaws would
19 fall under this.

20 MR. QUATREVAUX: Madame Chair, I just want to say,
21 I think that we've covered things as minor as changing the
22 number of columns on the form, if it is written.

1 CHAIR BATTLE: Bill

2 MR. McCALPIN: Well, since any policy or change in
3 policy that was going to affect grantees would either be a
4 regulation, a rule, an instruction or a guideline, I'm not
5 sure that all this language about policy really changes what
6 we were talking about yesterday in terms of rules,
7 regulations, guidelines and instructions, because any policy
8 would be incorporated in one of those vehicles.

9 And we talked yesterday about the necessity of
10 notice and comment with respect to those vehicles, so I'm not
11 at all sure that talking in terms of policy adds much to what
12 we talked about yesterday.

13 MS. GLASOW: The reprogramming notice does not
14 include grant conditions. The rulemaking requirement does.

15 CHAIR BATTLE: So, for example, the negotiated
16 grant in assurances that we came up with, I think, several
17 months back, would have to have gone out for notice and
18 comment. Is that correct?

19 MS. GLASOW: (Nodding)

20 CHAIR BATTLE: Before they could have been made
21 final. So that does, it seems to me, have an effect on how
22 we would ultimately end up conducting business as it relates

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1 to grant assurances, grant conditions and guidelines, in a
2 way we have not had to do it in the past.

3 MR. McCALPIN: It turns out there may be some
4 advantage in not having reauthorization this year.

5 (Laughter)

6 MS. GLASOW: Part of the problem is we've never
7 really clearly defined what guidelines or instructions are
8 for our purposes. They're -- under the Administrative
9 Procedure Act, which we are not subject to but we certainly
10 analogize to often, there is a concept that's called
11 substantive rule, which is basically a legislative rule that
12 affects the rights, obligations, requirements on those who
13 are subject to the rule. And that, under the APA, has always
14 required notice and comment.

15 A procedural rule or an interpretive rule, on the
16 other hand, doesn't necessarily, because it simply either
17 interprets the rule or it just kind of gives guidelines of
18 how to follow a law that's already established. We've not
19 come up with those types of definitions, although we've faced
20 some court cases sometime in the past where they say we don't
21 care whether you call it instruction or not, it's a
22 substantive rule and therefore you should publish it for

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1 notice and comment.

2 So, it's something that needs attention in the
3 sense that maybe we do, as we suggested yesterday, need to
4 define some of these terms, or at least be aware of the fact
5 that they are in this legislation, however you want to handle
6 it.

7 CHAIR BATTLE: Yes.

8 MR. McCALPIN: Would it be your view that a general
9 counsel opinion responding to a request from a grantee would
10 have to follow this procedure?

11 CHAIR BATTLE: A specific grantee, no.

12 MR. McCALPIN: But, a -- the opinion may well
13 establish a principle that would become applicable with
14 respect to any grantee.

15 MR. FORTUNO: I think that certainly the typical
16 opinion response to a specific set of circumstances posed by
17 a grantee, but the principle is a broader application. It
18 may govern that specific set of circumstances, but may be
19 relevant to other grantees in similar circumstances. To the
20 extent that it -- I think that one might argue it's simply
21 explaining what a policy or provision in a rule, guideline or
22 instruction means.

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1 CHAIR BATTLE: -- distinction between interpreting
2 a policy and actually setting a policy? Is that what your --

3 MR. FORTUNO: But I think I would be reluctant to
4 proceed on the assumption that such an interpretative opinion
5 would not fall under this, for fear that someone would
6 construe that in fact it did and we were remiss in not
7 getting public comment.

8 That would make it really difficult, if every time
9 a grantee asked for a legal opinion, and you were preparing
10 to respond to that request, you somehow had to publish that
11 to get comments from the public. That would certainly make
12 it cumbersome, but I'd be concerned about proceeding too
13 freely in light of that language and reauthorization if it in
14 fact went through as it's currently crafted.

15 CHAIR BATTLE: Well, one thing we do know, at this
16 juncture, and that is that, though we have gotten out of the
17 subcommittee in the House, the Senate has kind of blocked it
18 and it's not going anywhere this year.

19 I think that's a prime opportunity for us to go
20 back and to begin some serious dialogue around these issues
21 and concerns, so that we can really illumine to those who are
22 going to be involved next year in the mark-up process, the

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1 concerns that we have about this language, and maybe work out
2 some alternative language that gets at the concerns that
3 people may have about the corporation acting without anybody
4 knowing what's going on, but yet freeze the corporation up to
5 do the business that we have to do with regard to issuing
6 general counsel's opinions and making interpretive decisions
7 that don't put us in a position of having to determine
8 whether the interpretive decisions are actually policy, which
9 have to go out for notice and comment, or whether they are
10 just an interpretation of a policy that's already identified
11 and has already gone through that process. Renee.

12 MS. SZYBALA: I mean, are things that you clearly
13 want notice and comment on -- that is, you really want to get
14 the feel of input on. I think that's -- at least to the
15 extent I've been here, it's not that long -- but that's been
16 done. The grant assurances that were negotiated last year
17 went out for comment to the whole field.

18 They weren't required to be published in the
19 Federal Register, which adds a level of bureaucracy and time
20 that sometimes gets -- would get in the way. And I think,
21 under this reg, we would have had -- under this legislation,
22 they would have had to be in the Federal Register. That's

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1 public and notice and comment, as opposed to this tailored
2 mailing to the grantees, whose comments you want. I don't
3 think that would be good enough under this.

4 MR. McCALPIN: I think -- for 10 or 12 years, I
5 think that the field programs have been complaining about
6 being hamstrung and constricted by this corporation. And
7 now, we have a similar complaint to the Congress about what
8 they're doing to us.

9 (Laughter)

10 MS. SZYBALA: I want to point out one other
11 provision in the reorganization. I'm sure there's more that
12 you'll find once you get into it that you don't like, but
13 there is another one that basically says LSC can no longer
14 set guidelines, provide guidance or instructions on record-
15 keeping for fiscal matters, just field each program and
16 determine itself how it wants to keep records. In our
17 comments to you, we have said that is a real problem on --
18 for the corporation's perspective.

19 MR. McCALPIN: You mean the Act isn't going to
20 require them to keep track of --

21 MS. SZYBALA: No, the Act says they have to do it
22 themselves, and each program will itself determine what

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1 record -- how it wants to do its records, keeping -- the Act,
2 as now written, says LSC shall set record-keeping guidelines.

3 CHAIR BATTLE: Let me just suggest that we do this,
4 because, really, reauthorization got about two hours from
5 this committee in the whole process, given that we had
6 regulations and we had a lot of other stuff going on. I
7 think we probably, at some point, really need to go back and
8 thrash out all of those concerns, and get involved in the
9 process of working through another document that we can
10 introduce next year that we can all agree to.

11 And, to the extent -- from our staff's standpoint
12 of view, all of our staff -- that we have some real concerns,
13 we really need to be on the front line to be involved in the
14 process of ferreting out those concerns. So, we'll have to
15 set aside some time, it seems to me, before this process gets
16 started next year to do that.

17 And I'd like for our staff to take -- to really get
18 into the implications of some of the provisions in the House
19 bill, and what I think was presented to the Senate, if it's
20 any different, so that we have all that information
21 available, and where, on the front lines next time.

22 With that, we have on our agenda today, "Consider

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1 an Act on proposed changes to part 1611 of the corporation's
2 regulations." And I know Linda has joined us in the interim.
3 We welcome you to the table.

4 MS. PERLE: I apologize for being late.

5 CHAIR BATTLE: We have Justice Dana again with us,
6 today, and Renee from the IG's office OIG's office.

7 MS. GLASOW: I would also like to point out there
8 are extra copies of this packet that we're using right here
9 on this front seat in the front row, if anybody in the public
10 would like to have one.

11 CHAIR BATTLE: Someone point out to me that,
12 given -- we got through approximately seven pages in four
13 hours, both morning and afternoon yesterday, and we've got
14 about 22 or 23 pages today in 1611 -- 26 pages in 1611 that
15 we've got to devour. Let me suggest a different procedure
16 for today. What I'd like to do is -- I am going to go
17 through and read, but just briefly through, so that we're all
18 on the same sheet of music, the sections.

19 Then, what I'd like is just some background as to
20 changes that were made and the reasons for those changes.
21 I'll entertain from the committee members whether they've got
22 any questions about that, and if we have no questions, we'll

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1 move on to the next section. And that may help us to move
2 through it a little bit quicker.

3 There are going to be some sections that I think
4 today are going to take an extended amount of time to
5 discuss, because I think there are some policy determinations
6 that this committee is going to have to determine. But let's
7 see if we can get through as much of this as we can, not
8 sacrificing the quality of our review, but trying to focus it
9 and spend the time where we need to. Okay?

10 Part 1611, financial eligibility, the first section
11 is 1611.1 purpose: "This part is designed to ensure that a
12 recipient will determine financial eligibility for legal
13 assistance according to the criteria that take account of
14 factors that influence an individual's or a group's ability
15 to obtain legal assistance and afford sufficient latitude for
16 a recipient to consider local circumstances and his own
17 resource limitations. This part also seeks to ensure that
18 eligibility is determined in a manner conducive to
19 development of an effective attorney-client relationship."

20 Just a brief background, if we can.

21 MS. PERLE: The change that -- the principle change
22 that was made in here was to remove the language that talked

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1 about giving preference to those least able to obtain legal
2 assistance.

3 Originally when the Act was passed, there was
4 language that suggested that that program should serve the
5 poorest of the poor, but that language was removed when the
6 Act was reauthorized in 1977, and it was never changed in
7 this rule, even though the rule has been revised several
8 times since then. And we thought it was appropriate to do so,
9 because there is no requirement that we do that.

10 Also, we just added reference to financial
11 eligibility, to make it clear that that's what this rule was
12 talking about.

13 MR. McCALPIN: It seems to me that's precisely the
14 policy issue that we touched on yesterday, and the question,
15 whether a discussion of client eligibility ought to be
16 limited to financial eligibility, or ought to address
17 eligibility for service in all its aspects, we have already
18 noted that there certain -- in certain services for which a
19 client would be ineligible, their client is presumably not
20 eligible for service if the request doesn't fall within the
21 priorities, subject to exceptions.

22 They're perhaps not eligible for service in the

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1 event there is a conflict, with the client already
2 represented. And, while it may be that the detail of
3 financial eligibility is so great that it deserves a
4 consideration on its own, it seems to me that it's at least
5 worth stopping to think about whether we need somewhere, in
6 some place, to discuss eligibility or lack of eligibility on
7 other bases.

8 MS. PERLE: I think that some of the bases that
9 what you're talking about really don't go to the client's
10 eligibility so much as the issue that is being -- that needs
11 to be confronted. In other words, the client may be
12 financially eligible, but if they have a criminal case or a
13 desegregation case, the program can't take it, but it's not
14 because the person is or is not eligible.

15 MR. McCALPIN: You equate eligibility with
16 financial eligibility, and I'm suggesting that that maybe is
17 not an appropriate linkage.

18 MS. PERLE: Maybe -- we may be dealing with
19 semantic difference. I think, you know, in my view -- and I
20 don't know how the general counsel's office feels about
21 this -- eligibility is an issue that relates to the factors
22 around the individual; that there are other prohibitions or

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1 requirements that are imposed by the Act that are not -- that
2 don't go to the issue of eligibility of this individual
3 person; and then there are other factors that go to the
4 ability of the program to provide service in a particular
5 place, but those don't necessarily go to the individual's
6 financial eligibility, either.

7 And so, I don't know that there -- I wouldn't
8 necessarily characterize them as eligibility. I guess I --
9 because we're trying to get away from the notion that just
10 because you're financially eligible, you have an entitlement.
11 We don't want that, but financial eligibility is a threshold.
12 If you're not financially eligible, then regardless of the
13 case, all these other factors, the program shouldn't provide
14 assistance, but that's just my view.

15 CHAIR BATTLE: What I hear raising the question
16 about is where do we then, since -- I think yesterday as we
17 were addressing 1621, or was it 1608? 1608?

18 MS. GLASOW: 1621. We got to talking about the
19 whole spectrum of things that either make -- not just the
20 client but the case eligible for consideration by a
21 particular program. And we use that term. Whether the term
22 eligibility has several components to it, the threshold

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1 component being financial eligibility, and then the program's
2 ability to set priorities and some other things affecting the
3 case eligibility, which is a total package which all happens
4 at intake.

5 And whether, at this point when we're dealing with
6 the whole question of eligibility, we need to distinguish
7 those two, or whether we need to put some other term on that
8 aspect that addresses case eligibility, and not use the term
9 eligibility at all, and use something else to describe that
10 process.

11 MS. PERLE: See, I don't think -- I think that we
12 do not use, at least not intent -- we've tried not to use
13 eligibility to discuss anything but the financial aspects
14 that relate to the particular client, and that the other
15 things are -- other factors, in addition to eligibility, go
16 into the determination. But I think it's a semantic issue,
17 and I don't --

18 MR. McCALPIN: I suggest to you that you're
19 misplacing the threshold in this whole thing. If a program
20 gets a telephone call and the person says, "I've just been
21 arrested and I need help," you never talk about financial
22 eligibility. If a person calls up and says, "I have this

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1 civil legal problem, and the program doesn't handle it," you
2 never get the financial eligibility.

3 So I'm not sure that the threshold problem is
4 financial eligibility. I think you determine the nature of
5 the need before you ever start to talk about the financial
6 eligibility.

7 MS. PERLE: With respect to certain things, that's
8 true. With respect to other things, for example, the merits
9 of the case, you may have to go through the whole process and
10 have some discussion about the -- about the specific case
11 before you -- you determine the person's eligibility, then
12 you have some discussion about the case, and then you make a
13 determination whether to go --

14 MR. McCALPIN: Maybe the first thing you have to do
15 is decides whether the request is within the priorities. And
16 why bother talking about financial eligibility until you've
17 made that decision?

18 MS. GLASOW: The problem here -- we do have other
19 rules that deal with the issues of criminal cases and
20 priorities. I think it would be very difficult to integrate
21 them into this rule. I think it would be more confusing than
22 helpful. We may want to make a reference to that somewhere

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1 in this rule, but otherwise we're going to be trying to pull
2 into this rule the issue of priorities, case types and
3 conflicts.

4 MR. McCALPIN: I was not suggesting that it be
5 here. In fact, I said I think maybe the detail of financial
6 eligibility is so great that it deserves a provision on its
7 own, but I was asking, where are we going to discuss other
8 realms, conditions of eligibility? And, in a sense, what
9 you're saying is, well, piecemeal around throughout the other
10 regulations. And I'm not sure that's satisfactory.

11 MS. PERLE: Well, there is reference in here to
12 priorities. There is reference in here to case acceptance
13 criteria -- a general reference. Maybe we need to define the
14 latter.

15 CHAIR BATTLE: I agree with Bill that it certainly
16 would be helpful to anyone in the field who is trying to
17 determine and structure how they address those threshold
18 issues, in determining financial eligibility, case
19 eligibility, and ultimately down to the merits. And, having
20 a section of regulations that defines how that works in the
21 scheme of things, I think, would be extremely helpful. Now,
22 where we stick it, where it goes, I don't know.

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1 MR. McCALPIN: Maybe, at the very least, you have
2 to put a statement before 1611.1 that financial eligibility
3 is only one basis of eligibility, and there are other
4 criteria or whatever, and for those, see other sections of
5 the regulations.

6 MS. PERLE: We do make the statement of that -- a
7 similar -- a statement similar to that, later on in the
8 footnotes, which we certainly can incorporate into the
9 commentary, and we could do it closer to the beginning, if
10 that's appropriate. When we get to that, you might want to
11 see if that sort of meets -- the kinds of statement that's in
12 the footnote meets your concerns, and if so, where we should
13 put it.

14 MR. McCALPIN: I don't want to see it in the
15 footnote; I want to see it up front.

16 MS. PERLE: I understand. What I said is, if the
17 language that's in there and the references meet the concerns
18 that you have, and -- and then, where we should put it.

19 MR. McCALPIN: One last minor stylistic change.
20 When you get one, two, three, four, five lines down toward
21 the end, and it says "and afford," and I expect that that's
22 intended to follow -- "this part is designed to ensure," and

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1 you get down there, and I think if you repeat the "to," it
2 helps to follow the sequence.

3 MS. PERLE: Okay, that's fine. Suzanne just
4 suggested that we might want to put some of the -- to put
5 another sentence in the purpose, which was -- see, I -- in my
6 view, the language about affording sufficient latitude for
7 recipient to consider local circumstances and its own
8 resource limitations addresses the point that you're making,
9 but that we could add some more language in the purpose
10 section that suggests that there are additional
11 considerations that a local program can --

12 MS. GLASOW: We could do an (a) and (b) under
13 purpose, for instance, and have (b) deal with the issue
14 you're concerned about.

15 MS. PERLE: We could. I mean, there are -- that's
16 somewhat more detailed than, generally, the language that
17 goes into a purpose section, but we could certainly consider
18 doing that, or putting it someplace else.

19 CHAIR BATTLE: Any other concerns? Bill?
20 Ernestine? Okay. We're down to definition. "1611.2
21 Definitions. 'Assets' means, at a minimum, cash or other
22 liquid assets or resources that are easily convertible to

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1 cash which are actually available to the applicant, and be
2 used to hire private counsel." Why don't we just go all the
3 way through this one?

4 "Governmental program for low income individuals
5 or families' means any Federal, State or local program that
6 provides benefits of any kind to persons whose eligibility is
7 determined on the basis of financial need.

8 "'Income' means actual, current, annual, total cash
9 receipts, before taxes, of all persons who are resident
10 members of and contribute to the support of a household or
11 family unit.

12 "'Total cash receipts' include, but are not limited
13 to, money, wages and salaries, before any deduction,
14 income" --

15 MS. PERLE: Net income.

16 CHAIR BATTLE: I'm sorry, "net income from self-
17 employment; regular payments from public assistance and other
18 benefit programs; and other regular or recurring sources of
19 financial support that are actually available to the
20 applicant for service." And that's the end. The rest of
21 what is already in the regulations, which gives a very
22 detailed listing of several things, has been stricken.

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1 I have one question -- let's just go first and get
2 the background, and then I've got a question about this one.

3 MS. PERLE: There's never been a definition, per
4 se, of assets. The Act mentions liquid assets. The original
5 version of the regulation didn't mention assets at all, and
6 when the -- when the reg was revised in 1983, assets were
7 added as something that needed that needed to be considered,
8 but it was a detailed set of considerations, including non-
9 liquid assets, and -- but the term asset was never defined.

10 So this was an effort to define it in a way that
11 was understandable, without going into very specific detail
12 about what kinds of assets -- from the definition, what kinds
13 of assets should be considered. So, this -- that was -- the
14 purpose was just to sort of say, this is what we mean by
15 assets, and we said "at a minimum," so that programs based on
16 their consideration of local circumstances, could define --
17 could include more things within the definition of assets if
18 it was appropriate.

19 CHAIR BATTLE: Okay. What I wanted to determine
20 was whether this listing, this very detailed listing, came
21 from --

22 MS. PERLE: Which detailed list?

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1 CHAIR BATTLE: The listing that's been stricken,
2 that you were proposing.

3 MS. PERLE: Yes. That's a different --

4 CHAIR BATTLE: Okay. That came from -- I mean,
5 what was the genesis of it? Did it come from some listing
6 somewhere else?

7 MS. PERLE: Anything that's in here that is struck
8 is contained in the current regulation.

9 CHAIR BATTLE: I understand that. Okay.

10 MS. PERLE: You mean, where was it -- where did it
11 originally come from?

12 CHAIR BATTLE: Yes. Where did it originally come
13 from? Was that some interpretation that was given --

14 MS. GLASOW: Well, it's a term that's used in
15 income.

16 CHAIR BATTLE: Tax regulations or something.

17 MS. GLASOW: And they define total cash -- income
18 meant actual, current, annual, total cash receipts. They
19 then defined total cash receipts, and they were very
20 specific, and this was some years back when they defined
21 that.

22 MS. PERLE: This was the -- this total cash

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1 receipts definition that's in here and is struck, it goes
2 back to the -- I think the 1976 original regulation. That's
3 always been in there. Now, there may have been some changes
4 along the way; this rule was revised several times during
5 that period, but there was a detailed definition of total
6 cash receipts in 1976 when the rule was first passed.

7 CHAIR BATTLE: And again, I want to understand the
8 wisdom of taking all of this out at this point.

9 MS. PERLE: I think, in part, because -- again,
10 it's one of these situations where the corporations come in
11 and looked at individual determinations on income, and has
12 been very rigid in applying the particulars that have been in
13 the definition. And we're -- you know, we're making
14 determinations about whether a particular individual was or
15 was not -- whether the program had made appropriate
16 determination about whether a particular individual was or
17 was not eligibility, and second guessing, often, the
18 determinations that the programs had made.

19 And we felt that it was more appropriate for the
20 programs to have guidance as to what kinds of things should
21 be considered to be income, but could, again, look at its own
22 policies and develop some policies based upon what the local

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1 circumstances would be. Now, programs have lived with this
2 definition for a long time, and, you know, if the committee
3 feels that the detail is needed, we certainly could put back
4 some or all of it.

5 CHAIR BATTLE: I had a question about one part of
6 this. They do not include money withdrawn from a bank, I
7 wondered about money in the bank.

8 MS. PERLE: That's included as an asset. It's a
9 liquid asset, so that that's a separate set of
10 considerations.

11 MS. GLASOW: We felt that a general definition
12 would be better than all this detail.

13 MS. PERLE: First of all, there might be items that
14 really do constitute incomes and aren't in there. For
15 example, someone raised -- someone raised the question about
16 whether we should include fellowships for graduate school,
17 and I think that, if you put it in, then it sort of sets it
18 in concrete, but if the fellowship really consists of tuition
19 payments, and the person never sees the money, then there's a
20 question --

21 CHAIR BATTLE: Well, tell me this, what about --
22 what about some discussion which gives guidance to how to

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1 determine what -- how to characterize assets, either as
2 liquid or as hard assets or as cash on hand or -- in
3 utilizing this list as examples in each group, because I
4 don't think, just simply by taking them out -- when I read
5 this definition, it's so open-ended that you will go from one
6 program to the next, and you'll get a different
7 interpretation of what should be included or excluded.

8 MS. PERLE: Well, there's a difference between
9 assets and income. I think -- you can make the same argument
10 with respect to both, but I think you have to make clear that
11 you need to separate them --

12 CHAIR BATTLE: But I guess what I'm saying, once
13 you do that separation, I think that something that's
14 instructive in the comments, that helps programs to be able
15 to make pretty -- what we're trying to get is a pretty
16 uniform determination -- if a client walks into any office in
17 America, that they're going to kind of get some semblance of
18 the same analysis of their financial eligibility.

19 MS. PERLE: I think that's what we intended to do,
20 and -- we didn't intend to just chuck all of this language
21 out; we intended to include much of it, at least, in the
22 commentary as examples of the kinds of things that should and

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1 should not be considered to be income. That's what we
2 intended to do.

3 Actually, I mean, even looking at some of this --
4 for example, in many kinds of programs, child support is not
5 considered income, you know, so it's interesting that it's on
6 here as part of the regulation, and I'm not sure -- I mean,
7 even looking at some of this, the -- in some areas, as well,
8 the -- let me see, it's in another category in here, that in
9 many cases it's not included.

10 In any event, I guess I would like to see some
11 examples, and where we put it, whether it's in the commentary
12 or in this portion of it, you know, I'm really not particular
13 one way or the other. However, I think that it is true that,
14 inasmuch as you can give guidance to the field of -- so that
15 you wouldn't have such extremes from one jurisdiction to
16 another, depending on what people's interpretation and the
17 knowledge of the intake workers, because it's really the
18 intake workers that are making the initial determination
19 whether or not someone even is financially eligible for the
20 services.

21 You know, and you'd have somebody who's a 20-year-
22 old coming in as an intake service worker, and you have

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1 someone who might be a 40-year-old who's been with the
2 program for 10 or 20 years and has a better sense of it,
3 there has to be some guidance so that even the most
4 inexperienced and the most ignorant of what all those
5 different categories are can have some initial training in
6 that light. And, how do we do it -- I guess I'm not
7 particular, but I would like to have some guidance to them.

8 MS. PERLE: Actually, I think you were, in a
9 certain sense, mirroring the discussion that we had some time
10 ago when we were talking about this. And what we concluded
11 was, it's not -- what's not -- it's not so important whether
12 you put it in the reg. What's important is that people in
13 the field have the information and the understanding about
14 what is income, what is not income, how it should be counted,
15 how it shouldn't be counted --

16 CHAIR BATTLE: That's what I had suggested.

17 MS. PERLE: So I think the consensus that we
18 reached, and again, I don't want to put words in other
19 people's mouths, but the consensus that we reached was that
20 it was much more important for the corporation to be able to
21 provide, through technical assistance or through sample
22 documents or whatever, guidance to programs in terms of

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1 what's an appropriate way to interpret this, without -- but
2 the key word was guidance, rather than sort of this very
3 strict blueprint for compliance, which is the way it's been
4 treated.

5 MS. GLASOW: And if you do have a concern, the time
6 of the public comment is a good time to ask the public, you
7 know, should the definition include more detailed
8 information? Would that be more helpful to you or less
9 helpful? And what about the specifics, you know, should this
10 one be included or should this one be left out?

11 CHAIR BATTLE: I would like to see us, before it
12 goes out for comment, give some explanation of the categories
13 and how one would make a determination in each of the
14 categories. And then, I think, asking the question to the
15 field and when we put it in the Federal Register as to which
16 is going to be most helpful, is a good way to get at how we
17 can ultimately structure this particular rule. But I think
18 we need more than to just take this same list and put it in
19 the comments, because what we really need to do is to give
20 some guidance to the field as to how to make determinations
21 around these issues.

22 MS. MERCADO: And the other thing, too, is that

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1 I'm -- to some respects, I look at some of these regulations
2 sort of in the future mode.

3 You know, assuming that you don't have either a
4 staff or management who is cognizant of who is -- to whom is
5 it -- it is a priority to provide that kind of direction and
6 guidance and technical assistance to the field about what
7 they ought to do, make independent on it's own, the program
8 ought to be able to pick these up and get some guidance of
9 what's going on, even if, for whatever reason, you know, the
10 corporation headquarters isn't carrying out this information.

11 And so, I want that independence to stand on its
12 own.

13 CHAIR BATTLE: Bill.

14 MR. McCALPIN: Well, let me start up at the top of
15 the definitions, instead of going to total cash receipts.
16 And I suspect that the concerns I have need not be addressed
17 in reframing this language, but I offered you as suggestions
18 for consideration and comments and so on. And that "easily
19 convertible to cash," it seems to me, could raise a number of
20 questions.

21 If you can pawn the piece of jewelry, is it easily
22 convertible to cash? If you have an insurance policy which

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1 has a cash value, is that easily convertible to cash? I
2 think -- there's a beguiling over simplicity to the language
3 "easily convertible to cash," and how that might be
4 interpreted in the field.

5 Second, move down to the income definition. I am
6 used to seeing income eligibility termed, or related in terms
7 of weekly or monthly, rather than annual, and I looked at
8 this, the annual income. We talk about how much a week for a
9 parent and two children, parent and three children and that
10 sort of thing. And, I don't know, it seems to me we publish
11 something in -- every year, and then, in the appendix we put
12 it down to -- we put it in terms of annual?

13 MS. PERLE: Yes, which is, I think, the reason that
14 this has always been stated as annual. And -- but of course,
15 you have to -- what you do is you take a current income,
16 whether -- you know, monthly or weekly or whatever and then
17 kind of annualize it, in order to get that.

18 MR. McCALPIN: But it seems to me that -- I suspect
19 that when the client calls an office, you don't ask that
20 client, "What's your annual income?" I think you say, what's
21 your take home pay per week, per month, or whatever. And I
22 think that, in terms of regular dealing, we are not dealing,

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1 you know, face to face with a client -- or whatever, in terms
2 of annual income. I think we're -- so, it may be that you
3 want to think about that.

4 The other thing in connection with income is, I
5 wouldn't -- going back to where we were a few moments ago, it
6 says that asset does not include tax refund. Does that
7 become income? It should, because we talk about before taxes
8 as income, so I would think that a tax refund ought to be
9 considered as income.

10 MS. PERLE: A tax refund is not included in the
11 income; it's included as an asset.

12 MR. McCALPIN: But you said they do not include tax
13 refunds in what was stricken out.

14 MS. PERLE: Income. The total cash receipts which
15 are part of income do not include a tax refund, because it's
16 not reoccurring. It would -- a large sum of cash like that
17 would be included as -- it's clearly a liquid asset. If
18 someone has just gotten several thousand dollars in lump sum
19 tax refund, and it's sitting in the bank, that's an asset.
20 And that could disqualify a person, even if, on the basis of
21 their periodic or recurring income they would be eligible.

22 MR. McCALPIN: What do you do about an income

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1 that's due and owing but not yet -- I mean, a tax refund
2 which is due and owing but not yet received?

3 MS. GLASOW: Basically, the way we've interpreted
4 the eligibility guidelines has been that when a client comes
5 in, we look at that person's financial situation at that
6 time. If they're out of work at that time, they have no
7 money, in essence. So we will look at the assets, at that
8 point, but they have no income coming in.

9 MS. PERLE: But there is a provision -- excuse me,
10 this -- the answer to that -- there is a provision that says,
11 before you make a decision about whether -- if somebody is
12 eligible based on their current income, you do look at
13 that -- at something called their income prospects, or
14 seasonal adjustments. So, in other words, if a person is out
15 of work, but they're promised in two weeks they're going to
16 have a job that's going to pay them 80 thousand dollars a
17 year, the program doesn't have any obligation to serve that
18 person.

19 But that has to be, in large measure, a judgment
20 call. I mean, how -- about how likely it is that this tax
21 refund or that this job is going to come through, and a whole
22 bunch of things. But the program is in the best position to

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1 make that determination and weigh those factors. But there
2 is a place in here that deals with that -- those prospects.

3 CHAIR BATTLE: Just to follow up on what I think
4 Bill is raising, it seems to me that one sitting down --
5 going through, trying to determine what is an asset, what is
6 clearly income, and how you construct a person's financial
7 picture for determining eligibility -- looking at this, it's
8 not really clear. Until Bill raised the issue about the tax
9 refund and the fact that it would be categorized as an asset,
10 I wasn't clear about that.

11 The other issue I haven't heard a response to is
12 the easily convertible to cash issue. If you own a house, it
13 is excluded -- excludable? Or is it -- if it's in a highly
14 marketable area and everybody's being able to sell their
15 house pretty quickly, is it easily convertible to cash?

16 MR. McCALPIN: Or you can borrow against it.

17 CHAIR BATTLE: You can borrow against it, if you've
18 got equity in it. I mean, how -- are we going to --

19 MS. PERLE: I think, generally, that -- I think
20 that, generally, how -- your principal residence is excluded
21 from your assets.

22 CHAIR BATTLE: Yes, but I guess, if we're to make

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1 the leap, which is what we're trying to do here, taking these
2 regulations and making them more readable, more
3 understandable, and more workable to the field, then, with
4 regard to financial eligibility, I think we need to step back
5 and say, okay, how can we take this section, given the kinds
6 of changes which at least make it work a little bit better,
7 and make it something that anyone can pick up -- part of the
8 point that Maria made -- anyone can pick up and march
9 through, and understand clearly the distinction between what
10 is an asset, what is going to be categorized as an asset,
11 what will be determined to be income, and how do I treat this
12 particular client in front of me in light of these
13 requirements.

14 Do you feel like we're there, now, or do we need
15 some more work to get there?

16 MS. GLASOW: I feel like we're probably closer than
17 you think we are, because, you know, the working group was
18 made up -- not entirely, but the majority of the people that
19 are in that group were project directors who deal with these
20 issues every day.

21 And, I think that they -- now, there are a couple
22 of people here in the audience -- Judy Schuenemeyer is from

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1 Delaware, she's a project director, and maybe she could speak
2 to this set of questions -- but I think that, what project
3 directors felt, the ones that were involved in the working
4 group, was that what they needed was a framework in which
5 they could make -- their program could set -- I'm not talking
6 about making an ad hoc decision with respect to each
7 individual that walks in the door.

8 The program has to set eligibility policies, and
9 procedures that they then follow, on a regular basis with
10 respect to each client. But to give them a framework without
11 sort of a rigid road map that they have to do in terms of
12 designing their own -- in terms of designing their own
13 process, and in -- but then, they could design their own
14 processes, their own criteria, within that framework, and
15 then apply them.

16 It may be more helpful when we do get to the asset
17 section. It may alleviate some of your concerns, especially
18 when you talk about the background.

19 When we first put that section in the rule, there
20 was tremendous comment both from the field and from Congress
21 on that when we were -- very specifically requiring that
22 certain assets be included or not included. It almost became

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1 a bog that we got down into, and there was tremendous adverse
2 comment to that. So, maybe the definition will make more
3 sense when we get to the asset section, I'm not sure.

4 MS. PERLE: When we're applying the definitions
5 rather than just dealing with the definitions.

6 CHAIR BATTLE: Rather than just articulating what
7 the definitions are. Renee, I think, had a comment.

8 MS. SZYBALA: I don't want to bring up anything
9 that we've hashed over in the past, and this was discussed in
10 our meetings with management, but based on some things that
11 were said, I just have to point out there is another way to
12 look at this here.

13 There is another prospective that you have to keep
14 in mind. Financial eligibility, more than any other part of
15 the Act, I think, is for Congress the guts of this program.
16 It is for poor people who cannot otherwise afford a lawyer.
17 Congress put into the Act a bunch of things that Congress
18 said needed to be considered. We pointed out, in our review,
19 that they had left some of those things out of the original
20 draft regs.

21 On the question of financial eligibility, the right
22 of the local programs to have differences or opinion is

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1 really questionable. This is, as Mr. McCalpin said, a
2 national program, and a poor person should be seen as a poor
3 person in Montana or in Hollywood.

4 There is, you know, just -- it would be impossible
5 to tell which programs are merely affluent, and which are
6 not, if one program, because they didn't have that many poor
7 people, set their eligibility requirements really, really,
8 really, really low, and another program, because they were
9 swamped with poor people, had to set them really high, and
10 they had to change what they were looking at in terms of what
11 makes you eligible and what-not. It would be impossible for
12 LSC to sit down and compare statistics nationally and know
13 that it wasn't comparing apples and oranges.

14 This is a part of the regs that really needs to
15 establish national uniformity. There is -- of course, you
16 have to be able to look at circumstances and use judgments
17 and all kinds of things on a local level, but not about the
18 guts of what is income.

19 MS. GLASOW: That's basically controlled by the
20 numbers that HHS puts out every year in the poverty level
21 guidelines, and that -- those are very low. So, I mean --

22 MS. SZYBALA: But what makes that -- what gets you

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1 to that level is where the question -- I mean, saying \$100 is
2 the poverty level means nothing. What makes the difference
3 is what you're going to count in getting towards that \$100.

4 MS. PERLE: I just -- one thing. Renee is correct
5 when she said that there were things with -- the IG's office
6 pointed out that the working group had left out parts of the
7 statutory requirements, but I wish to make one thing clear.
8 Once they were pointed out, they were put back in.

9 MS. MERCADO: I was still trying to sort of sort
10 out in my mind the comment that Bill made just a few minutes
11 ago as far as the annual income is concerned, because I have
12 seen that aspect of it work to the detriment of -- let's
13 assume someone who was employed at some company or small
14 farmer or whatever, that either lose your farm or they lose
15 their job at the factory, there is no unemployment income.

16 Two or three months later, they have some legal
17 problem, a crucial legal problem, whether it means that
18 they're going to be foreclosed on or something else.

19 Now, if you're counting annual income in -- you
20 know, for the first seven or eight months of their life, they
21 obviously had a fairly decent income, middle income or
22 whatever. And now, for the last two or three months, they've

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1 virtually had no income. Yet it's obviously a person who
2 needs assistance.

3 Now, supposedly maybe their only liquid asset
4 they've got is their home, but it's in a foreclosure
5 situation. They need assistance from somebody. How do you
6 establish -- if it's going to go by annual income, obviously
7 this person will not qualify for our services. If there's no
8 doubt that they have no prospect of income in the near
9 future, nor have they had it for the last two or three
10 months.

11 MS. PERLE: There are two places when income
12 prospects are taken into consideration. And one is, when you
13 have someone who, based on their annual income, would not be
14 eligible, you can look in -- you can look at their income
15 prospects and say -- factoring that in, you can -- you can
16 serve that person, just as long as their annual income is not
17 over -- in this proposal, 200 percent of poverty.

18 So we're still -- you know, we're still looking at
19 people who are in a very low income situation, on an annual
20 basis. And, if the person was a real middle income -- you
21 know, a middle class farmer who was now in this situation,
22 they probably couldn't qualify. And I think that most people

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1 in this room would thing that's appropriate, even if
2 they're --

3 MS. MERCADO: Well, even a middle class female
4 factor worker who had a \$14 an hour job, the factor shuts
5 down, you know, there's no prospect of any other employment
6 in that city, that small community for the next five or six
7 months that they can see, and, you know, they're in a
8 foreclosure situation, and that is, their only asset is their
9 home. Then again, I'm trying to look at how we would handle
10 that.

11 CHAIR BATTLE: At what point do you annualize, I
12 guess, becomes the real underlying question. Do you
13 annualize going -- looking at some forecast forward, and also
14 looking at historical data on their income, or do you
15 annualize --

16 MS. PERLE: I think that's a perfect example of the
17 kind of situation that we're talking about, where the
18 programs really have to have -- to be able to look at the
19 individual and apply their own processes to that individual's
20 situation. And there is some flexibility within this in
21 terms of looking at current income prospects, both to qualify
22 people who might not otherwise appear to be qualified, and to

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1 disqualify people who may not have any current income, but
2 whose prospects are much better.

3 CHAIR BATTLE: Why don't we move on? Part of
4 the -- I'm sorry.

5 MS. WATLINGTON: I wanted to say, the welfare
6 department uses this, too, for classifying income -- they use
7 it, too, in order -- it's either your yearly income or 90
8 days within that time, and that way -- because, you have to
9 recognize, if you just use that one you're going to leave out
10 some people that are still in, so I think you should be
11 flexible that, you know, so the yearly income and some other
12 type of thing like the 90 days, which would be -- catch the
13 people that Maria was saying that gets in between that, just
14 deal with the one --

15 CHAIR BATTLE: One figure.

16 MS. WATLINGTON: Right, to determine eligibility.

17 CHAIR BATTLE: What I was going to suggest --
18 because a lot of these issues are going to get flushed out in
19 the following regulations. We kind of got caught in the
20 definitions, rather than the actual implementing regulations,
21 which will address some of the concerns that we've raised so
22 far, so have we -- but I just want to ask my committee, have

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1 we at least gotten out on the table all of our concerns about
2 what we've got in the definitions? And if we have, let's --

3 MR. McCALPIN: Let me ask one other question. In
4 the March version, the definition of total cash receipts was
5 totally eliminated. In the June version, it's back in. What
6 caused that change?

7 MS. GLASOW: Well, it was, we felt, basically that
8 if the term total cash receipts was used in the definition of
9 income, we needed to know what that meant. At some level, we
10 needed to define that, because we would have problems
11 interpreting the definition of income, at that point, so we
12 either had to redefine income not to include that term, or we
13 had to state what that term meant.

14 MS. PERLE: And I think that what people felt was
15 that we needed to put in some guidance as to the kinds of
16 things that would be counted as income without being too
17 rigid. And so it was really to meet the kind of concern that
18 we were talking about earlier that we put back in the
19 language that's in there now.

20 CHAIR BATTLE: Okay, are we ready, committee, to
21 move on to 1611.3? We're changing maximum to standard annual
22 income level. "Every recipient shall establish a standard

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1 annual income level for persons to be eligible to receive
2 legal assistance supported with funds provided under the Act.

3 "(b) Unless specifically authorized by the
4 corporation, a recipient shall not establish a standard
5 annual income level that exceeds a maximum of one hundred and
6 twenty-five percent (125 percent) of the current official
7 federal poverty income guidelines. The calculation of 125
8 percent of the current federal poverty income guidelines are
9 set forth in Appendix A, and are revised annually. The
10 governing body shall review the recipient's standard annual
11 income level annually, and consider any changes made in
12 Appendix A.

13 "(c) Before establishing" --

14 MS. PERLE: This is a very long section. I don't
15 think you want to go through the whole thing. It's up to
16 you.

17 CHAIR BATTLE: Let's see. (c) goes on -- I see.
18 Why don't we stop there, and then we'll handle (c) as a
19 group, and then we'll handle (d), (e) and (f) as a group.
20 Okay.

21 MS. PERLE: In what you have read so far, there are
22 no substantive changes, and I think it's correct, in that all

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1 the changes that were made here were simply to clarify what's
2 already in this rule. We changed maximum to standard because
3 maximum was very confusing, because maximum doesn't mean
4 maximum here, because there is this -- the next level, kind
5 of an upper level cap, which does represent a maximum, but
6 the number that we're talking about here was not a -- is not
7 a maximum.

8 We wanted to make the reference to Appendix A a
9 little bit clearer. We took language that required some
10 review that appeared later and put it up in the beginning,
11 and then, again, referenced Appendix A to make it clear the
12 programs needed to make sure that they knew what the current
13 Appendix A was before they made a determination about what
14 their level was going to be.

15 CHAIR BATTLE: I had a question that I wrote out in
16 margins, and -- does this -- does that Appendix A take into
17 account geographic differences in cost of living in terms of
18 how that cap is set?

19 MS. PERLE: Only for Alaska and Hawaii.

20 MS. GLASOW: And also, I'd like to point out that
21 the responsibility for doing that federal poverty guideline
22 has been transferred from OMB to HHS, and we point that out

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1 when we publish the appendix each year, although our Act
2 still references OMB, it's really HHS.

3 MS. PERLE: Just to make it perfectly clear, this
4 is not a set of numbers that LSC establishes. All LSC does
5 is make the calculation of multiplying the numbers that we
6 get from HHS by 125 percent. This is a standard poverty
7 figure that's used government-wide --

8 CHAIR BATTLE: This comes really right out of our
9 Act in terms of what we've got to do.

10 MS. PERLE: Now, we did spend a substantial amount
11 of time discussing whether we ought to consider changing the
12 125 percent, you know, up or down.

13 CHAIR BATTLE: Now, does the 125 -- we got into
14 this discussion, I think, a little bit earlier on. Is the
15 125 percent something that we have imposed, or is it in our
16 act?

17 MS. PERLE: No, it's something that we impose. The
18 Act requires us -- LSC to set a figure, in consultation with
19 OMB and the governments of the states.

20 CHAIR BATTLE: Have we ever gone back to the
21 governors of the state and OMB on that figure?

22 MS. PERLE: There was consultation, originally.

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1 CHAIR BATTLE: I'm saying since that original
2 figure was set at 125, have we ever gone back?

3 MS. PERLE: Not as far as we know. We discussed --
4 in discussing whether we wanted to revisit that figure,
5 there -- we did say, you know -- people did say, you know, if
6 we change that figure, we're going to need to go back to OMB
7 and consult with the various governors of the various states,
8 and does anybody really want to get into that.

9 And I think the consensus was that we didn't want
10 to change the figure anyway, but I think there was also a
11 consensus that nobody really wanted to kind of make LSC go
12 through that exercise.

13 MS. MERCADO: But that -- realistically, though, I
14 mean, when you take into account all the inflation factors
15 and cost of living factors, when you're saying 125 percent of
16 poverty, it may, in reality, in concrete dollars that clients
17 have to survive with, may equal to 50 percent of the
18 actual -- you know, that their income eligibility, they had
19 50 percent dollars to spend in than they had 10 years ago or
20 15 years ago, when this 125 percent of poverty was done.

21 And I would like us to start initiating a
22 discussion with the governors, and as long and tedious as

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1 that may be, I think that for the client community that we
2 represent, it is important that, in real dollars, that we're
3 looking at realistically what our client has with \$100 to
4 spend now than they had in 1975.

5 MS. PERLE: I think that's absolutely right, but I
6 think we also have to understand that in terms of real
7 dollars, we're working with a program that has 40 percent
8 fewer dollars than it had -- I think that's the figure --
9 than it had in 1981. And so, the higher we raise our annual
10 income level, you know, the more -- you know, it's just a
11 larger pool of people that those limited resources are going
12 to be spread over.

13 MS. MERCADO: And conversely, maybe that would make
14 a better argument to Congress about whom we're actually
15 representing or not representing within those numbers. You
16 know, I think that they have to understand what the real
17 pictures are and the real realities are, and the fact is that
18 we're not presenting a very true picture of the people that
19 we should be representing.

20 I mean, even assuming the 125 percent level, in
21 concrete dollars, we're not even getting half of those folks,
22 and I don't think that that's a factor that I have seen in

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1 any of the discussions or analyses of including them. And we
2 know that we ought to be at 848 for minimum access. What
3 does that translate to clients where they ought to be?
4 Should they be at 200 percent of poverty level in order to
5 represent the same number of clients that we represented in
6 1975 versus now?

7 MS. PERLE: I think the answer to that question --
8 well, I don't know. I think the figure that we're using --

9 CHAIR BATTLE: Let me just add something before you
10 say something about that. I think it probably would be
11 helpful to have some discussion around figuring out where we
12 truly are, both from a financial eligibility standpoint of
13 view, if we were to take where we started out and extrapolate
14 it to where we are now, given inflation and all those other
15 factors that play into it.

16 The other problem, I think -- and this is what
17 Linda raised -- is where we truly are in terms of our
18 resources, and what it is that we can do. We do two things.
19 We set the 125 and then we set another cap, the 200. And
20 when we talked about 200 before, there wasn't a whole lot
21 of -- it was kind of arbitrarily set at another level to give
22 some flexibility in how we work our formula.

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1 I think that that second number that we use, if it
2 could be tied to where we ought to be, would be another way
3 of figuring out exactly what that distinction in our true
4 client community is, and would also give us a statistical
5 basis on a going forward basis for being able to say how that
6 client community has grown over the years, and what we ought
7 to be able to service, if that's possible.

8 I don't know exactly how we go at being able to
9 develop that figure, but I think it would be useful for us to
10 look at that.

11 MS. PERLE: I just want to add one thing that did
12 come out of the discussions, not just with respect to this
13 rule, but with respect to the number of rules. There was, I
14 think, a fairly strong sentiment expressed by the client
15 members of the regs working group that we wanted to maintain
16 the focus of this program on poor people.

17 And the higher you went in terms of expanding the
18 definition of eligible client for board membership, or in
19 terms of defining eligibility, the less focused this program
20 became on the poorest members of our community, and those
21 that were, you know, defined -- and, although I think that a
22 lot of us have some sense that, if we were able to expand the

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1 reach of the program further up towards, you know, the lower
2 middle classes or the working classes, we would have more
3 political support and a variety of other things, and it would
4 be more realistic in terms of what people really need to live
5 on.

6 There was still concern amongst the client members
7 that you would be sort of deluding the focus, which has
8 historically been the focus of this program, and also, you
9 know, decreasing the numbers of the people who were really in
10 dire need who could be served ultimately, and that, you know,
11 by giving programs more leeway to serve higher income folks,
12 that there would be a tendency to serve more of those people
13 and fewer of those in lower income categories.

14 MS. MERCADO: Linda, I'm not talking about serving
15 higher income people. I am really talking about someone
16 who's getting \$4.00 an hour or \$4.25 an hour minimum wage.
17 It hasn't gone up very much in the last 10 or 15 years,
18 compared to -- I mean, and I can do my comparison, you know,
19 on a can of peas that I could buy for 20 cents when I was
20 going to law school here in Washington, D.C. 14 years ago,
21 and they now cost me 79 cents.

22 Now, there has got to be a comparison, and they're

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1 still getting that \$4.00, and they were getting \$3.75 before.
2 Now, what is that buying? I'm not talking about that it's
3 going to have a higher income person -- it's about what the
4 real dollar is equal to, and the great number of clients that
5 we're not representing even in that lowest of poverty level.

6 MS. PERLE: Absolutely. I don't think anybody
7 disagrees that that's a message that we need to get across.
8 I guess the question that I'm asking is whether that's
9 something that we can afford to build into our eligibility
10 criteria, that recognition.

11 MS. GLASOW: Has HHS already taken that into
12 consideration?

13 MS. PERLE: Well, HHS raises the poverty figures
14 every year. I don't know. I think that most people believe
15 that they have not kept up with the real increases in the
16 cost of living for --

17 CHAIR BATTLE: Let me just suggest this. It seems
18 to me that really we could have further discussion about this
19 issue, but that it would be incumbent upon this committee to
20 make a recommendation to the full board to go forward with
21 the reexamination before we could do anything to change the
22 125. We're stuck with it unless we go through the procedure

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1 that our statute sets out the we must undertake.

2 So, why don't we put a pin in the discussion,
3 because we can't resolve it right now. But as a committee,
4 we can give some consideration to whether or not that needs
5 to happen, and we need to do that separate from going through
6 the regulations right now. I think Bill has mentioned that
7 he's got some questions he wants to ask about the particular
8 regulations we have before us.

9 MR. McCALPIN: Is there an express provision in the
10 Act which authorizes maximum income levels to be exceeded?

11 MS. PERLE: No.

12 MR. McCALPIN: We are directed to establish maximum
13 income levels, so on what basis can you go above 125 percent
14 of poverty?

15 MS. GLASOW: In essence, we -- the corporation can
16 establish those levels, and we do that, in essence, by
17 adopting those numbers, and then setting out in our
18 guidelines the factors to be considered around those numbers.
19 So we, in essence, are doing that with the numbers that we
20 publish each year.

21 MR. McCALPIN: Maybe what you do is consider those
22 criteria within the maximum, not outside of it.

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1 MS. GLASOW: That's correct. In essence, we do
2 establish the maximum income guidelines by publishing our
3 numbers each year. That isn't the only factor we look at in
4 terms of deciding whether it's just --

5 MS. PERLE: There is a second section, in
6 addition -- section 1007(a)(2)(A) says that we have
7 established the maximum income levels.

8 And then it says, established guidelines to ensure
9 that eligibility will be determined by recipients on the
10 basis of factors which include liquid assets and income
11 level, fixed debts, medical expenses and other factors which
12 affect -- and I think that, you know Congress -- and a list
13 of other things -- and it strikes me that Congress intended
14 there to be, you know, to sort of set a maximum income which
15 was a guideline, and then, you can consider other things
16 within that.

17 The original --

18 MR. MCCALPIN: Within that, that's the phrase. I
19 have -- don't understand -- I have -- I think that's an
20 interpretation. You can read (A) through (B), as you have
21 done, to go outside the maximum. On the other hand, you can
22 read it as saying you're considering those criteria within

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1 the maximum set by the corporation.

2 MS. PERLE: I'm not exactly sure how to respond,
3 other than to say that the original rule, when the rule was
4 passed in 1976, it didn't have that 150 times 125 percent.
5 It just said, in addition to income you can consider these
6 other factors, so there was no cap. So they only had one
7 income level stated, which was 125 percent, but the
8 regulation clearly anticipated that people who were above 125
9 percent of poverty would, if there are other factors present,
10 be able to be served by programs. And then, that 150 times
11 125 percent was added in 1983.

12 MR. McCALPIN: Well, this really gets to my -- the
13 point which I had in mind, and that is, I don't like your
14 word standard, I don't think that conveys to me what we're
15 talking about, and I have some apprehension about departing
16 from the use of the word maximum since that's the word the
17 Congress gave us in (a)(2)(A), that the corporation, in
18 consultation and so on, established maximum income levels.

19 And, I -- we send this up to the Congress, they
20 say, "We've told you to establish maximum income levels, and
21 now you're establishing standard income levels. What are you
22 doing?"

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1 It's -- but, in any event, even if we don't use
2 maximum, standard doesn't convey to me what I think we're
3 talking about. We may be talking allowable, acceptable,
4 something, but standard, you know --

5 MS. PERLE: We can use a different word, and I
6 think the footnote's made it clear that we kind of struggled
7 with what was the appropriate word. We came up with this,
8 and nobody was fully satisfied with it, but we said, let's
9 use it just because we need a word, and we felt that maximum
10 was confusing and somewhat misleading in the context, and --

11 MR. MCCALPIN: One last question let me raise with
12 you. Read (a)(2)(A) with me, "The corporation shall
13 establish, in consultation with governors of the several
14 states, maximum income levels," plural.

15 Does that suggest that we were asked to establish
16 different, not just a single income level, but different
17 ones, taking into consideration, as it says, family size,
18 urban and rural differences, and substantial cost of living
19 variations. Should we have, perhaps, different maximum
20 levels in different parts of the country?

21 MS. PERLE: Well, we do. As I said, the HHS
22 guidelines make a distinction between Alaska and Hawaii, on

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1 the one hand, and everyplace else on the other hand, because
2 there's recognition that --

3 MR. MCCALPIN: But we don't do urban and rural.

4 MS. PERLE: No, we don't, and over the years, there
5 has been lots of discussion. I think there was discussion --
6 was it at the board meeting -- there was some discussion
7 about that issue. I think it was at the board meeting on
8 Saturday, where whoever was talking about it said that it's
9 been a major struggle over the years trying to take -- to
10 figure out if there's a way to --

11 MS. MERCADO: It was Andy Steinberg.

12 MS. PERLE: It was Andy Steinberg, correct. And
13 that, while we recognize that the cost of living in urban
14 areas is -- may be higher than the cost of living in another
15 area, there may be difficulties in terms of costs of service
16 because of large distance. And you may be able -- and that
17 translates in terms of the ability, and also, perhaps -- and
18 also, the difference that it considers -- pardon me, you can
19 strike that --

20 But, within an urban area, it may -- you may
21 have -- how can I put this? I'm getting myself confused --
22 that there may be, you know, different considerations between

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1 urban poor living and rural poor living that sort of balance
2 one another out.

3 CHAIR BATTLE: I guess the bottom line of what I'm
4 hearing Bill raise -- and it's a concern that I have and I
5 think the other members of the committee share this
6 concern -- is that, right now, our statute sets specific
7 guidelines as to how we're supposed to determine financial
8 eligibility. And, in those guidelines, maximum income
9 levels, by its term, seems to indicate that there are certain
10 variations that should be taken into account, that at present
11 really aren't.

12 MS. PERLE: Certainly family size is taken into
13 account.

14 CHAIR BATTLE: Family size is, but cost of living
15 variations, when you only include Alaska and Hawaii, and
16 there are as many variations across the country as there are
17 that are not take into account, I can't say that we've done
18 what we should do with regard to cost of living variations,
19 or the distinctions between urban and rural differences.

20 If we're to reexamine and come up with a new way to
21 do this, I think we have to take -- we have to go back to
22 what our task was at the onset, it seems to me, and to look

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1 at how we can accomplish setting these income levels in a way
2 that takes into account what the statute says we have the
3 authority to take into account, and those variations.

4 Now, the reason I asked the question about Appendix
5 A -- I didn't have Appendix A before me, and I didn't know
6 what kinds of variations were contained in Appendix A. I
7 guess Appendix A is in the back of the regs?

8 MS. PERLE: Yes. Well, it's at the -- not in the
9 back of the regs. It's at the end of 1611, in that book.

10 CHAIR BATTLE: In this book, okay.

11 MS. PERLE: And it's changed annually in the
12 spring.

13 CHAIR BATTLE: And we don't have any real control
14 over how those changes occur, we just adopt it.

15 MS. PERLE: Right.

16 MS. MERCADO: Mine doesn't have it, unless --

17 CHAIR BATTLE: Bill just showed me a copy. His was
18 actually stuck in there.

19 MS. PERLE: I do have the most recent one.

20 CHAIR BATTLE: Okay.

21 MS. GLASOW: I think, if we look back at the
22 regulatory history on this rule, we'll see that boards have

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1 really struggled with this issue, and I think, to some
2 extent, they relied on the HHS numbers, and maybe presumed --
3 I don't know, I'd have to go back and look at their
4 considerations more thoroughly -- that HHS was doing some of
5 this consideration ahead of time, and then we were just
6 taking those numbers and going with it.

7 MS. PERLE: I think, if you read this, it
8 doesn't -- I don't think it suggests, necessarily, that the
9 levels themselves have to take into account urban and rural
10 differences and cost of living, but that the process of
11 consideration has to take into account those things. And I
12 think that, over the years, the corporation, every time it's
13 readdressed this issue, has taken those things into
14 consideration, and has just decided that the variations are
15 too complex to make distinctions --

16 CHAIR BATTLE: Well, I guess -- yes, they are
17 complex, and I agree with that. But I wonder whether what
18 our reg needs to be doing is explaining how, in taking this
19 table, if you're in an urban area, what kind of consideration
20 one can give to whatever that -- now we've got between 125
21 and 150 percent -- whether or not that's your measure of the
22 guideline for determining income eligibility, or financial

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1 eligibility, or exactly whether these are factors that a
2 program can consider.

3 MS. PERLE: Well, don't forget, the 125 percent is
4 a maximum figure in the sense that that's the most that a
5 program can set its regular -- or whatever word you want to
6 use -- income guidelines at. There are many programs in this
7 country that set it at 100 percent of poverty, because,
8 otherwise, they would be overwhelmed even more than they are
9 now.

10 I don't know that there's any program in the
11 country that sets it below 100 percent, but I think there are
12 a number that set it at between 100 and 125 percent. So,
13 programs do take into account urban and rural differences,
14 and cost of living. And I don't know whether there are any
15 large programs, state-wide programs, for example, that may
16 have different -- you know, may use 100 percent for certain
17 parts of their area, and 125 or 150 in others, I don't know.

18 MR. McCALPIN: I'd like general counsel's office to
19 advise us whether, in their view, the provisions of (a)(2)(B)
20 permit programs to exceed the maximum income level which
21 (a)(2)(A) requires the corporation to establish.

22 MS. GLASOW: Okay.

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1 MS. PERLE: In other words, whether the provision
2 of 150 percent, of 125 percent that's in the current act, or
3 the 200 percent, whether that's permissible.

4 MR. McCALPIN: Where is 150 percent of 125?
5 Where -- I have trouble finding that.

6 MS. PERLE: That's -- this is a complicated rule,
7 because of the way it's set up, and it's been made more and
8 more complicated. It's on page --

9 MR. McCALPIN: Where is it in the Act?

10 MS. PERLE: It's not in the Act, just as 125
11 percent is not in the Act.

12 MR. McCALPIN: I understand that, so what you're
13 saying is that the maximum income level set by us is 125,
14 except in some instances it's 150 or 125.

15 MS. PERLE: Well, I think that's your question.
16 Your question for the general counsel's office is whether the
17 current rule, or the proposed rule, for that matter, are
18 consistent with the provisions of the Act.

19 MR. McCALPIN: That's right. That's what I'm
20 asking, whether we have the -- well, we can set maximum
21 income levels. That's clear, but whether a program can go
22 outside a maximum income level is what I'm getting at.

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1 MS. PERLE: I think we understand the question, and
2 I guess the only answer that we have right now is that it has
3 been that way since the beginning, and it's never been
4 seriously questioned, I don't think. But that doesn't
5 necessarily answer the question.

6 (Laughter)

7 MR. McCALPIN: As I understand, consistent
8 interpretation by an agency entrusted with interpretation of
9 a statute is a factor in determining. I understand that, but
10 I'd still like counsel to give us an opinion.

11 MS. GLASOW: Certainly.

12 MR. McCALPIN: And I wish you would struggle with a
13 different word than standard.

14 MS. PERLE: We would be happy for any suggestions.

15 MS. MERCADO: Well, you know where I think it -- I
16 think that we could deal with it if we went ahead and, in
17 that first -- 1611.3(a), if we went ahead and said, "every
18 recipient shall establish a maximum annual income level,"
19 because that would be consistent with the language in the
20 Act.

21 And then, for the remainder of the language that
22 you have on (b), you know, when you have standard, it makes

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1 sense, so that there is a standard annual income that will
2 not exceed a maximum of whatever, that those are -- it
3 provides the intent that you want of have some standard,
4 again, not exceeding the maximum.

5 MS. PERLE: Right. I understand that. The problem
6 is that if you use maximum in terms of what the program
7 should establish, and then, you said not to exceed a maximum,
8 that, I think, gets confusing to programs, because then
9 it's --

10 CHAIR BATTLE: Why not break out maximum income
11 level and define it? Give it definition, and then your
12 utilization of that term, once it's defined, should clarify
13 how you use it throughout. And we haven't done that yet,
14 have we?

15 MS. PERLE: I think that may be an approach that
16 would be helpful. It's -- let's -- we'll struggle with that.

17 CHAIR BATTLE: Do you want to move on to (c)?
18 "Before establishing its standard annual income level, a
19 recipient shall consider cost of living in the service area.
20 The recipient should also consider other factors that it
21 determines are relevant, which may include, but are not
22 limited to," and cost of living and the locality is taken

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1 out, and number one becomes "the number of clients who can be
2 served by the resources of the recipient; (2) the population
3 who would be eligible at and below alternative income levels;
4 and (3) availability and cost of legal services provided by
5 the private bar in the area."

6 Let's go ahead and include (d). "(d) Unless
7 authorized by §1611.4, no person whose income exceeds the
8 standard annual income level established by a recipient shall
9 be eligible for legal assistance supported with funds
10 provided under the Act."

11 MS. PERLE: The cost of living and the locality was
12 removed from this place where it is in the current rule, and
13 moved up, because Renee pointed out -- originally, we had
14 all -- we had it below -- we left it where it was, I think;
15 I'm not sure I can recall all of the various variations that
16 this rule has been in, but we included a bunch of -- all of
17 these factors as things that the program could, if it wished
18 to, consider.

19 And Renee pointed out that cost of living and the
20 locality was one of the things that was required under the
21 Act to be considered, so we moved that up to a -- to
22 something that needed to be considered by the recipient,

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1 but --

2 CHAIR BATTLE: But I'm not clear as to whether
3 that's a recipient determination, or if that's a
4 determination by LSC, along with the governors of the several
5 states, as to how that should be done.

6 MR. McCALPIN: It's both.

7 MS. GLASOW: This is -- we are supposed to
8 establish guidelines to ensure that the eligibility of
9 clients will be determined by recipients on the basis of
10 these factors.

11 MR. McCALPIN: This is the determination within the
12 maximum.

13 MS. PERLE: Yes.

14 CHAIR BATTLE: Okay.

15 MR. McCALPIN: Whether they go to 100, 110, 120,
16 125 --

17 CHAIR BATTLE: They can also give consideration to
18 that same issue.

19 MR. McCALPIN: It's part of what influences me to
20 raise the question of whether factors can go outside the
21 maximum established by us.

22 MS. PERLE: I understand that, yes.

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1 CHAIR BATTLE: Let me just find out if there are
2 any questions from the committee with respect to (c)(1), (2),
3 (3) and (d).

4 MS. MERCADO: I have questions with (c)(1).

5 CHAIR BATTLE: Okay.

6 MS. MERCADO: And I know that you had -- you made
7 this point a few minutes ago, that part of the reasoning in
8 that 125 percent poverty, why some do 100 percent is because
9 they can't service that number clients.

10 And again, I go back to, even though we may not be
11 able -- there's no way that we can service all of the clients
12 that we can service. You've only got so many lawyers and so
13 much time, even if people are required -- require that, but
14 to set an eligibility guideline based on what the resources
15 of that program are, I have a lot of problems with.

16 You know, again because that doesn't take away from
17 the number of poor people in that community or that
18 jurisdiction that need the assistance. It just means that
19 we're going to have to be more aggressive about finding funds
20 somewhere else so that we can represent them. But that
21 shouldn't affect the income level, because they're still
22 poor, whether we represent them or not, whether we have to

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1 send them to a pro bono or a PAI or some other agency or
2 whatever, they still are poor.

3 And I don't -- you know, and if we say, well, we
4 only have X amount of dollars so we can only service X amount
5 of clients. Therefore, our guidelines are going to be lower
6 on the income eligibility.

7 Fundamentally I just have a problem with that,
8 because I think that that's where we get into problems when
9 we're justifying why we should or shouldn't receive any funds
10 from Congress or especially any additional funds, you know,
11 when our real picture, our real numbers are not presented as
12 to the number of people that we're not representing.

13 MS. WATLINGTON: I agree with you entirely, because
14 you're losing -- you have to go more aggressive, because
15 you're losing a lot of people. And the cost of living is
16 still increasing and is making it harder for those poor to
17 survive.

18 MS. PERLE: I don't think anybody in this room
19 would disagree with what you said. I mean, it's impossible
20 to disagree with that. I think it's just a question of
21 programs being able to keep their heads above water, to be
22 able to provide meaningful service to the people that they do

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1 serve.

2 And that's a decision that a program has to make,
3 as to, you know, whether they're going to become -- you know,
4 that -- programs get -- every program could set their --
5 probably set their guidelines, if they were allowed to, at
6 300 percent of poverty.

7 And everybody would still agree, probably, that
8 every single person that they served was poor, but it might
9 mean that all they could do was do telephone advice. And
10 that would be it, because they wouldn't have the resources to
11 provide service beyond that to anybody who sought the
12 service. So it's really a question of priorities. And, it's
13 part of the whole process of allocating resources.

14 MS. MERCADO: Yes, but there's priorities, in the
15 sense of, you know, well, we're only going to take, you know,
16 emergency TRO situations, even though these 10 people that
17 showed up today are all poor and eligible, and they all have
18 a legal problem.

19 And that's a priority that I wish that the local
20 program sets, but that -- your inability to respond to every
21 client that comes in who has a legal problem, who meets the
22 financial eligibility criteria, that your inability to

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1 represent all that number of folks shouldn't change the
2 income guidelines for those people. I mean, they're going to
3 be -- they're still going to be at 100 percent of poverty or
4 125 percent of poverty.

5 MS. PERLE: I understand that. I guess it's
6 really -- again, it's a balancing between the number of
7 people you're going to serve on the one hand, and the breadth
8 of -- the scope of representation you're going to provide on
9 the other.

10 MS. MERCADO: But doesn't that go in your priority
11 setting? I mean, isn't your priority setting saying, you
12 know, you've got only so many lawyers and staff, you've only
13 got so much money. I mean, there is only so many people that
14 you can physically represent.

15 CHAIR BATTLE: But you have to go back, too, I
16 guess, Maria, and look at the way that the Act originally
17 talked about the program's ability to represent, I guess, the
18 poorest of the poor. So if you've got to err on one side or
19 the other, and you have limited resources, you want to try to
20 reach those people who truly have the greatest amount of need
21 as part of what you need to be able to factor in.

22 MS. PERLE: I think that's part of what people

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1 thought about, but don't forget, Congress removed that.

2 So, what it said to the local program is that,
3 within the broader parameters that are set by the -- by the
4 Congress and then by LSC, you have to make a decision whether
5 you're going to try to serve more folks with more limited
6 resources -- I mean with more limited service, or you're
7 trying to target your resources on a somewhat more narrow
8 group of people and provide more complete service, or whether
9 you're going to -- you're going to look -- try to serve
10 people in more categories of representation but serve fewer
11 people.

12 CHAIR BATTLE: Renee.

13 MS. SZYBALA: Just an observation. I think it's
14 correct that we lose statistically a tremendous amount of
15 argument by not allowing people at, say, 300 percent of
16 poverty is the level at which -- certainly, people cannot
17 afford a private lawyer if they're below 300 percent.

18 By not making our cap 300 percent, we lose the
19 statistics for argument's sake, but you have to look at
20 whether the administrative costs of obtaining that statistic,
21 of leaving out those people, of doing your priority setting
22 and intake, and telling people who are financially eligible

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1 that you can't represent them on other grounds. You have to
2 look at whether the administrative burden of doing that for
3 the programs is worth developing that statistic, and I'm not
4 sure it would be.

5 CHAIR BATTLE: I'd like to shift to another issue.
6 The statute actually sets out some very specific things that
7 the recipient is supposed to consider for purposes of making
8 a determination of eligibility, and not all of those things
9 are contained here in --

10 MR. McCALPIN: That's not the recipient, that's us.

11 CHAIR BATTLE: No, guidelines -- recipients in (b).

12 MR. McCALPIN: "The corporation shall: (b)
13 establish guidelines to ensure" --

14 CHAIR BATTLE: "will be determined by recipients on
15 the basis of these factors."

16 MR. McCALPIN: That eligibility will be -- okay.

17 CHAIR BATTLE: Yes, so I'm saying, recipient
18 determinations --

19 MS. PERLE: Those things are -- but those things
20 are all reflected in the regulation in one place or another.

21

22 CHAIR BATTLE: Okay.

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1 MS. PERLE: The assets are in a separate section,
2 income level --

3 CHAIR BATTLE: I guess the question I'm raising is,
4 we here are talking about the considerations by a recipient
5 for determining eligibility --

6 MS. PERLE: Of an individual.

7 CHAIR BATTLE: Of an individual, and is this the
8 proper place, then, to include all of these? Are you saying,
9 I mean --

10 MS. PERLE: They're not included in this section;
11 they're included later in the more specific discussions of
12 what goes into the recipients' determination of their
13 financial eligibility policies and guidelines.

14 CHAIR BATTLE: Okay. Why don't we take a --

15 MS. MERCADO: What section is that on just so that
16 I can cross-reference it for myself?

17 MS. PERLE: It starts, I think, on page 8, where
18 it's -- it starts on page 6, actually, and then goes on -- I
19 think that -- I think that, you know, one of the things --
20 maybe, if you want to take a break, when we come back, one
21 thing that would be helpful is to sort of outline how this
22 set of determinations -- how a recipient goes about

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1 determining -- under this scheme -- now, you may decide that
2 this scheme isn't the way you want to go -- but, under this
3 scheme, how we anticipated that, when a client walked in the
4 door, how they -- how a determination would go as to whether
5 or not they would be eligible.

6 I think that would be helpful in terms of your
7 overall ability to kind of get a handle on how this works.

8 CHAIR BATTLE: Why don't we do this? We're going
9 to take a very brief, 5-minute break, and come right back and
10 pick up, give the court reporter a break, too, for a moment.

11

12 (A brief recess was taken.)

13 CHAIR BATTLE: Let's go back on the record. Linda,
14 I think we had just completed at least part of the discussion
15 of subsection (d), and were in the midst of trying to
16 determine recipient ability to consider certain factors in
17 determining eligibility, financial eligibility.

18 MS. PERLE: I wanted to make a point, which I
19 really wasn't able to make -- a couple points, but one of
20 which is, in part, in response to the set of issues that Mr.
21 McCalpin raised, I think that we weren't necessarily looking
22 at the 125 percent and the 150 times 125 percent quite the

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1 way that the rules intended to be looked at, and I wanted to
2 clarify that a little bit.

3 I think that what the rules say is, the income
4 level that we're looking at is 125 percent of poverty, but
5 that we have to -- that we understand that with respect to
6 certain people, that there are factors that you have to look
7 at, in looking at their income, which say that this person --
8 income may look like it's really 135 percent of poverty, but
9 if you look at these factors, that income is not available to
10 them, it is not disposable income for a variety of reasons,
11 which are listed here, and that what we really have to do is
12 deem their income, on the basis of these factors, to be below
13 125 percent.

14 I think that's really kind of the way that we need
15 to look at it, and I think that, in fact, justifies the use
16 of the other figure.

17 I think that the other point to be made, and Judy
18 can correct me if I'm wrong, is that the 150 times 125
19 percent that's in the current rule is something that is, in
20 fact, used sparingly, that most people's income is, in
21 fact -- their absolute income is below 125 percent. Is that
22 right, Judy?

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1 MS. SCHUENEMEYER: Yes.

2 MS. PERLE: That there are not that many times
3 where the whole set of exceptions are applied. I think
4 that's one of those reality checks.

5 What I wanted to do was to kind of -- I think,
6 before we talked about the rule, to walk through a little bit
7 what we perceive to be the way this will work in practice,
8 and then what I'd like to do, with the committee's
9 indulgence, is to ask Judy Schuenemeyer, who's the director
10 of the program in Delaware, if she could give us a little bit
11 of her perspective, from the perspective of somebody who has
12 to deal with these rules everyday, in making or reviewing
13 eligibility decisions.

14 CHAIR BATTLE: Now, are you going to do that in
15 relationship to the sections we've already discussed, or as
16 an overview to all of the sections?

17 MS. PERLE: I think it would be more helpful to do
18 it as an overview, the way that they work together, but if --
19 I can do it whatever way, obviously, the committee prefers.
20 What we attempted to do -- under the current rule, the person
21 comes in and then you have to make this determination and
22 then you make this determination and then you make this

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1 determination, and it's sort of back and forth, it's very
2 confusing, and you can't figure out what factors are
3 considered at what point in the determination.

4 And programs have struggled with it, and they've
5 done their best, and then LSC has oftentimes come in
6 monitoring, saying, "no, you're doing it wrong, and you need
7 to do it this way." And then, the next time they come in --
8 so they change it, and the next time they look at it and say
9 "no, you're doing it wrong," and then you need to go back the
10 way it was before. It's very confusing, so the attempt in
11 this rule was to simplify the process.

12 And what we intended to do was to have a -- to set
13 it up as a situation where a client comes in, there are
14 certain basic questions that are asked about their income.
15 If their income is below 125 percent of the poverty, they are
16 financially eligible. They are eligible on the basis of
17 income. You then look at assets, and they could be excluded
18 on the basis of assets. If they don't have over the -- over
19 the asset limits, then you look at other criteria.

20 And obviously, you have -- you look at priorities
21 in the first instance, if it's -- and the certain
22 restrictions in the Act, but sometimes those decisions are

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1 not totally clear, either, until you've made some of the
2 other determinations. So, it's not totally clear at which
3 point all those considerations come in.

4 But the point is, you look at income, then you look
5 at assets, and then, if the person -- after you've looked at
6 income, the person's income is over 125 percent, then you can
7 say, "Okay, it's over 125 percent, but do these other
8 considerations suggest that you should be considered to have
9 a lower income?" And then, those things are things that we
10 haven't gotten to, yet. They're like medical expenses and
11 fixed debts and obligations, child care expenses, and unusual
12 expenses.

13 In other words, then you -- then, if those things
14 are present, then the program can determine -- if one or more
15 of those factors are present, then the program can determine
16 that the person -- we should serve that person because, in
17 essence, even though they're absolute income is higher, these
18 factors, in fact, suggest that it really is much lower, that
19 their disposable income is much lower.

20 So, that's sort of the way it works. So, it's
21 supposed to be -- we've attempted to make it a simpler, more
22 streamlined procedure.

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1 CHAIR BATTLE: Okay. Why don't we, in light of
2 that overview, which shows that at least we have the same
3 intent at this point in time, to take the guidelines, and to
4 make them -- take this particular reg, which establishes the
5 guidelines for determining financial eligibility, and make it
6 more streamlined, taking out all of these specifics and
7 giving some guidelines in the write-up --

8 MS. PERLE: And also rearranging things.

9 CHAIR BATTLE: And trying to rearrange it. Let's
10 look at the next sections, and see where they fall out in our
11 discussion. And what I'd like to do is to take (e), (f) and
12 (g). And then we can discuss (e) and (f) and (g) together,
13 which will take us all the way through 3.

14 "(e) The governing body of a recipient shall adopt
15 financial eligibility policies or guidelines consistent with
16 these regulations for determining the financial eligibility
17 of persons and groups seeking legal assistance under the Act.
18 The governing body shall review its financial eligibility
19 policies or guidelines at least once every three years, and
20 make adjustments if necessary."

21 And "(f) If, based on its financial eligibility
22 policies or guidelines, a recipient has determined that an

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1 applicant's current annual income does not exceed the
2 recipient's standard annual income level, before undertaking
3 representation or providing services to the applicant, the
4 recipient shall consider: (1) the recipient's priorities
5 established under part 1620 of these regulations; (2) the
6 applicant's current income prospects, taking into account
7 seasonal variations in income; (3) the availability of
8 private or other legal representation at low or no cost with
9 respect to the particular matter in which assistance is
10 sought; (4) the consequences for the individual or group if
11 legal assistance is denied; (5) the existence of assets
12 reasonably available to the applicant which are in excess of
13 the asset ceiling set by the recipient pursuant to 1611.5;
14 (6) other significant factors that affect an individual's
15 financial inability to afford legal assistance, which may
16 include evidence of a prior administrative or judicial
17 determination that a person's present lack of income results
18 from refusal or unwillingness, without good cause, to seek
19 acceptable, suitable employment; and (7) any other case
20 acceptance criteria that the recipient may establish or
21 impose to determine which cases to accept from among priority
22 cases of financially eligible persons or groups."

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1 And the final section, (e), subsection (g), "This
2 part does not prohibit a recipient from providing legal
3 assistance to a person whose annual income exceeds the
4 standard annual income level established here, if the
5 assistance provided to the person is supported by funds of a
6 source other than the corporation."

7 MR. MCCALPIN: Madame Chair, as you know, I am
8 scheduled to participate in a telephone conference call at 11
9 o'clock, so if I can make two quick comments. Yesterday, we
10 discussed whether or not the merit of the case ought to be a
11 factor in determining acceptance, and therefore, I suggest
12 that on page 6, "the recipient shall consider," and that the
13 merit of the claim or -- so -- should be included as a
14 factor.

15 The other comment I want to make is in subsection
16 (g) on page 7. "The standard annual income level established
17 here" -- it is not established here. We are not establishing
18 it here; it is established as required here. I may be gone
19 when the rest of it goes on, I wanted to get those two
20 comments in.

21 MS. PERLE: Thank you. That is helpful.

22 CHAIR BATTLE: What I do note, just in looking at

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1 that, some of the concerns I had about 1007(b), in terms of
2 having some of the other criteria that recipients were to
3 consider in making a financial eligibility determination are
4 included in this list, so I -- you gave me comfort earlier,
5 which I now see realized in some of these factors.

6 MS. PERLE: Most of these factors are factors that
7 were present in the current -- that are present in the
8 current regulation in a different place.

9 CHAIR BATTLE: Did we have the three-year review
10 current?

11 MS. PERLE: No.

12 CHAIR BATTLE: Is that new?

13 MS. PERLE: That's new. The current language, I
14 think, requires that it's done every year. And, what we felt
15 was, well, clearly, programs needed to look at their level
16 every year, in light of the fact that the Appendix A changed
17 every year.

18 They wouldn't be required to change the actual
19 income guidelines, but that what they needed to do was to
20 have a periodic review of all of their policies, to see
21 whether there were factors in the community that had changed,
22 or that there were new things that had risen, or that things

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1 hadn't worked out the way they had anticipated and that were
2 difficulties under their policies, but that, by requiring
3 that the programs do it every year, it became rather pro
4 forma, and people didn't really pay much attention to it, but
5 that if it was required to be done less frequently, they
6 would take it more seriously.

7 We, originally, I think, suggested that it -- that
8 the -- that it say it should be done periodically, but then
9 people said no, that they thought it was important that they
10 should have a specific -- a date certain by which it needed
11 to be done, that -- to encourage people to put it on a
12 calendar and actually get it done. So that's why the three
13 years is in there.

14 That's also consistent with the treatment of asset
15 ceiling, which is later.

16 CHAIR BATTLE: This list seems to -- with the
17 addition that Bill has suggested of the merits of the case,
18 which we discussed yesterday -- seems to be exhaustive. Are
19 there any other suggestions from any of the other committee
20 members or board members to add to this list?

21 MS. MERCADO: I'm just still trying to look at the
22 time period. I think, more than anything else --

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1 MS. PERLE: For reviewing the process?

2 MS. MERCADO: For review. I don't know that -- I
3 would prefer, maybe, every couple of years, but --

4 MS. PERLE: You mean, every other year?

5 MS. MERCADO: Just because you have turnover of
6 staff, and you have turnover of board members, I mean, we're
7 assuming that boards are on a third rotation, I don't know.

8 MS. PERLE: I think Judy Schuenemeyer would be a
9 good person to ask about whether, in reality, this is a
10 good --

11 MS. MERCADO: Yes, but it's the government body
12 that's doing that, and I don't know that you have any kind of
13 a staggering term so that you have somebody who is
14 knowledgeable about what those discussions may or may not
15 have been, so that if you make it a three-year period, it's
16 conceivable that you may have a totally new board or
17 governing body that may not have had the benefit of whatever
18 the discussions are or had a sense of continuum. And so,
19 maybe the two-year --

20 MS. PERLE: I think you would find -- Judy, again,
21 can correct us -- I think you'll find that most programs have
22 staggered terms. Now, they have maybe three or four-year

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1 terms or whatever, but they're staggered, so that there is
2 continuity on the board.

3 But -- and if that's so, then what you should have
4 at a three-year interval is probably some new board members
5 who can add a fresh perspective, and some board members who
6 were there the last time to add a historical perspective.

7 But I -- that's just my assumption. Is that correct, though?

8 MS. SCHUENEMEYER: (Nodding)

9 MS. PERLE: Judy says that's -- is shaking her head
10 yes. Judy, would you like to come up here? Do you think it
11 would be helpful to have Judy's perspective on some of these
12 issues?

13 CHAIR BATTLE: Sure.

14 MS. WATLINGTON: I think so.

15 MS. MERCADO: Ernestine, you have been on a couple
16 of boards. What's the time period? I mean, is it usually
17 three-year term or a two-year term? What's the average term?

18 MS. WATLINGTON: Each board is different, and that
19 was -- that has been a problem with -- what happened is, they
20 came and wanted -- that has been a fight on a local level
21 with the clients and the board. It's turned, because they
22 have used that against clients. That has been some, you

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1 know, problem with that as far as terms on different boards.
2 Each local board has their own terms.

3 MS. MERCADO: Yes, because in Lubbock, for example,
4 they're every two years.

5 MS. PERLE: Every two years?

6 MS. MERCADO: Yes, and the bar appoints, you know,
7 a new board person or persons to the --

8 MS. WATLINGTON: The bar will appoint it, but it's
9 the -- you know, the other ones that the local board -- the
10 process for the other board members, you know, is big
11 problems with -- on local boards, your state boards --
12 that's -- but it's always been like, in the years prior, as I
13 stated before, is it's always been that fear of the
14 corporation dictating to you.

15 CHAIR BATTLE: But this says "at least once every
16 three years." It seems to me that the board, if it, on its
17 own motion, wanted to, they could review it even more
18 frequently than they --

19 MS. PERLE: They could review it every year if they
20 wish, or every other year.

21 CHAIR BATTLE: This sets an outer guideline to say
22 that at least once every three years this needs to be done,

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1 but not that the board is constrained to only do it once
2 every three years, it seems to me.

3 MS. PERLE: Right.

4 CHAIR BATTLE: Rosie, did you have something to
5 add?

6 MS. NEWSOME: Yes, I was just going to say, we do
7 ours every year.

8 CHAIR BATTLE: Yes, and you could continue to, it
9 seems to me, under this guideline.

10 MS. WATLINGTON: But this three years, you say --
11 it doesn't say you must, so --

12 MS. PERLE: Don't forget, you're required to look
13 at the actual money income levels every year, because they
14 change every year. So you have to -- you know, you have to
15 look at the numbers that come out each year, and say, "Do we
16 want to go -- we're now at 125 percent of poverty" --

17 CHAIR BATTLE: Now, where is that, Linda, in the
18 guidelines, that the annual review on the actual money -- the
19 annual review by a recipient of the -- of what's put out each
20 year, because really, I think what happens is, HHS, each
21 year, updates these guidelines, and then each recipient
22 has -- and I want to find out where -- the responsibility to

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1 review that to see what they're going to go with.

2 MS. GLASOW: It's on page 4, "The governing body
3 shall review the recipient's standard annual income level
4 annually, and consider any changes made to Appendix A. We
5 send that out to the field every year --

6 CHAIR BATTLE: So every year they've got an
7 obligation to look at the numbers, and then, look at the
8 broad policy at least three years.

9 MS. PERLE: Right, and this policy involves not
10 just the income level, but it involves how you determine
11 eligibility and what factors you consider and how you weigh
12 various factors. Those are the things. And that -- and what
13 we want that to be is a real serious effort to look at how
14 those policies and procedures are working, and fix any
15 problems.

16 MS. WATLINGTON: Well, that has always been
17 required. You had to review it, and your board had to get it
18 in every year. And you have to be -- not just get it in, you
19 have to have it in a -- that the board vote -- and
20 everything; that had to be turned in every year. There's a
21 lot of these things that the boards -- we've had to do every
22 year. I mean, a lot of restriction -- I mean, a lot of

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1 things, basically, we had to do and report back to the
2 corporation. I thought we were supposed to eliminate some of
3 that paper.

4 CHAIR BATTLE: Well, that's what doing it every
5 three years is doing, is saying that the board can, on its
6 own, do it more than once every three years, but at least
7 take a careful look at the policies, guidelines that they use
8 for financial eligibility.

9 What about the listing that we got? Are there any
10 questions from any of the board members about the kinds of
11 considerations that a recipient can give in coming up with
12 their annual income?

13 MS. PERLE: I want to just explain number (6) a
14 little bit. It sort of sticks out a bit like a sore thumb,
15 because it's --

16 CHAIR BATTLE: It comes straight out of the
17 statute, doesn't it?

18 MS. PERLE: It comes right straight out of the
19 statute, and although the statute says, you know, that you
20 may consider those things, what -- you know, and so, I think
21 that there would have -- could, if the committee wished to
22 remove that, it certainly could. They're not required to

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1 do --

2 CHAIR BATTLE: I'm comfortable that -- the fact
3 that it's in the statute, I think we need to just go ahead
4 and leave it in.

5 MS. PERLE: Right, I mean -- and so, it's still
6 left as permissive. You know, it says, which may include
7 evidence, and so, programs don't -- are not required to
8 include that in their consideration of -- in their policies,
9 but it's still listed as one of the things that they may
10 consider.

11 CHAIR BATTLE: Okay. Anything else? Any other
12 concerns or --

13 MS. GLASOW: I would just note that on these
14 factors, number (1) refers to the priorities, which we
15 will -- we were talking about these issues earlier. And
16 number (7) talks about case acceptance, the type of cases
17 they can accept, and so those are the factors that Bill was
18 concerned about earlier.

19 MS. PERLE: And also, number (2) deals with the
20 issue of income prospects and variations in income. And
21 they're not, you know, they're sort of --

22 CHAIR BATTLE: What I was hoping we could have, and

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1 I know that this gets down to an individual intake technician
2 style in terms of how they do this when you've got someone
3 who has just lost their job and they don't have any prospect
4 of -- because of the kind of job that they held, and some
5 knowledge about the job market in that area -- any prospect
6 of being able to get another job, figuring out how much you
7 include of previous income in your determination of an annual
8 income.

9 MS. PERLE: Judy, maybe you can answer that. We
10 were talking about that a little bit in the bathroom.

11 (Laughter)

12 CHAIR BATTLE: Where all power decisions are made.

13 MS. PERLE: We were discussing that out in the
14 hallway earlier. You can leave that part out.

15 CHAIR BATTLE: Judy, give your whole name.

16 MS. PERLE: Do you want to pull up a chair?

17 MS. SCHUENEMEYER: I'm Judy Schuenemeyer. I'm the
18 executive director of community and legal aid society in
19 Delaware, and I'm speaking only for myself and my program,
20 and I realize that every program is different, based on where
21 it is and a lot of other factors. Ours is a statewide
22 program, but we're a very small state, and it's urban and

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1 rural, so we have some of the problems that face both of
2 those communities.

3 I've been with the program for 17 years, so what
4 I'm saying to you is based on my experience. In terms of
5 looking at annual income, it's a very individual thing, and
6 we rely on people's judgment. You have the criteria, sort of
7 the parameters of it, but you have to look at the individual
8 person and what their prospects are going forward; sometimes
9 you look at what kind of situation they're in on an ongoing
10 basis.

11 School bus drivers are what comes to my mind when
12 I'm thinking about people where looking at their annual
13 income requires going back as well as going forward. We have
14 some school bus drivers on our state who do not get
15 unemployment when they're off in the summer. They have an
16 annual contract, and based on that, they have no income
17 during the summer and during any kind of vacations that the
18 schools have.

19 You have to look at their annual income. There's
20 just no other fair way to look at that. Other companies that
21 employ drivers have different kinds of contracts, and they
22 are permitted to receive unemployment. They still may be

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1 eligible for our services, but you've got to look at what
2 that person's situation is.

3 The comment was made earlier by someone that, as a
4 practical matter, most of the clients that we serve, we don't
5 even get into these questions, because most of them are at or
6 below the 125 percent of poverty level. So, it's -- I get
7 asked to approve waivers very infrequently. I doubt if we
8 have more than 12 or 15 waivers per year, so this is not an
9 issue that comes up with great frequency.

10 And we're one of the states, if you look at the
11 list of how poverty level declined, we're one of the ones
12 that's at the bottom, supposedly, based on the 1990 census,
13 which would say, we have fewer poor people than most other
14 programs do. But we still have most of our clients falling
15 below 125 percent of poverty.

16 So what we're talking about, I think, is really
17 very few people, in terms of looking at the factors that
18 would be considered in serving someone, because most people,
19 you're not going to have to look at any of those factors.
20 They will be eligible.

21 MS. PERLE: Judy, I just want to make one point
22 about the list that we're looking at right now. There are

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1 two lists within this regulation. This list is intended to
2 be factors that a program should look at in determining
3 whether a person whose income falls below 125 percent of
4 poverty should, nevertheless, not be served. That's what
5 this list that's on page 6 and 7 is intended to be. And so,
6 what we're saying is that, this person, based on this pure
7 income calculation, the person's income is below 125 percent.

8 But, if, for example, they have lots of assets,
9 they shouldn't be served. Or, if what they're seeking is
10 just so insignificant, the consequences for the individual
11 that the program is not going to use its resources, I doubt
12 that there are too many things where that's not already taken
13 into consideration in priority setting, but -- or, right now,
14 the person has no income, but they're about to -- like, for
15 example, your bus driver.

16 Right now, it's the end of August, and they have no
17 income. But in September, in two weeks, they're going to
18 have a job which is going to carry them through, and assuming
19 that that income is high enough to put them above, that
20 person shouldn't be served, even though right now they have
21 no income.

22 So those are the kinds of -- that's the reason for

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1 this list of factors. The other thing is, (3), that they --
2 if there are some communities where the person has fairly low
3 income, but what they want is an uncontested divorce, and in
4 that community private attorneys will do an uncontested
5 divorce for \$150.

6 The program could decide that that's still too much
7 for a poor person. But they also could decide that, if they
8 really want it, they could scrape that together, and that we
9 have -- that we need to focus our resources on other issues.

10 So, those are the kinds of things that can go into
11 weighing whether you make a decision that a particular
12 individual should not be -- who has a low income should not
13 be served.

14 There's another set of circumstances to consider.
15 That person whose income is slightly above should,
16 nevertheless, be served. And that comes later in the rule.

17 CHAIR BATTLE: Is there anything else?

18 MS. WATLINGTON: When we did that conference with
19 Alan Houseman -- I forget the name of it there -- poverty --
20 and also in Pennsylvania -- poverty has shifted in our
21 statistics. We have even had to shift our dollars into our
22 program based on that. It shifted from the east to the west.

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1 CHAIR BATTLE: Do you mean the geographic location
2 of the number of people who would meet the qualifications?

3 MS. WATLINGTON: Yes.

4 CHAIR BATTLE: Well, you know -- and, I guess the
5 other question that I had, mobile priority setting plays into
6 this, and we don't have any real oversight. That's a
7 determination made by the governing body of the recipient as
8 to what those priorities are. And, certainly, that should be
9 part of what a recipient considers in terms of making a
10 financial eligibility determination.

11 MS. PERLE: Is that a question?

12 CHAIR BATTLE: I guess that's just a comment.
13 That's a comment. I had a question about (g), which gets
14 into, in my view, the issue of time keeping, because it talks
15 about a recipient being able to exceed this, if that person
16 is being supported with funds other than corporation funds.

17 And, I just had in my notes a question mark about
18 whether we should, at this point, discuss time keeping or
19 other methods to -- factor the considerations given by the
20 subcommittee on the issue of timekeeping.

21 And it seems to me that the only -- the only
22 circumstance where it becomes relevant is where there is this

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1 situation where you've got potential clients that don't meet
2 our eligibility, and cases that don't meet our statutory
3 requirements that are being considered under that same
4 program umbrella with other funds.

5 And, I wondered whether, in order to be able to
6 fully address the concern that Congress has about time
7 keeping at all, whether we need to give some consideration to
8 some methodology for assuring that that concern has already
9 been allayed based on our own regulatory practice.

10 MS. PERLE: We raised that issue in footnote 16,
11 because -- not just congressional concern, but there have
12 been program concerns.

13 I think that those concerns arise in a lot of
14 contexts, but it's been a particular set -- a particular
15 focus and concern in programs that get Title III funds which
16 serve elderly, and they're not permitted to be means tested,
17 and require matching funds and LSC funds have been determined
18 to be available for that match, so that many programs have
19 elderly units that serve, then, both LSC eligible clients and
20 non-LSC eligible clients, and use both Title III money and
21 LSC money.

22 And LSC has raised often the issue about how you

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1 can justify and document the allocation issues. The
2 allocation of clients to one set of funding or another. And
3 to raise the issue, I think that -- I don't know that it's
4 appropriate for us to try to address that issue in the
5 eligibility regulation.

6 I think that the corporation will have to
7 wrestle -- particularly if reauthorization passes some sort
8 of time keeping requirement -- how that is to be implemented,
9 and clearly play out, in this -- in the operation of this
10 regulation.

11 CHAIR BATTLE: I guess what I'm suggesting is that,
12 rather than -- particularly since we know reauthorization's
13 not going to happen this year -- we ought to address in the
14 regulations this year whether it's wise on our part, knowing
15 that there is this program and congressional concern, to give
16 some thought to -- not necessarily in this regulation but in
17 an appropriate part of the regulations -- coming up with some
18 methodology for assuring that those distinctions are clearly
19 drawn.

20 MS. PERLE: Under the current rider, the
21 corporation -- if the corporation is to implement any time
22 keeping, it has to be -- the system has to be done through

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1 regulation. That's what the current rider requires now.

2 CHAIR BATTLE: Yes. So, I'm just saying that's
3 just an issue on the table for us to consider as we look at
4 the regulations.

5 MS. WATLINGTON: A clarification, because there has
6 been a lot of concerns in the field, in the programs about
7 time keeping. I've been at several board meetings or -- when
8 it used to come up and try to get passed, or they would --
9 Judy, maybe you can do that. I know it had been a concern.

10 As board chair, several times we've -- you know,
11 we've had to comment, so I think a good clarification on
12 that -- for -- not only for, as you said, the reason behind
13 it on both sides, what the -- what Congress wants and what
14 the field -- to get a clear understanding of how that
15 affects, because that has been a very sore spot.

16 MS. MERCADO: I think that in questions where
17 you've got independent funding, whether it's Title III that
18 is requiring it, or whether it's IOLTA money or whatever,
19 that, for purposes of making sure that a recipient does not
20 get tainted in the whole servicing of that client in those
21 kinds of cases, really have no alternative but to do time
22 keeping to make sure what percentage, you know, of the case

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1 funding goes to that particular client for what particular
2 funds.

3 And that I don't think that anyone questions that;
4 I think the whole issue of time keeping is one as to where
5 they ought to be time keeping on every single case that they
6 do, when there are not separate kinds of funding sources. I
7 mean, those are two different issues.

8 CHAIR BATTLE: And I guess the concern that I raise
9 is, it seems to me we have an opportunity to get ahead of
10 that band, and make a determination that addresses the real
11 concern so that we don't get imposed upon us some overall
12 time keeping that would affect programs where there's not
13 even an issue of the use of funds that are private funds as
14 well as corporation funds.

15 MS. SCHUENEMEYER: If I could respond. I'm not
16 sure; I know I don't represent the field, because we've been
17 time keeping for over 10 years, because we have a number of
18 different funding sources, and we time keep by funding
19 source. All of our paralegals and all of our attorneys keep
20 daily time sheets by tenths of an hour.

21 Most of the field is not in favor of time keeping
22 because they see it as extremely burdensome. And it is, but

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1 once people get the hang of it, they manage to do it. And
2 ours is fairly complicated, because we do have a number of
3 different funding sources. But I know I don't speak for the
4 field, because the majority do not keep time.

5 CHAIR BATTLE: Look, any lawyer who has to time
6 keep, it doesn't matter what it is that you do, it's a
7 burden, so I can really understand that level of concern.
8 What I see us having is an opportunity to, though, address
9 the concern that I heard at least expressed in the
10 subcommittee about time keeping. In a way, that will
11 potentially blunt the need for time keeping to be imposed on
12 every program, even where there are not the variety of
13 funding sources being used.

14 Okay, anything else on what we've covered? Can we
15 move on to the next? 1611.4 "Authorized acceptance to the
16 standard annual income level. A person whose income exceeds
17 the standard annual income level established by a recipient,
18 but does not exceed 200 percent of the federal poverty income
19 guidelines, may be provided legal assistance supported by
20 funds provided under the Act, if the person would not be
21 disqualified on the basis of any other factors considered
22 under 1611.3(f), above. And, the person is seeking legal

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1 assistance to secure or maintain benefits provided by a
2 government program for low income individuals or families."

3 MS. PERLE: That's (a).

4 CHAIR BATTLE: That's (a). Let me just go through,
5 well, (b), and then we'll take up (c) separately, because (c)
6 is a rather lengthy subsection. (b) is "The person is
7 seeking legal assistance to secure or maintain benefits
8 provided by a governmental program for the disabled, but only
9 if without those benefits the individual would be financially
10 eligible for services from the recipient." Okay. Any
11 questions? That's pretty straightforward, it seems to me.

12 MS. PERLE: Just to make it clear, what we're
13 saying in the first part is that you have to go back and
14 refer to that list -- the list that we just talked about,
15 which are used to exclude people who would be eligible, and
16 make sure that none of those would exclude a person, you
17 know, regardless of the -- in other words, if the person,
18 regardless of their income, had a lot of assets, for example,
19 there wouldn't -- you wouldn't be able to permit them to be
20 served under this authorized exceptions provision.

21 CHAIR BATTLE: Now, the only question that I had is
22 the discussion we had a little bit earlier about where the

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1 200 percent comes from, and it's, you know, is --

2 MS. PERLE: It's arbitrary. You have the 150
3 percent of -- to 125 percent, which works out to 187 and a
4 half percent, was also arbitrary.

5 It was imposed in 1983 and, as I said, prior to
6 that time there wasn't any outside cap, so that programs, at
7 least theoretically, had the ability to serve, through this
8 exception language, people at even higher income levels if
9 they met some of these other -- if there were these other
10 considerations, and the corporation determined in '83 that we
11 needed to have an outside limitation, and the regs working
12 group didn't quarrel with that. I think most people felt
13 that that was a useful --

14 CHAIR BATTLE: The only thing -- now, this would
15 only be for purposes, not of any kind of other eligibility,
16 but I am, to some degree, intrigued by what Maria raised
17 earlier. We have, in coming up with 848, which, you know,
18 went over like a lead balloon with Congress, but really set
19 out where we ought to be if we were to service the same
20 population that we started out -- if we were to extrapolate
21 what our figures were for purposes of, you know, how much it
22 would take to service our programs up until today.

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1 The other question in my mind is, if we were to
2 take where that 125 percent truly is in our present
3 population, we're only really servicing, under this
4 guideline, two groups of people, people who are looking for
5 governmental assistance, it seems to me, and -- or they're
6 disabled, right. I mean, you're only expending this for
7 purposes -- and then (c), I haven't -- we haven't gotten into
8 (c).

9 MS. PERLE: Well, (c) is a whole other set of
10 factors, so I think it's not -- no, I think it's not
11 appropriate to say we're only looking at disabled, and
12 people --

13 CHAIR BATTLE: Because (c) is another whole
14 group --

15 MS. PERLE: Because (c) has a whole other set of
16 catch-all --

17 CHAIR BATTLE: But it certainly would be helpful to
18 begin in the field to collect data on where our original
19 clients are. That was the point I was about to make, and
20 setting that 200 percent at some extrapolation of the 125 to
21 date might give us that information.

22 MS. PERLE: I just wanted to make one point clear,

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1 that in terms of the information that we give now to Congress
2 and the minimum access figures and all that, that's all based
3 on 100 percent of poverty, because it's based on the census
4 figures.

5 I think this is correct, that there isn't -- that
6 in fact we're underestimating by a factor of -- by some
7 fairly substantial factor, the number of people who are
8 eligible for our program now, because we only use the census
9 definition of poverty, which I think is key to the HHS
10 figure. I think that's correct.

11 CHAIR BATTLE: Do we have any other questions about
12 these sections? These two, (a) and (b)?

13 MS. PERLE: Just so it's clear, this one on the
14 governmental program for the disabled, that's a new provision
15 that we're adding because we felt that, with respect to a
16 number of people who get disability payments, they're not
17 really in any different position than people who are seeking
18 to assure or maintain benefits, income maintenance benefits,
19 but we added the second phrase because it's -- it is also
20 true that a number of people who have substantially higher
21 incomes do receive those disability benefits.

22 So we wanted to make sure that we would only be

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1 including those folks who would -- who would be eligible
2 without the benefits, the disability benefits. Is that -- I
3 don't know if that's clear.

4 CHAIR BATTLE: So what you're saying is, if a
5 person would have, based on their income level, have been
6 eligible anyway, and then when they go on disability --

7 MS. PERLE: And they want to get disability or
8 they're on disability and they want to maintain it.

9 CHAIR BATTLE: Then we can represent them using
10 this formula.

11 MS. PERLE: Right, if their total income is up --
12 only -- is below 200 percent of poverty. So, it still is a
13 narrow range.

14 MS. GLASOW: It's basically saying, okay, for these
15 situations, we're going to deem you poor. But even then,
16 that income still can't go past 200 percent.

17 MS. MERCADO: So if you have some veteran that has
18 income, once they get their disability benefits, it's over
19 the 200 benefits, then they wouldn't qualify for services.

20 MS. PERLE: Right.

21 MS. MERCADO: Because, I mean, in social security
22 and veteran are the two main ones that have come to my mind,

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1 to where, once they get their benefits, they actually
2 wouldn't qualify under our income guidelines for those
3 services.

4 MS. GLASOW: So you can help them get those
5 benefits, but once they get them, they're not --

6 MS. PERLE: If the benefits bring them over 200
7 percent of poverty, you can't. But if you didn't have the
8 200 percent, you couldn't represent them if their total
9 income was above 125.

10 MS. MERCADO: I missed something there.

11 MS. WATLINGTON: I think I got lost there.

12 MS. MERCADO: Give me a concrete example, because
13 I -- because you lost me on your second comment.

14 MS. PERLE: Okay. You have an individual who
15 has -- I don't know, I don't know what source of income --
16 maybe no income or general --

17 MS. MERCADO: I know there's been a lot of
18 discussion about veterans.

19 CHAIR BATTLE: A PTSD veteran who has become
20 unemployable because of his condition of PTSD, and he was
21 disabled during a war, so he's got some benefits that he's --

22 MS. PERLE: So he's got benefits, and the benefits

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1 are being questioned. He lives on his benefits. If, with
2 those benefits, he is -- his income is over 200 percent of
3 poverty, he's not eligible for consideration. But if it's up
4 200 percent of poverty, if you took away those benefits and
5 he was under 125 percent of poverty, then you could consider
6 him here.

7 CHAIR BATTLE: So we can assist someone in getting
8 up to 200. What if that same person is not receiving those
9 benefits and, because they're not receiving it, they're below
10 the 125, but when they receive them they're going to be above
11 the 200 percent. Can we assist them?

12 MS. PERLE: Yes, you can assist them. And then,
13 there's the -- then it works -- once you've assisted them and
14 you're successful, he's probably no longer eligible.

15 MS. GLASOW: But you can help him get the benefits.

16 MS. PERLE: Right. I think that one of the things
17 that the purpose of --

18 MS. MERCADO: I think the purpose of their main
19 concern was that a lot of people who had no benefits, who are
20 entitled to them, and for whatever reasons they haven't been
21 able to get them. And once they got them, they went beyond
22 poverty level.

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1 MS. PERLE: I think that's the purpose of this
2 program, and it -- at least one of the purposes is to help
3 people, to give them assistance so that they can get out of
4 poverty.

5 MS. WATLINGTON: But if you have a realistic
6 poverty guideline, you're not helping them when they're still
7 in poverty, just say, giving them the expectation, that's
8 what I was talking about, that realistic one under 25 percent
9 of poverty, when it's more or less 200 and still isn't out of
10 poverty. You know what I'm saying?

11 MS. PERLE: I think everybody knows what you're
12 saying, and everybody appreciates it, so it's really just --

13 CHAIR BATTLE: Can we move on to (c)? Is everybody
14 comfortable with that? "(c) The recipient determines that
15 the applicant should receive services on the basis of one or
16 more of the following factors: (1) the applicant's current
17 income prospects, taking into account seasonable variations
18 in income; (2) unreimbursed medical or nursing home expenses,
19 but if a person's income is primarily committed to medical or
20 nursing home expenses, that person may be served if his or
21 her income does not exceed 200 percent of the federal poverty
22 income guideline, after such expenses are deducted; (3) fixed

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1 debts and obligations, including current federal, state or
2 local taxes withheld from salary or pay periodically, and
3 unpaid federal, state and local taxes from prior years; (4)
4 child care, transportation and other expenses necessary for
5 employment, job training or educational activities in
6 preparation for employment; (5) unusual expenses associated
7 with age or disability of resident family members; (6) child
8 support and alimony payments to a former spouse or custodial
9 parent; and (7) other significant factors that the recipient
10 finds are related to the applicant's financial ability to
11 afford legal assistance.

12 MS. PERLE: One point on number (6), the reason
13 three project directors met, and one of the points that they
14 made on (6) was that we ought to put in current or former
15 spouse or custodial parent, because there might be -- people
16 might just be separated, and they might not be former
17 spouses. I think that we should change that.

18 I don't know if these things are self-evidence, or
19 if any of them need specific explanation. They're based on
20 the factors that exist in the current regulation, but there
21 have been some additions and some clarifications.

22 MS. MERCADO: Well, and (7) is sort of a catch-all

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1 regulation, so that that way there are some other particulars
2 from the jurisdiction --

3 MS. PERLE: Right, or with respect to the
4 particular person. General counsel's office files on
5 eligibility are filled with all sorts of quirky little
6 questions, about can we serve this particular person.

7 I remember one issue that arose; it was a question
8 raised about -- by the guardian of a person. And the
9 guardian said that you were providing service to this person,
10 and I don't think that the person is eligible because they
11 have this income of whatever it was.

12 And when we looked into it and we talked to the
13 program, we found out, sure, they have an income, but the
14 problem is the income goes to the guardian. And the
15 guardian -- so the person has no access to it, and what they
16 were trying -- the legal assistance they sought was to end
17 the guardianship.

18 CHAIR BATTLE: You mention, in number (6), "child
19 support and alimony payments made to a current or former
20 spouse or custodial parent." There have been instances where
21 a grandparent has become the custodial guardian of children,
22 and a father has to pay child support to the grandparent.

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1 MS. MERCADO: Or aunt.

2 CHAIR BATTLE: Or aunt or uncle or some other
3 guardian. So we may need to just kind of adjust that
4 language to take into account present realities.

5 MS. MERCADO: Yes, I think that if you just have a
6 managing conservator.

7 MS. PERLE: Would it be sufficient to add custodial
8 parent or guardian?

9 CHAIR BATTLE: Yes.

10 MS. PERLE: Would that be sufficient?

11 MS. MERCADO: Guardian is a different status,
12 though.

13 MS. SCHUENEMEYER: A grandparent can have custody
14 but not be a guardian.

15 CHAIR BATTLE: Custodial person.

16 MS. SCHUENEMEYER: Custodian of a minor child.

17 CHAIR BATTLE: Or custodian, period.

18 MS. MERCADO: In Texas, we use managing
19 conservators. And then managing conservator, under the
20 statute of the language, is the person who has custody and it
21 may be a grandparent, it may be another relative.

22 MS. PERLE: How about if we say custodial parent,

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1 guardian, or other custodian of a minor -- of a minor child?
2 Is it only minor children? Could it be a disabled child? It
3 gets so complicated.

4 CHAIR BATTLE: Why not just say current or former
5 spouse or custodian of a minor child?

6 MS. PERLE: Of a minor or dependent child?

7 MS. MERCADO: Okay. Let me ask you this. Do you
8 have, in any circumstances, adults to whom some other -- you
9 know, where there is support for an adult who can no longer
10 take care of themselves, and there are custodial -- not a
11 parent, if you will, but there's a custodial adult that is --
12 has custody of this senior person who cannot take care of
13 themselves.

14 It's not a nursing home, and they get child support
15 payments, or -- it's not child support, but adult support
16 payments. And I don't know what category it goes into.

17 MS. PERLE: I think it could fit under (7). I
18 mean, that's one of those sort of unusual or quirky
19 situations that I think could fit under (7).

20 CHAIR BATTLE: I like your statement, custodian of
21 dependent minor children, former spouse or custodian of
22 dependent minor children -- child or children and -- with the

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1 r-e-n in parentheses. That's probably a good way to make
2 that statement.

3 Is there anything else -- any other observations by
4 committee members?

5 MS. PERLE: Let me just say, that all of the
6 material that's taken out over the next three or four pages
7 is found elsewhere. It's just been substantially rearranged,
8 so it's easier to follow, so I don't think that there's
9 anything that's in here that is left out, other than some
10 documentation requirements.

11 For example, on page 12 on medical expenses, there
12 was -- there's documentation -- there's a requirement for
13 written approval of the project director based on written
14 documentation received by the recipient and available for
15 review for the -- by the corporation. And we didn't think
16 that that was an appropriate -- that was --

17 CHAIR BATTLE: So, where has all of this been moved
18 to?

19 MS. PERLE: Some of it's been moved -- most of it's
20 been moved up to what we've just been talking about, the
21 sections that we've just been talking about.

22 MS. GLASOW: Basically, it's a listing of all those

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1 factors, or a reference to the factors elsewhere. There were
2 more references, and instead of making so many references, we
3 just put them out in that fashion.

4 MS. PERLE: I mean, for example, if you look on the
5 bottom of page 13, it says, "If a recipient tentatively
6 determines not to serve a client under the maximum income
7 level," then you have to go back and look at these other
8 factors. And there's this sort of ping-pong process that you
9 have to go through, which is very difficult, confusing, and
10 lot's of places where people and issues fall through the
11 cracks.

12 And so, what we really tried to do is make this a
13 much more straightforward process. Again, Judy can -- maybe
14 Judy can sort of give you an example of how difficult it is
15 to balance all of these things under the current rule.

16 MS. SCHUENEMEYER: The way the rule is currently
17 written, it's very confusing to people trying to figure out,
18 with these two sections, what factors they consider in
19 determining eligibility and what factors they consider when
20 they're not going to take the case. The proposed changes
21 would be very helpful from that standpoint, because they're
22 much more simple and easier to understand.

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1 CHAIR BATTLE: Okay. Does anybody have any
2 questions about the deleted material? We'll just handle that
3 in -- as a group. It's basically, according to the
4 discussion, been subsumed earlier under --

5 MS. PERLE: With the exception of the last part,
6 which appears at the top of page 14, that's under paragraph
7 (c), which is group eligibility. And that's pulled out and
8 put in a separate category -- a separate section.

9 MS. MERCADO: Section 11.6.

10 MS. PERLE: Right.

11 CHAIR BATTLE: Okay. Group eligibility is going to
12 come up later, but all the rest of it has come under the
13 earlier section on recipient, determination of eligibility?

14 MS. MERCADO: Yes, the only that wasn't included in
15 there was the medical stuff, from what I could tell.

16 MS. PERLE: The disability. The medical was --

17 MS. MERCADO: Where's the medical? I mean, where
18 would that be written into it? I didn't see it. Did I miss
19 it?

20 MS. PERLE: Under -- yes, on the bottom page 9,
21 spilling over onto page 10. "Unreimbursed medical or nursing
22 home expenses" -- "but if a person's income is primarily

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1 committed to medical or nursing home expenses, that person
2 may be served, if his or her income does not exceed 200
3 percent of the federal poverty income guidelines after such
4 expenses are deducted."

5 It's articulated in a slightly different way. It's
6 the same substance. It's just made a little bit less
7 confusing in terms of how you apply it.

8 MS. MERCADO: I guess because the focus of that
9 paragraph seemed to me to be targeted at elderly more so than
10 with anyone that had any particular type of medical expense.
11 I mean, just the way it reads, it would seem like that it's
12 generally dealing with people who are in nursing homes. I
13 mean, I know that --

14 MS. PERLE: Well, I think that also, their medical
15 expenses -- I mean, you could have disabled or --

16 CHAIR BATTLE: But it says or.

17 MS. PERLE: Yes, it's or. I mean, you could have
18 someone who has substantial medical expenses and you don't
19 have -- you're not eligible for medicaid, for some reason,
20 and you don't have health insurance, and most of your income
21 is devoted to paying hospital bills.

22 CHAIR BATTLE: Was there something else?

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1 JUDGE DANA: Yes. It seems to me that -- I don't
2 know whether it was intended to do this, but there's a -- I'm
3 sorry, I'm Howard Dana.

4 The proposal, in section (c)(2), if I read it
5 correctly, it means that after a person who's in a nursing
6 home has all of those expenses paid, they can still have
7 200,000 -- 199 percent of poverty left over, and be
8 represented by a legal services attorney. And that's
9 substantially different than a person whose income before
10 expenses is over 150 percent, when, primarily -- when more
11 than half of their income goes to paying those expenses.

12 MS. PERLE: I think that number should be 125
13 percent.

14 MS. MERCADO: Yeah, because after the such expenses
15 would put them above --

16 JUDGE DANA: Either that or take the word after and
17 change it to before. Sorry.

18 MS. PERLE: Thank you.

19 MS. MERCADO: So we're talking about a 200 percent,
20 though, in the language of all this. Isn't it -- you know,
21 we start with --

22 CHAIR BATTLE: So you're saying use before such

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1 expenses are deducted, or after?

2 MS. MERCADO: Because the previous sections before
3 are dealing with the 200 percent of poverty and all the
4 different exceptions to dealing with --

5 MS. PERLE: No, I don't think that's right to say
6 before, because then, what you're saying is that you can't
7 take account of the medical expenses if it says before --
8 before such expenses are deducted.

9 CHAIR BATTLE: Well, it should not exceed 125
10 percent, then, after such expenses.

11 MS. PERLE: After.

12 CHAIR BATTLE: So we change the 200 to 125 percent.

13 MS. PERLE: I think that's right. We'll have to
14 look at it again, but I think that's what was intended.

15 CHAIR BATTLE: Thank you for pointing that out to
16 us, Judge. Okay. Are we at a point that we can start with
17 asset ceilings? Has everybody had a chance to go through all
18 the deleted material, and determine whether there are any
19 questions about the material that's been deleted or moved to
20 another section?

21 Hearing nothing, I'm going to read asset ceilings.
22 1611.5, subsection (a): "The governing body of a recipient

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1 shall establish guidelines incorporating reasonable asset
2 ceilings to be utilized in determining eligibility for
3 service under 1611.3 and 1611.4. As a part of the review
4 required under 1611.3(e), the recipient shall review its
5 asset ceiling guidelines at least once every three years, and
6 adjust them as necessary."

7 That's (a). Then we have substantial material
8 that's been deleted. "(b) In establishing guidelines, the
9 recipient may consider exemptions available under state or
10 federal law from asset limitation," and "(c) The asset
11 ceiling guidelines may provide authority for the director of
12 the recipient or the director's designee to waive the
13 ceilings on maximum allowable assets in unusual situation."

14 Okay. Now, we had a substantial portion of this
15 asset ceiling regulation that has been deleted. I guess the
16 first question is, what happens to all of this information
17 that's deleted? Where is it, and was -- I think the notes
18 point out that you made a determination that maybe this level
19 of detail is not required by the Act, but do we plan to give
20 some guidance with regard to how to establish the asset
21 ceilings, and how they play into the formula in the comments?

22 MS. GLASOW: I'd like to point out two things about

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1 the deleted material. As I pointed out earlier, there was a
2 lot of public comment when this section was added to the
3 rule. And, in response to that comment, they revised, when
4 they put into final, they substantially revised what they had
5 as a proposed rule, and as a final rule. And in so doing,
6 the language has proven to be ambiguous and difficult to
7 interpret and we've had a problem with that.

8 It wasn't clear, for instance, whether a recipient
9 had to put -- list in their guidelines every single possible
10 asset, or whether they just needed to consider assets before
11 they did their guidelines. And, so we deleted some language
12 simply because of its ambiguity.

13 There was language in here in terms of the specific
14 assets, and some of those -- if this committee needs that we
15 need to have more guidance in the rule itself, we could add,
16 but if we do so, perhaps we should consider, as we did
17 earlier on, maybe some other things need to be added that
18 would be excluded.

19 This is an attempt to simplify the assets and allow
20 the programs to establish their own guidelines based on their
21 local situations, so it is greatly simplified, but part of
22 the deletion was due to ambiguous language that was difficult

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1 to interpret.

2 CHAIR BATTLE: I wondered why we are deleting the
3 provision which would have required the recipients to
4 transmit to the corporation, on an annual basis, their
5 guidelines for how they are establishing their asset
6 ceilings.

7 MS. PERLE: I think in part it's just an effort to
8 remove a lot of requirements that the Act never required, and
9 that -- where there was a lot of paper flow into the
10 corporation; no one ever really quite knew what happened to
11 all of that paper. And it's also, in part, in recognition of
12 the fact that the corporation's going through this whole
13 review of how it best should ensure compliance with a variety
14 of things.

15 And so, the corporation still has the ability,
16 under the Act, to require whatever records it wishes programs
17 to keep, and reports that it wishes programs to provide to
18 the corporation.

19 But we thought it was best not to do that within
20 the confines of this individual regulation, but rather within
21 the corporation's sort of overall effort to review what kinds
22 of documentation and record-keeping it needed, which it's

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1 doing with respect to all of the various things that have
2 been required to be reported to the corporation. So, in
3 almost every place, we've taken out those kinds of reporting
4 requirements.

5 CHAIR BATTLE: Is it envisioned that this review
6 would take place in tandem with the other review of financial
7 eligibility? The asset ceiling has now a three-year, as
8 opposed to an annual time set.

9 MS. PERLE: Yes. And that's why the reference is
10 in there. It says "as part of the review required under
11 1611.3(e)," which is the review that you're referring to.

12 CHAIR BATTLE: Any other questions from any other
13 board members on this particular reg?

14 MR. McCALPIN: I would suggest that sub-part (b)
15 might read somewhat more smoothly if you would take the
16 phrase from asset limitations and place it to follow
17 exemptions, "exemptions from asset limitations available
18 under state or federal law."

19 MS. PERLE: That's fine.

20 CHAIR BATTLE: What did you say? I'm sorry.

21 MR. McCALPIN: I would just say, I think in (b), if
22 you take the last three words and move them up to follow the

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1 word "exemptions" in the second line, that I think it reads
2 somewhat more smoothly.

3 MS. PERLE: There were situations where programs
4 were, in their own asset guidelines, applying the exemptions
5 that were available under other programs and the corporation
6 was telling programs that they couldn't do that, because it
7 wasn't specifically noted in this rule.

8 MS. MERCADO: But if you're doing bankruptcy or
9 anything else like that, you've got to --

10 MS. PERLE: That's right. It doesn't make -- it
11 made no sense.

12 MR. McCALPIN: Let me -- do we, at some place -- if
13 not in the regulations, some other way -- suggest to programs
14 that in their own best interests they ought to keep a record
15 of exemptions granted, because of the questions that
16 inevitably arise on this subject, and that they ought not be
17 standing there naked when somebody challenges them?

18 MS. PERLE: Yes. I think the answer to that is
19 yes.

20 MR. McCALPIN: Where do we make that suggestion?

21 MS. PERLE: I think we will do that in the
22 commentary. And actually, I will -- I think this is in this

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1 section. No, it's not -- never mind.

2 CHAIR BATTLE: Is -- are we going to require, since
3 we have changed it from an annual review to a three-year
4 review, are we requiring that the programs, when they do
5 their three-year review, share that with LSC? And, if so,
6 where are we going to put that?

7 MS. PERLE: We are not requiring that they report
8 it to LSC. They're -- they'll have to do it, and they have
9 to keep records of it, and which -- LSC, as part of its
10 overall compliance effort --

11 MR. McCALPIN: And when they self-certify in the
12 monitoring visit, they've got to certify that they have
13 followed the regulations.

14 MS. PERLE: And if LSC has any question about
15 whether they've actually gone through the process, they can
16 come back and ask for documentation, and then -- it's just a
17 question of whether they have to send this piece of paper in
18 to the corporation.

19 MS. MERCADO: Well, I think there has to be some
20 kind of direction to the recipients that, at some point in
21 time, the corporation, through its granting or monitoring and
22 compliance duties, would want to see what these -- you know,

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1 every three years or yearly, if they so choose -- decisions
2 have been on financial eligibility. And I think, perhaps,
3 maybe you're right, that that ought to be in the commentary
4 section that you recommend that they keep those records.

5 I mean, there's a difference in them keeping it
6 within their own archives and having to send it to you so
7 that you create another bureaucracy of archives. And, as
8 long as that is available for the corporation to review, you
9 know, that they shouldn't have -- I mean, because you don't
10 want to go to a program three years later and say, "You
11 should have kept all these records" or "You should have kept
12 all of this stuff," when they didn't know they were supposed
13 to in the first place.

14 But at the same time, you don't want to create
15 another level of bureaucracy by having to create a -- you
16 know, an additional division of the corporation to solely be
17 responsible for getting all this information and doing
18 whatever it is that you do with it. I'm not in interest of
19 creating more levels there.

20 CHAIR BATTLE: Renee.

21 MS. SZYBALA: I wanted to point out that the same
22 exact issue comes up in something we already did, which is

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1 exemptions on the income, that as, this is exemptions to
2 asset ceilings, there was also, on your exemptions to income,
3 there used to be a record-keeping requirement which is now
4 out. Part of what we discussed is we should treat them
5 consistently. The working group has an income exemption,
6 record-keeping requirement out.

7 The asset limitation exemption requirement's still
8 in. Management decided to take both of them out, and figure
9 out what it's going to need when. From an OIG perspective, I
10 just hope that, if they find that on their desk review, which
11 I imagine they will want to see some of this documentation,
12 certainly the three-year review, then -- I hope it exists.
13 That is, the income -- the record-keeping requirement has not
14 even been established in the reg.

15 LSC can establish record-keeping requirements,
16 certainly, but if we know we're going to need them, then they
17 ought to be in the reg. It is more efficient to do it that
18 way than to separately notice and comment them later when we
19 decide we are going to need them.

20 MS. PERLE: Maybe Suzanne ought to speak to this,
21 but that the -- why don't you speak to that about -- in terms
22 of what the management's --

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1 MS. GLASOW: Management's position, at this point,
2 is that they're doing an overview of this whole situation in
3 terms of record-keeping and reporting, for not only this
4 issue, but for all the issues. And in deference to that, it
5 would really preempt their review to put something in this
6 rule at this point.

7 It may very well be that down the road they will
8 decide to do a regulation reporting or record-keeping, or
9 they may do it as a guidance mailing to the field. I'm not
10 sure where they are at this point, but in deference to their
11 current efforts to decide how they want to do this, we
12 haven't put anything in this rule or any other right now that
13 would preclude their efforts.

14 CHAIR BATTLE: I guess, probably, the concern that
15 I have is, you know, management is making the determination
16 not as to whether to put this in, but actually to take out a
17 requirement where, in the past, however this asset ceiling
18 was established on an annual basis, that the information was
19 to be transmitted to the corporation.

20 So, if we're changing that and we're saying "don't
21 do it every year, now do it every three years," and we're
22 doing it every three years, but you don't have to send it to

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1 us. I'm just wondering, are we completely moving in a
2 direction that, in the long run, is going to be in the best
3 interests of the corporation, or do we at least need to get
4 the record to show that they've done it every three years?

5 MS. PERLE: I think the answer to that question is
6 no, that we don't need to get the record. There might --

7 CHAIR BATTLE: We just need to have them to
8 maintain it.

9 MS. PERLE: That's the issue that we're really
10 struggling with here, I mean, there -- I should mention that
11 this region 3, with respect to the earlier provision Renee
12 mentioned, suggested that we put back in the provision the
13 record-keeping provision for determinations to serve people,
14 over, because they felt it was protective of programs.

15 And they wanted this provision on the asset
16 ceilings to remain in, which it did remain -- it was in in
17 the draft that they viewed. This is one of the things that
18 we took out in the last week in response to management's
19 concern.

20 I think it's fair to say the regulations group is a
21 little schizophrenic on it, because in one instance, Renee is
22 right, they kept it in, and in the other instance they took

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1 it out. And I'm not sure that there was any real sort of
2 over-arching reason for leaving it in one place and not the
3 other. I think it was just -- it struck people one way when
4 they saw it at one time and it struck people a different way
5 the other time.

6 CHAIR BATTLE: There was a lady in the back. You
7 wanted to make a comment, would you come up to the mike?

8 MS. TU: My name is Ahn Tu, and I'm in the office
9 of program support, and I just would like to echo what Ms.
10 McCalpin was referring to, because we are -- I understand
11 that even -- this is, I guess, addressing your concern about
12 a corporation not requiring programs to send, you know, the
13 document to the corporation.

14 We, in our compliance and self-certification and
15 desk review process, that is a good system for us to check
16 that programs do indeed comply with this. So I -- you know,
17 we may not have the document at the corporation, but the
18 corporation does, I mean, should feel comfort about that,
19 that the program does do it.

20 MS. MERCADO: And so, that goes back again to my
21 initial concern that I think that the programs ought to get
22 the direction from the very beginning that this is

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1 documentation that is required that they keep in their files.

2 The fact that they don't physically send it to the
3 corporation automatically, so that, as I said, that we create
4 another bureau of level of bureaucracy, but when desk reviews
5 come up, when monitoring and visits come up, that that is
6 immediately accessible to it, that that has been a compliance
7 factor that has been dealt with in order for us to comply
8 with our act.

9 MS. PERLE: When you first -- one of the issues
10 that we were dealing with when this board first came on was
11 the question about grant assurances, and one of the problems
12 that arose with the grant assurances is that, sprinkled
13 amongst the grant assurances and all different -- and memos
14 that went out to the field at various times and sprinkled
15 through the regs were various requirements, documentation
16 requirements for programs.

17 And, I think Judy will be able to confirm that it
18 was probably virtually impossible for a project director to
19 be totally up to date on what all the various documentation
20 requirements, report requirements were, because they were so
21 scattered, they came from so many different sources. And
22 sometimes, a monitoring team would come in and say, "You're

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1 supposed to be keeping that record" or "You're supposed to be
2 sending this documentation to the corporation."

3 And the project director would sit there and go,
4 "Nobody told me that." And I think that what part of this
5 effort is, is -- eventually will be to consolidate all of
6 those requirements in one place so that program directors
7 know -- there's some kind of a checklist, so that they know
8 what it is that they need to --

9 MS. MERCADO: And I think that when you're asking
10 that people do it at least once every three years, that the
11 oppressiveness of having to do so much reporting or so much
12 paperwork or whatever, that you've taken care of that for the
13 time, that at least once a year -- I mean once every three
14 years, that is done. And you ought to have a record within
15 every three-year period of time of them having complied with
16 the assets and the financial eligibility requirements.

17 That's not saying that they have to do it every
18 year or that they have to do it every two years, but they
19 have to do it at least once every three years.

20 CHAIR BATTLE: Let me suggest something that might
21 address this. And I think Ms. Tu brought it to our
22 attention.

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1 If in fact, there is a mechanism in place for us to
2 check to see that this is done, and if, in fact, we're going
3 to take out the requirement that it be transmitted to us,
4 then why don't we, in our comments section, point that out so
5 that programs will know that they are required to keep these
6 reports, and that these reports are going to be part of what
7 it is that the corporation will check when it goes out and
8 monitors the programs. I mean, that's --

9 MS. SZYBALA: I'm sorry, but then, for me, I have a
10 real problem back at footnote 30, because there it works
11 to -- the transmittal requirement is certainly one that
12 shouldn't be in the regs. I mean, LSC should only get what
13 it needs when it needs it, not just to make work. But this
14 one is taking out any requirement that you document your
15 exceptions.

16 And that makes it extremely difficult for LSC to do
17 its monitoring for compliance, no matter what method it's
18 using, whether it's using, at the moment, a desk review, or
19 whether it's using the IPAs to go in and check that the regs
20 are complied with.

21 If the recipient can just say, "Yeah, we've had
22 some exceptions, but we didn't keep any records." I mean,

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1 it's unlikely recipients would do that; this is records you
2 would imagine are kept in the ordinary course, and not
3 burdensome to require that they be kept.

4 MR. McCALPIN: That's the point I raised a while
5 ago when I said when do we tell these programs that in their
6 own self-interest they need to have -- keep a record of these
7 exceptions -- income, asset, whatever.

8 MS. SZYBALA: What Linda is referring to is -- I'm
9 sorry -- some kind of over-arching, much more easy to follow
10 reg or guideline that will have all record-keeping
11 requirements, and I think that's definitely the way we should
12 go. But that doesn't mean that before that's in place, all
13 record-keeping requirements should, in anticipation of that,
14 be taken out.

15 When that's ready to go, then everything else
16 should be made consistent with it, and taken out. But that's
17 not even on the table right now, I mean, no one is working on
18 that reg. And it seems to be to me somewhat dangerous to
19 take out the record-keeping requirements just kind of --

20 CHAIR BATTLE: I see what you're saying, okay. I
21 think she's raising a real legitimate point, and the record-
22 keeping flows through on section (b), which is on page 11,

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1 and through what we just finished talking about in 1611.5,
2 transmittal of information which, once you transmit it, that
3 means you've got to do it and you've got to send it up.
4 That's documentation in part. I think that's an issue for us
5 to decide, really, as a committee. How do we want to handle
6 the record-keeping on determinations?

7 MS. SCHUENEMEYER: I would just like to say that
8 the region 3 directors feel very strongly that this ought to
9 stay in, for the very reasons that have been stated. It's in
10 our self-protection, and as a director, I certainly want to
11 have a procedure in place where I can have the last word over
12 whether an exception's going to be granted, a waiver's going
13 to be granted, and the back-up documentation on why that
14 waiver should be granted. And I believe that the requirement
15 that a copy be in the client file has also been taken out,
16 and I think the general -- the OIG has support that, but --

17 MR. MCCALPIN: I think it ought to be kept in the
18 recipient's file, not the client's file.

19 MS. SCHUENEMEYER: I can think of one good reason
20 to keep it in the client's file, and that's if someone from
21 outside is saying "Why are you serving this person that I
22 know is over your income guidelines?" And, if that question

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1 is raised, and the file has been transferred to a new
2 attorney, for example, who doesn't remember the
3 circumstances, I can go back to the file and look at it and
4 see.

5 CHAIR BATTLE: But that's a recipient
6 determination, it seems to me.

7 MS. SCHUENEMEYER: Right.

8 MR. MCCALPIN: The problem is that shoehorns into
9 the client file.

10 MS. MERCADO: If you want to -- it's very easy to
11 make a copy for the file that will follow the client with
12 whatever attorney they happen to get, new or old attorney,
13 and keep a separate file that does -- a recipient file that
14 deals with all exemptions for excludability --

15 MS. SCHUENEMEYER: That's what's done, now.

16 MS. MERCADO: -- so that when that issue comes up
17 and you don't want to open up the Pandora's box of attorney-
18 client privilege, that you have an independent file that
19 already deals with the exemptions, you know, to the assets or
20 the financial eligibility. And that's the best way of
21 handling both, so that you deal with the day-to-day work of
22 the attorneys and then you deal with the independent --

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1 CHAIR BATTLE: I'd like to get a sense from the
2 committee as to how you feel about this question of record-
3 keeping on the waivers. I'm hearing some concern, both from
4 the field and from the OIG, about deleting this before we
5 come up with an ominous section that deals just with record-
6 keeping, and it may be that what we need to do is to tag
7 these sections, and then remove them if we're going to put
8 them all in one place later on.

9 MS. PERLE: I think also what we want to do is get
10 comment -- as part of the public comment process, we want to
11 specifically flag those sections. Whether you determine at
12 the outset to leave them in or to take them out, that's
13 entirely your decision, you know, and as I said, the working
14 group, on one place said to leave it in and one place said to
15 leave it out, and I'm not sure that there was any basis for
16 distinguishing those two.

17 The LSC management said take both of them out, OIG
18 would like to have both of them in, and I think that at least
19 the region 3 project directors would like to have both of
20 them in, so there's -- you know, there isn't really
21 consensus. I think that you need to decide initially whether
22 you want to leave it in or take it out, but then you want to

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1 flag it and make sure that we get -- you get the public
2 comment.

3 CHAIR BATTLE: My inclination -- I guess I'm chair,
4 so I get to speak first, but my inclination would be for us
5 to really, at this point, to leave them in. We are going to
6 be considering so many regulations.

7 I would hate for us to, you know, in this process,
8 remove record-keeping, only to have that fall in the interim,
9 and then at some point pick it back up later, and now say
10 everybody has got to keep records, because when you go out to
11 monitor, you're going to get into some arguments about,
12 "Well, I read the regs, and you implemented one that said I
13 didn't have to keep this, and then all of a sudden we do."
14 So, my thinking is that what makes sense is for us to keep it
15 in in the interim.

16 MR. McCALPIN: I would suggest or move that it is
17 the consensus of the committee that the documentation be
18 required, and be required to be kept in the recipient file.

19 MS. MERCADO: That's what my preference would be.

20 MS. WATLINGTON: Ernestine, do you --

21 JUDGE DANA: May I -- I'm Howard Dana, and this is
22 the first instance in which I'm speaking in my capacity as

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1 the representative of the American Bar Association. We are
2 very concerned about client information becoming generally
3 available to the corporation and to third parties, thereby
4 waiving client confidentiality and attorney-client
5 information.

6 And, in any exception that is made, what we are
7 going to -- what is going to happen is there is going to be
8 information as to the client's assets or its income level,
9 and I think that that information currently is maintained in
10 the client's file, and is protected. If we start making that
11 information in a general recipient file that is available for
12 auditing and inspection, I think that would be very
13 unfortunate.

14 I may have missed the thrust of the concern, but
15 I -- that is an area that the American Bar Association is
16 very concerned about, when regulation becomes -- has the
17 effect of piercing the responsibility of legal services
18 lawyers to keep client information confidential.

19 MR. MCCALPIN: Howard, you can't believe that, if
20 there is a challenge to the eligibility of the client, that
21 the information with respect to eligibility is not going to
22 be available.

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1 JUDGE DANA: I can and I do. I think the
2 information is available to the program. I think that -- I
3 think the program can be charged with looking at the
4 information, and certifying that the regulations of the
5 Corporation had been complied with. But I think that it is
6 -- just because a challenge is made, by whoever, is no reason
7 for an attorney to disclose information about his client.
8 And that's an area that the American Bar Association is very
9 concerned about.

10 MS. MERCADO: Judge Dana, I think that one of the
11 things that at least I assumed or myself, and maybe that was
12 a wrong assumption if I didn't state it orally, is that when
13 we talk about keeping documentations about any exemptions to
14 the guidelines, one, we're talking about general guideline
15 changes or exemptions that are done by the governing board as
16 to the financial eligibility, and the asset eligibility.
17 That's one category that is just guidelines that that
18 particular board is doing. And I was thinking of that as a
19 document being kept as a separate entity.

20 Now, when we start talking about individual clients
21 and the challenge to that client, that in that discussion, it
22 would have to be a format or a manner if that exemption is

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1 challenged to review, for it would, at all costs, protect the
2 attorney-client privilege.

3 JUDGE DANA: Later on in these proposed regulations
4 there is a provision, which we'll come to, where, if there is
5 a challenge to a particular client, there is a provision
6 that's been well thought out that requires the program or the
7 lawyer, actually, I think, the executive director of the
8 recipient, to investigate the matter and certify to the
9 Corporation that the person is eligible, or complies with the
10 regulations.

11 That protects -- you're correct. We have no
12 objection to your -- the general thrust of what you were
13 talking about, which is making sure that the procedures and
14 regulations and guidelines that the Corporation has are on
15 file and available to the Corporation and anyone else.

16 But it's the individual client information that
17 needs to be seen as really not belonging to anyone other than
18 the lawyer and the client.

19 MS. MERCADO: Yes, and I think the Board would be
20 in agreement with you on that.

21 CHAIR BATTLE: Let me just, as the chair, let me
22 say this. The specific requirements that we're talking

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1 about, I think, are requirements that have been there
2 already. And we're only talking about maintaining those
3 until we come up with a recordkeeping requirement.

4 And as it relates to the recordkeeping on a waiver,
5 the recipient's responsibility would be to keep another
6 record, other than the client's files, is the way that I read
7 that, so as to provide the information to the Corporation as
8 to the number of clients so served with the waiver and a
9 factual basis for those decisions.

10 So that doesn't really get into disclosure of the
11 specific names of any clients that have been served; nor does
12 it get into any attorney-client privileged kinds of matters
13 about that representation.

14 MS. PERLE: I think that what we should do is add a
15 qualification similar to the one we had in yesterday, with
16 respect to the client complaint files, about preserving the
17 identity of clients, directly or indirectly, and for
18 previously identified clients, preserving the client's
19 secrets and other information gained in the course of
20 representation.

21 MS. MERCADO: But consistent with attorney-client
22 privilege.

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1 MS. PERLE: Well, it's not just attorney-client
2 privilege. It goes beyond that. And that -- I mean, I would
3 either reference the part later in the rule that speaks to
4 those issues or include the same language in both of these
5 places that we had in yesterday's -- in the client grievance
6 procedure, or similar language. It may be we want to vary it
7 a little bit.

8 I think also I agree with Howard completely, but I
9 also think that with respect to the financial eligibility,
10 less of that information may relate to the representation.
11 But still we want to make sure it's not identified with a
12 particular client.

13 And you know, in different communities, more of
14 that information you may need to take out, in a small, rural
15 community where there are small employers or whatever, if the
16 intake sheet says this person gets, you know, \$100 a week as
17 an employee and is a housekeeper in a particular -- there may
18 be information in there that would identify the person, and
19 that would need to be taken out, but that would vary.

20 MR. McCALPIN: Let me ask you this. I never
21 thought that I'd be arguing the position of the inspector
22 general, but I may be about to. Suppose that a complaint

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1 comes in to this Corporation that program A is representing
2 an individual who is, in fact, worth \$100,000. We get that
3 complaint at the corporate level.

4 I suppose we don't -- are we simply to have to rely
5 on the representation of the program, that the client is, in
6 fact, eligible? Are we not, as a Corporation, permitted to
7 make a determination of whether the program is simply wrong?

8 MS. PERLE: I think that's a subject that we
9 assumed we would get into in more detail this afternoon
10 because there's a substantial portion of this document
11 devoted to that discussion.

12 MS. GLASOW: We have two alternatives, basically,
13 for this committee to consider as to whether we would get
14 very detailed into that or not.

15 MS. MERCADO: That's in the 69.7 discussion?

16 MS. GLASOW: I think so, yes.

17 MS. PERLE: Yes.

18 MS. MERCADO: So I guess maybe we can get to it.

19 MS. PERLE: We can either talk about that now or
20 come back to it later. I mean, it's clearly a significant
21 issue. It's probably the one place within these rules that
22 we've dealt with so far where there's a substantial

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1 difference of opinion between the working group and
2 management.

3 CHAIR BATTLE: We at least have a consensus, I
4 think, about the recordkeeping issue, taking into account
5 what Howard has suggested to us about --

6 MR. McCALPIN: I think there's a difference
7 between us as to what the regulation says about where the
8 recipient keeps the documentation. I suggest that it ought
9 not be in the client file. Howard, I think, would put it in
10 the client file. And I --

11 MS. MERCADO: And I said a compromise of two.

12 MS. SCHUENEMEYER: That's what happens now.

13 MS. MERCADO: That's what happens now.

14 CHAIR BATTLE: Well, it happens now in two places,
15 if you read the way that (b) is written. It really goes in
16 the client's file and another record is kept so that the
17 Corporation can be provided with the number of clients and
18 the factual basis for each of those decisions.

19 So the documentation is kept in two places. One,
20 I'm assuming the client's name is sanitized out of the
21 document that's kept for Corporation review, and what's
22 relevant is how that underlying decision was made and is

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1 available to the Corporation.

2 MS. PERLE: I think that what we need to do is
3 state that explicitly, though, that we don't just leave it as
4 an assumption that the clients' identities --

5 MS. MERCADO: Well, see, you crossed it out on the
6 original 1611.4(b).

7 CHAIR BATTLE: Yeah, that's what needs to go back
8 in.

9 MS. SCHUENEMEYER: Mr. McCalpin, I believe, wanted
10 to change client file to recipients, but after looking at
11 that second sentence --

12 CHAIR BATTLE: It really impresses --

13 MS. SCHUENEMEYER: Is it okay to leave it client's
14 file?

15 CHAIR BATTLE: That's on page 11.

16 MR. MCCALPIN: It's also in 16.

17 MS. SZYBALA: I have a problem and I always have
18 this problem, with why we should be specifying to the
19 recipient at all where it keeps its records. I mean, you
20 know, in local control, this seems to be a basic thing. They
21 decide where they're going to keep this waiver information.

22 In terms of what the Corporation is going to have

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1 access to, that's not dependent on where the document is
2 kept. That's dependent on all kinds of other things.

3 I think that Linda's suggestion is a good one, that
4 that language that you saw yesterday that was heavily
5 negotiated, that will appear later on in the retainer part of
6 this reg for some reason doesn't appear in the body of this
7 reg, about eligibility documents. And if it did, a lot of
8 things would become clearer, like if there is an argument
9 about a particular named person's eligibility, if this
10 allegation comes to the Corporation, and the way this would
11 normally come, in my understanding, is through a congressman
12 passing on a constituent complaint that my guy was in court
13 against your people and they were representing a rich guy.

14 MR. McCALPIN: Senator Helms has done that.

15 MS. SZYBALA: My guy lost and you shouldn't have
16 been financing. The Corporation is, if we put that language
17 in that says where the name of a person is known, the
18 Corporation's not going to get the information. The
19 Corporation's just going to have to negotiate how they're
20 going to deal with this.

21 It could be a third party who everybody agrees will
22 come in and audit this, but based on the current accepted

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1 state of the facts in terms of client names and whether we're
2 ever entitled to information connected to a client name, the
3 Corporation is not going to, itself, be able to investigate.
4 The Corporation could get something together on an ad hoc
5 basis, situation by situation, that can satisfy it one way
6 other about what went on in that case.

7 In terms of what Judge Dana was thinking about,
8 though, the particular provisions that are now in there as an
9 alternative for how the Corporation would investigate this
10 are totally inadequate in the OIG's view, and we'll get to
11 that at the end.

12 CHAIR BATTLE: We've got two alternatives before
13 us, as I see it. One is it seems to me what we've at least
14 agreed to as a committee is that we're not going to deal with
15 recordkeeping now, we're going to tag all of those sections,
16 and when we deal comprehensively with recordkeeping we can
17 take into account what Renee has raised about how we're going
18 to instruct a particular recipient to keep its records or
19 whether we're going to instruct a recipient as to how to keep
20 its records.

21 Given that as one thing that we're looking at now,
22 the question becomes, do we want to, at this point, do

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1 anything to affect the way these sections are now written, in
2 any way, or do we want to leave them as is until we deal with
3 recordkeeping generally?

4 MS. MERCADO: The only thing that I would add is
5 that I think that because of the discussion that has been
6 raised on this reg, that there would be a better consensus, I
7 think, on behalf of the field, the client community and us,
8 ultimately, if we included the language that dealt with
9 protecting the attorney-client privilege, secrets, ethics,
10 you know, the whole section -- I don't remember which one it
11 was but if we can incorporate that language into this
12 particular part, that that would cover a lot of those
13 concerns, and then we deal with the recordkeeping, I think,
14 at a later date.

15 CHAIR BATTLE: That is certainly an alternative.
16 My concern is until we get into all of it, I'm not sure that
17 we need to affect any of it. These are regs that have been
18 in place, and I don't know if there have been specific
19 concerns raised as of yet as to how these operate or how
20 we've been able to get access.

21 And if we have some specific instances of problems
22 that have arisen under the regs at present, then maybe we

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1 need to address it right now. If not, then I would suggest
2 that we defer until we look at recordkeeping.

3 MR. McCALPIN: But you're not suggesting that we
4 wipe everything off and have no requirement.

5 CHAIR BATTLE: No, I'm saying keep them in place.
6 My suggestion is that we keep the recordkeeping requirements
7 in place and then, at one point in time, tag them and get
8 comments from the field as we go through these regs. And
9 then, at one point, when we look at recordkeeping
10 comprehensively, at that point, let's look at it and let's
11 make a section and call it recordkeeping and tell a recipient
12 where and how we want them to keep their records, and what it
13 is that we're going to review and what's attorney-client
14 privilege and what's secret, and all of that.

15 MS. GLASOW: Some of this may be clearer after
16 we've gone through the whole discussion on section 7.2
17 because it involves two alternatives, one where we're asking
18 for a lot of recordkeeping and monitoring and the other where
19 we're not. So it may be helpful to look at that, and then
20 look at the whole rule as a whole for that very issue.

21 CHAIR BATTLE: Why don't we do this? Why don't we
22 take a lunch break? We are at a point where I think we can

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1 do that, and get started back, let's say, at 1:00. It's
2 12:26 now. My goal -- I don't know if I'm being realistic or
3 not -- is to get through all of this today, and we are
4 approximately at page 15 or 16 and we've got to get through
5 10 more pages this afternoon to finish this.

6 So if we can take a lunch break now, recess until
7 1:00. Thank you.

8 (Whereupon, at 12:25 p.m., a luncheon recess was
9 taken.)

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

(1:15 p.m.)

1
2
3 CHAIR BATTLE: I'm ready to call us back to order,
4 if we can gather up all of our Board members up front because
5 this afternoon we're going to begin to lose people seriatim,
6 as they sit on the panel. So if we can collect ourselves for
7 the afternoon.

8 I notice the OIG is not in, as of yet, but I assume
9 Renee has pulled up her chair and she will be here shortly.

10 The next regulation that we have before us is group
11 eligibility, 1611.6. And it has three parts to it. Let me
12 just read it all the way through and then we'll handle the
13 next one separately.

14 "A recipient may provide legal assistance to a
15 group, corporation, association or other entity if such
16 entity lacks and has no practical means of obtaining funds to
17 enable it to obtain private counsel in the matter in which
18 representation is sought and if it (a) is primarily composed
19 of persons who are financially eligible for legal assistance
20 under the Act or (b) has as one of its principal functions or
21 activities the furtherance of interests that benefit those
22 persons in the community who would be financially eligible

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1 for legal assistance under the Act and the representation
2 sought relates to that function or activity. (c) this part
3 does not prohibit a recipient from providing legal assistance
4 to a group that does not meet the requirements of this
5 section if the assistance provided to the group is supported
6 by funds from a source other than the Corporation."

7 Now, the only comment that I would make before we
8 get started is that if you read the preamble and it ends in
9 "and if it" and then you go straight to (c), "this part does
10 not prohibit" --

11 MS. PERLE: I was just thinking the same thing. I
12 was thinking that we ought to make the first part an (a) and
13 then make what's now (a) and (b), make them (1) and (2), and
14 make what's now (c), make it (b). I think that would work
15 better.

16 CHAIR BATTLE: Yes, we need to just kind of
17 reorganize that.

18 First of all, just for background, this is a new
19 section or is it a revised section?

20 MS. PERLE: No, it's not a new section. It was a
21 section that's been in the rule since the beginning. It's
22 been revised a number of times. It was just sort of buried

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1 in one of the earlier sections.

2 CHAIR BATTLE: And it was moved to there.

3 MS. PERLE: We just moved it to a separate section
4 because we wanted it to sort of be, you know -- have people
5 sort of look at it sort of separately.

6 This formulation is closer to the original
7 formulation when the reg was originally written in 1976. And
8 so we decided that in 1983 the focus of the rule was narrowed
9 substantially in terms of group representation. And this
10 goes back to the somewhat broader characterization, with a
11 number of refinements.

12 MS. WATLINGTON: It was rewritten so that it made
13 it very difficult or programs afraid to really work with
14 groups because -- and it really inhibits helping clients with
15 their self-help projects.

16 MS. PERLE: That's right.

17 MS. WATLINGTON: So this will -- to go back to the
18 regular language, would make it not as difficult.

19 MS. GLASOW: I was just trying to find it, too.
20 The current language says --

21 CHAIR BATTLE: What page are you on?

22 MS. GLASOW: I'm looking at our publication.

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1 CHAIR BATTLE: Can you tell us what page?

2 MS. GLASOW: It should be section --

3 MS. PERLE: 1611.5(C).

4 MS. GLASOW: And it should be crossed out.

5 MS. PERLE: The current language is on page 14.

6 The language of the current rule on group eligibility is on
7 the top of page 14, upper case letter C, which is struck out.
8 It reads, "The recipient may provide legal assistance to a
9 group, corporation or association if it is primarily composed
10 of persons eligible for legal assistance under the Act and if
11 it provides information showing that it lacks and has no
12 practical means of obtaining funds to retain private
13 counsel."

14 So what this said was that in order to represent a
15 group, it had to be a group that was primarily composed of
16 eligible clients. It could not be a group whose function was
17 to benefit the client community.

18 So this opens up the ability of programs to
19 represent groups that may not themselves be composed of --
20 primarily composed of eligible clients but that serve the
21 eligible client community, so long as they don't have
22 sufficient means to hire counsel to represent them.

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1 MS. MERCADO: For example, I know in Texas we have
2 something that's called the Texas Alliance for Human Needs
3 and the board members themselves may not necessarily be
4 client eligible, although we have some client eligible
5 people, but the primary focus and function of the whole
6 organization is to promote and work with poverty issues.

7 So in that case, under the current guidelines, they
8 wouldn't be eligible.

9 MS. PERLE: I think most groups, when you're
10 talking about community groups, you know, within the
11 community, are still going to be groups that are primarily
12 composed -- when they're membership groups, they're probably
13 still going to be primarily composed of poor people, but
14 there are a lot of groups that are not membership groups.

15 And so what the Corporation would look at would be
16 their boards, and say that no, you couldn't provide service.

17 CHAIR BATTLE: Bill?

18 MR. McCALPIN: My reaction when I read (b) was that
19 it was like the proverbial Mother Hubbard -- covers
20 everything and touches nothing. I think it would not be
21 difficult to create almost any kind of an organization, even
22 by the extreme right, which would take the position that it

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1 is our theory and view that this benefits eligible clients.
2 You know, this concept that all ships rise on the incoming
3 tide could support some right wing economic development
4 organization.

5 I just don't think that this gives much guidance of
6 any kind to a determination, and I think I could create
7 almost any kind of a group, one of its functions or
8 activities I could argue, hopefully persuasively, that it was
9 in furtherance of the interests that benefit persons in the
10 community who would be financially eligible.

11 There are a lot of people in this country who think
12 that they know how to improve the lot of persons who are
13 financially eligible, with whose views we would not agree.
14 It just seems to me that this is so open and so broad that it
15 would admit almost any kind of organization, newly created,
16 it has no assets and it's not likely to get some.

17 So I just don't think this gives a lot of guidance
18 to people who may have to apply it the rule.

19 MS. WATLINGTON: Bill, I think it would help
20 because, like I say, the community groups that were trying to
21 get started and get into economic development, it's very
22 difficult to get the legal services attorneys to work with

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1 you on that because the group representation was very
2 difficult to do. But this will allow the community groups
3 that want to start CDCs and nonprofits, the ability to do
4 that.

5 The other groups, I guess I don't see that part
6 that you're saying because people -- the community groups now
7 don't allow themselves to be used that much. They more or
8 less use it for self-help community groups.

9 MR. MCCALPIN: I don't disagree with you at all
10 that we ought to permit group representation which is truly,
11 we all agree, in the interest of those financially eligible.

12 My problem is that I think this is so broad, it
13 permits the representation, if a program would so desire, of
14 a group that wouldn't be doing the kinds of things you and I
15 want at all.

16 CHAIR BATTLE: But it seems to me that this
17 particular group representation regulation still fits within
18 the scheme such that this group would be analyzed for the
19 purposes of determining whether the representation meets the
20 priorities of the programs and all those other things.

21 So even if they've got a claim and they want
22 representation, if it doesn't fit within a particular

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1 program's priorities, I can't see the program taking that on.

2 MS. PERLE: Somebody's got to make that
3 determination about whether they fit into this category, and
4 it's going to be the program that makes that determination.

5 MR. McCALPIN: Well, and then when the group is
6 turned down and challenges the determination, how can you use
7 this has a defense of the decision made?

8 MS. MERCADO: It's conceivable that you could have,
9 for example, she's talking about an economic development
10 group that obviously is trying to do something for a blighted
11 area. On the same token, you could also have, and I've seen
12 a lot of these crop up, supposedly nonprofit economic
13 development areas but they're really designed to provide
14 economic development more for the entity, whether it's for a
15 city or for a county.

16 And it's conceivable that one of their activities
17 might affect or help poor people, but overall, the general
18 thrust of these organizations are to bring more development
19 into the main community. And I guess if they got denied,
20 because you can obviously see through that, that even though
21 one of its functions can be to represent poor people, that
22 the bulk of the work that they do is to do economic

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1 development for the city, but that's how they get RTC
2 properties, that's how they get all these other kinds of
3 things.

4 MS. PERLE: First of all, these groups are probably
5 not going to be groups that don't have the resources to hire
6 private counsel. And that's also -- don't forget, that's the
7 preliminary threshold, that it lacks and has no practical
8 means of obtaining funds to enable it to obtain private
9 counsel in the matter in which representation is sought.

10 MR. SZYBALA: The group has to be poor.

11 MS. PERLE: It has to be a poor group.

12 CHAIR BATTLE: Now, I was intrigued by the history
13 of this particular provision, having been in the regulations
14 from 1976 until 1983. I just wondered whether we've done any
15 kind of historical research on whether there have been
16 concerns or how this regulation, when it was in place between
17 '76 and '83, it was implemented, whether it caused any
18 problems.

19 So it seems to me we've got some history with this
20 particular reg that might give us insight into whether or not
21 reimplementing it today is going to be a good idea.

22 MS. PERLE: But I think that there's always

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1 criticism of legal services programs for their group
2 representation, under the current rule and under the old
3 rule.

4 MS. WATLINGTON: It's very difficult. That's my
5 history of having to really -- the attorneys, they don't want
6 to get into it, either. It's really very -- that really gave
7 them the out from doing their day to day type of legal
8 services that they wanted to do, rather than being able to
9 help clients to help themselves more.

10 So the history, as far as on my personal level and
11 statewide, was it allowed them to do that day to day thing
12 and not really represent the clients as they needed to be
13 represented.

14 I don't know about other states, but I know in
15 Pennsylvania we had a hard time getting attorneys to do that
16 because they wanted to do that --

17 MR. MCCALPIN: Let me ask this. How important is
18 it to depart from the present principle that it is a group
19 composed essentially of financially eligible persons? How
20 important is it to go beyond that to get a different kind of
21 group, not so composed, acting in the interests of those
22 persons? Why the change?

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1 MS. PERLE: I think it's very important.

2 MS. WATLINGTON: Very important that it be a
3 requirement.

4 MS. PERLE: I think that's right. I think that in
5 terms of the ability of legal services to really assist
6 people in community groups, to assist people to get out of
7 poverty, it's very important that there not be this sort of
8 very narrow focus on who's eligible and who's not eligible
9 within the group.

10 CHAIR BATTLE: Maria?

11 MS. MERCADO: I think maybe one of the ways that we
12 can deal with a possible extreme possibility that might occur
13 because of the way the language is phrased in this section
14 (b) or (2), whichever one it is, (a)(2), and yet deal with
15 the ability to represent community groups that want to do
16 work on behalf of poor people is to maybe change the language
17 where the organization -- as I gave you my example, the Texas
18 Alliance for Human Needs is composed of board members that
19 probably wouldn't meet the financial requirement, but their
20 work is solely to work on issues that affect poor people.

21 There are others like that that might only focus on
22 health care or there may be some that may only focus on

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1 housing, but nevertheless, the board itself, because it's not
2 a member organization, does not have lines of clients but the
3 primary focus of the organization is that.

4 And Bill's concern, which is that one of, and
5 you're right, that you could have some right wing
6 organization have one of its 10 things that it does be
7 dealing with poor people, then maybe if you do the focus of
8 the organization that its primary focus is to help poor
9 people, then that takes away from some other hidden agenda
10 that other organizations would have.

11 MS. PERLE: I think if we took out some of the
12 language "one of" in (b) or (2) --

13 MS. MERCADO: That's right.

14 MS. PERLE: So in other words, has as its principal
15 function or --

16 MS. MERCADO: Yes, I think that that would deal
17 with all the concerns.

18 MR. McCALPIN: That's a help.

19 MS. WATLINGTON: Now, say it again. What did you
20 add?

21 MS. MERCADO: No, delete "one of." Where the
22 community group whose primary function is to promote --

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1 CHAIR BATTLE: You know, we took out the "primary
2 purpose" language and put in "one of its principal
3 functions," and we're really back to "primary purpose."

4 MS. MERCADO: The persons are not having to be
5 financially eligible.

6 MS. PERLE: I think that there was a lot of
7 discussion in the regs working group about purpose language
8 because somebody could point to the by-laws or articles of
9 incorporation and say your purpose doesn't say this, but in
10 fact, this is what the group does. So it's how they function
11 and what their activities are.

12 CHAIR BATTLE: Okay, so we can go with -- does the
13 committee feel more comfortable, then, with "its principal
14 function"?

15 MR. McCALPIN: I think that's better.

16 CHAIR BATTLE: Okay. What about (b)? Are there
17 any concerns? (b), it seems to me, is a catch-all we're
18 putting at the end of each to say if you're using private
19 funds or non-Corporation funds, then these restrictions don't
20 apply.

21 MS. PERLE: And there was some criticism that we
22 repeated this several times in this regulation. I think they

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1 came from the IG. But I think it's important that it's
2 emphasized that nobody -- you know, that if you're using CDBG
3 funds to do this, that it doesn't --

4 MS. MERCADO: I think it's also important for
5 people who would choose to make unnecessary complaints to
6 their congressional people or to the IG or whomever, that if
7 someone has this provision that is specifically outlined
8 there, that if people are using IOLTA funds or private funds
9 or whatever other kinds of funds there is, then, you know,
10 before that entity that is being complained to comes to us,
11 that they would have known that this is already something,
12 that maybe that's how they're doing it, and they need to
13 investigate, rather than getting us caught into that whole
14 process.

15 So I see this as a preventive measure.

16 MS. PERLE: It also permits a legal services
17 program to contract with a group that may have some
18 resources, to do some work on their behalf, if it's being
19 supported by other funds.

20 MR. McCALPIN: Could this paragraph be interpreted
21 to mean that a program could use private funds to fund a
22 group to engage in representation prohibited by the Act?

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1 MS. PERLE: No.

2 MR. McCALPIN: You don't think it could be read
3 that way?

4 MS. PERLE: No, because the representation is
5 still --

6 MR. McCALPIN: In other words, this is not tied to
7 whatever the private --

8 MS. PERLE: Under 1610, in other words, they
9 couldn't use private funds to represent a group -- private
10 funds in an abortion case, for example, under our current
11 scheme. They could use IOLTA funds to represent the group,
12 and that was an issue that was raised in California.

13 MR. McCALPIN: And maybe you just can't cover every
14 base in every regulation, but this part does not prohibit a
15 recipient from providing legal assistance to a group that
16 does require it, if it's from a source other than the
17 Corporation. So that, you know, I can see people saying,
18 "Well, we can use private funds to fund this group to handle
19 an abortion case."

20 MS. PERLE: Well, you could use private funds to
21 represent this group, which wouldn't be eligible, but you
22 still couldn't --

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1 MR. McCALPIN: To fund the group, to fund the
2 representation of the group.

3 MS. PERLE: To fund the representation. But if
4 the representation involved a prohibited activity, they
5 couldn't use private funds to do it.

6 CHAIR BATTLE: It says "this part," so we're only
7 talking as to this particular part, and I think that this
8 prohibition only goes as far as --

9 MS. PERLE: This is only dealing with eligibility.

10 CHAIR BATTLE: Eligibility. So I think that we're
11 protected, based on that language, dealing with only this
12 part.

13 Are there any other questions as it relates to
14 group eligibility, from the committee? If there aren't,
15 let's move on to the next one. 1611.7, manner of determining
16 financial eligibility, subsection (a).

17 "A recipient shall adopt simple intake forms and
18 procedures to obtain financial information from individuals
19 and groups to determine eligibility in a manner that promotes
20 the development of trust between attorney and client. The
21 forms shall be preserved by the recipient," period.

22 MS. PERLE: That's done that way because it's

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1 handled later.

2 CHAIR BATTLE: Okay. "(b), if there is substantial
3 reason to doubt the accuracy of the financial or other
4 eligibility information provided by an individual or group
5 client or applicant for service, a recipient shall make
6 appropriate inquiry to verify it in a manner consistent with
7 the attorney-client relationship."

8 (c), and this is a new section, or is this --

9 MS. PERLE: This is a new section.

10 CHAIR BATTLE: New section. "When one recipient
11 has determined that a client is financially eligible for
12 service in a particular case or matter, another recipient may
13 extend legal assistance or undertake representation on behalf
14 of that client in the same case or matter at the request of
15 the original recipient in reliance upon the initial
16 eligibility determination.

17 "The subsequent recipient is not required to review
18 or redetermine the client's eligibility unless there's a
19 change of circumstances as described in 1611.9, or there is
20 substantial reason to doubt the validity of the original
21 determination." That's (c).

22 Now, let's see. How far does (d) go?

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1 MS. PERLE: (d) is a long one that's more
2 complicated.

3 CHAIR BATTLE: Let's stop right there, then.

4 MS. PERLE: (c) is a new provision and --

5 MR. McCALPIN: Are we taking (a), (b) and (c)?

6 CHAIR BATTLE: (a), (b) and (c) together. So let's
7 kind of get the background on (a), (b) and (c) in the manner
8 of determining eligibility.

9 MS. PERLE: I think most of the changes that are in
10 here are -- well first of all, in (a), we drop the
11 requirement that these forms be approved by the Corporation.
12 That's sort of part and parcel of this whole effort to remove
13 things that really the Corporation shouldn't be dealing with.

14 CHAIR BATTLE: Okay, if we remove that there, are
15 we going to include this as part of what we do on just
16 recordkeeping?

17 MS. PERLE: In compliance.

18 CHAIR BATTLE: Compliance and recordkeeping and
19 just make a note of it?

20 MS. PERLE: Yes. The reason we took out the last
21 part of (a) is because it's dealt with below, and it was sort
22 of redundant.

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1 And (b), I think the changes in (b) are just
2 intended to clarify the language. There's no substantive
3 change in that.

4 (c) is added to deal with a particular set of
5 circumstances where support centers are asked by a local
6 project to come in as either co-counsel or to take over
7 representation in a case that has statewide or national
8 repercussions.

9 And what's happened often is there's a case that's
10 been well developed at the local level. There's the
11 determination made at some point that the client is eligible,
12 and then the support centers come in and they've been
13 criticized by the Corporation on numerous occasions for not
14 making an independent eligibility determination.

15 And so what this is intended to do is to say that
16 they can rely on the determination that was made by the
17 recipient that developed the case, and if the person met that
18 program's eligibility criteria at the time they're accepted,
19 then they should be considered to have been eligible.

20 Now obviously, if there's a change in
21 circumstances, or if something happens that suggests to the
22 support center that somebody lied or misrepresented or was

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1 mistaken, then certainly nothing prevents them from going
2 back and making --

3 CHAIR BATTLE: What is the scheme at present? I
4 mean, this is a new regulation to address the question of
5 reliance.

6 MS. PERLE: I think the scheme at present is that
7 that's the way it works, the way that -- but what's happened
8 is that on numerous occasions the Corporation's come in and
9 criticized programs for doing that.

10 CHAIR BATTLE: Is there anything else, Suzanne,
11 that you have to add to that?

12 MS. GLASOW: It was more an application of
13 regulations. There was nothing specific in the regulations
14 that dealt with that. It was just the way it was applied,
15 and we're trying to make it clear with this one how to handle
16 that kind of a situation.

17 CHAIR BATTLE: Any questions from the committee?
18 Anyone? Okay, we can move on to (d).

19 "Except as necessary to fully represent a client,
20 information furnished to a recipient by a client or an
21 applicant for service to establish financial eligibility
22 shall not be disclosed to any person who is not employed by

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1 the recipient nor associated with the recipient as co-counsel
2 in the representation of the client in a manner that would
3 reveal directly or indirectly the identity of the client or
4 applicant for service or, with respect to a previously
5 identified client, that would reveal client confidences,
6 secrets or other information relating to the representation
7 of the client, without the expressed written consent of the
8 client or applicant."

9 And we've got alternative 1, and then we've got
10 quite a bit of --

11 MR. McCALPIN: That is alternative 1.

12 CHAIR BATTLE: That is alternative 1. Alternative
13 2 --

14 MS. GLASOW: Basically, alternative 1 means we stop
15 there. We don't go on to (e) and (d).

16 CHAIR BATTLE: Okay. Then we have a lot of
17 information that presently in the regulation that's been
18 stricken. And we get down to page 21, which is, you pick up
19 with, me reading, "When the Corporation is investigating
20 specific allegations that raise questions regarding the
21 financial eligibility of an identified client or other person
22 allegedly served with resources provided by the Corporation:

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1 (1) the Corporation shall disclose to the recipient the
2 allegations and any information relating to the client's or
3 person's financial eligibility provided by the complainant or
4 discovered by the Corporation in the course of its
5 investigation.

6 "(2) the recipient shall conduct a good faith
7 review of its eligibility determination with respect to that
8 client or person, taking into account any information
9 provided by the client or person and any additional
10 information in the recipient's possession or supplied by the
11 Corporation or the complainant.

12 "(3) in the event that the recipient determines,
13 after reviewing the available financial and other
14 information, that the client or person was eligible for
15 services or was not served by the recipient using resources
16 provided by the Corporation, the recipient's executive
17 director or the director's designee shall so certify to the
18 Corporation.

19 "(4) in the event that the recipient determines,
20 after review of the available information, that the client or
21 person was served by the recipient with funds provided by the
22 Corporation but was not eligible for services, the recipient

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1 shall: (a) allocate the costs of the representation to a
2 funding source other than the Corporation, (b) discontinue
3 representation in a manner that is consistent with 1611.9 or
4 (c) take such other action as the recipient and the
5 Corporation agree is reasonable and appropriate, consistent
6 with the applicable rules of professional responsibility and
7 ethical obligations."

8 So we really have two alternative ways to deal with
9 client confidential identification.

10 MS. GLASOW: As a framework, I'd like to explain
11 that if this committee is interested in considering (e) and
12 (f) instead of alternative 1, which would not include this in
13 the regulation, the Office of Inspector General would have
14 some concerns it would want to express, and I know management
15 would like to, because we have basically decided not to put
16 this in the rule at this point.

17 So we haven't looked at it as thoroughly as we
18 otherwise would have, and we would like to kind of pull it
19 back and look at it more thoroughly.

20 MS. SZYBALA: Based on the scheme of how we
21 reported the rules out to you, everything you just read --
22 that is, (e) and (f) -- should be in the footnote as

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1 something that has not been agreed to, something there's a
2 disagreement over. It was just because of length that they
3 still appear in the text.

4 This was the working group's formulation. The OIG
5 objected. Management, for its own reasons, objected, as
6 well. The working group was never convened to then see if it
7 had a problem with just striking out (e) and (f).

8 So (e) and (f) remain the working group's
9 recommendation. In other words, it's not fully negotiated.
10 But (e) and (f) wouldn't appear here if this reg appeared the
11 way management has now approved it. Management's reg would
12 stop right after -- right at footnote 45.

13 The choice is not between the underlying language
14 on page 19. That language is in, either way. That is, there
15 is agreement about access, what third parties are going to
16 get access to, and that's the same language that we saw
17 yesterday in rule 1621.

18 MS. PERLE: I think that what the alternative is
19 intended to do is, in fact, explain what (d) means, in terms
20 of the Corporation investigating allegations.

21 CHAIR BATTLE: Let me see if I understand it
22 because I'm really not certain that I'm clear.

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1 MR. McCALPIN: I'm not sure what (e) and (f) you're
2 talking about.

3 CHAIR BATTLE: And I did not read (f) and (f) is
4 part of what -- (e) has to do with the Corporation's
5 investigation.

6 MS. SZYBALA: So does (e). (e) and (f) should go
7 together.

8 CHAIR BATTLE: Even though they're stated as
9 alternatives --

10 MS. SZYBALA: No, they're not.

11 CHAIR BATTLE: Alternative 1 and 2.

12 MS. PERLE: We struggled with the best way to
13 convey this to you and it was complicated and it was hard.

14 MS. MERCADO: (e) and (f) would only be if we
15 decided that we wanted it to go into the whole detail of how
16 investigations should --

17 MS. SZYBALA: Correct.

18 MS. MERCADO: -- where the IG and management has
19 not even made a decision whether, in fact, that ought to be
20 the way or --

21 CHAIR BATTLE: I was about to see if I could
22 restate it, and if I'm wrong, then please correct me so that

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1 the committee can understand.

2 First of all, (d) deals with the confidentiality of
3 the name of the client. Everyone agrees on the way that it
4 is presented stated. There is no question the --

5 MR. McCALPIN: (d)?

6 CHAIR BATTLE: On (d), yes.

7 MS. PERLE: On the bottom of page 18.

8 CHAIR BATTLE: On the bottom of page 18, the
9 beginning of page 19, the language and the additional
10 language that's contained in (d) is something to which the
11 working group, general counsel, our management staff and the
12 OIG all agree, that language.

13 So why don't we take that up first. Does the
14 committee have any -- do we have any questions about that,
15 subsection (d)?

16 MS. MERCADO: The only thing that I remember, and
17 I'd like to ensure that I was correct on this, was that I
18 thought that we had language in the previous section that we
19 reviewed yesterday that had a slightly different language as
20 far as professional ethics and -- I can't remember what
21 section that was.

22 MS. GLASOW: Page 4 of 1621, page 4 for 1621,

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1 paragraph (d). "The recipient shall not disclose the
2 contents of this file." It's below the crossed out language.
3 "The recipient shall not disclose the contents of this file
4 to the Corporation or to any other third party in a manner
5 that would reveal directly or indirectly the identity of the
6 client or, with respect to a previously identified client,
7 that would reveal client confidences, secrets or other
8 information relating to the representation of the client
9 without the expressed written consent of the client."

10 MS. PERLE: The difference is, I think the place
11 where it's different is that this includes 1611 and it
12 includes references to applicants for service, as well,
13 because you could be dealing with situations where somebody
14 was denied service. I think that's the principal difference
15 between the two.

16 MS. SZYBALA: Also you worry about co-counsel, in
17 grievances.

18 CHAIR BATTLE: Right, I notice the language
19 involving co-counsel here and we had not made that
20 identification earlier on.

21 Okay, Bill?

22 MR. McCALPIN: Explain to me the basis or the reach

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1 of the exception with which (d) begins. "Except as necessary
2 to fully represent a client."

3 Now, what's that exception intended to provide?

4 MS. PERLE: I think it's intended to deal with a
5 situation where you, as the lawyer, are representing the
6 client and in order to represent them, there is information
7 that's in the client's file that relates to financial
8 information that you have to share, because it's part of --
9 for example, if you're dealing with a divorce case, where you
10 have financial information about the person, and that's
11 information that you're required to share with opposing
12 counsel to work out a settlement or whatever.

13 So it was sort of an effort to ensure that we
14 weren't going to interfere with the ability of an attorney to
15 represent the client.

16 Now, we could say that differently if people are
17 not comfortable with that.

18 CHAIR BATTLE: Well, I could read that to mean that
19 you can't fully represent a client if LSC has a question
20 about eligibility. You could read that in a number of
21 different ways.

22 MS. PERLE: Region 3, the region 3 folks suggested

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1 that we change that underlined part to say "except as
2 permitted by applicable rules of responsibility, information
3 furnished to a recipient by a client shall not be disclosed."

4 MR. McCALPIN: Except as what? What did you just
5 read?

6 MS. PERLE: "Except as permitted by applicable
7 rules of professional responsibility," but I think you're
8 right. I think that --

9 CHAIR BATTLE: That's a lot more restrictive.

10 MS. GLASOW: We could put something in there, drop
11 that, for this part, and put at the end, "This does not
12 preclude an attorney -- this is not intended to preclude an
13 attorney to fully represent his client," something like that.

14

15 MS. SZYBALA: It would be more specific, I think.
16 You're talking about you're not going to require an attorney
17 to get the same financial information from a client twice.

18 CHAIR BATTLE: It probably would make sense if you
19 took that particular provision out and did a separate section
20 that fully explains what you mean by it, and began this
21 section with information furnished through a recipient shall
22 not be disclosed, and really just express that thought here.

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1 And then, following it, put a provision, as you have in many
2 of the others, which is the exception to that general rule.

3 Does that satisfy your concern?

4 MR. McCALPIN: Yeah, I think so. I was just trying
5 to get clarification of what they were driving at with this.

6 CHAIR BATTLE: And I think if you put a separate
7 sentence in, you could give further clarification.

8 MR. McCALPIN: Just as a matter of grammar or
9 structure, in the fourth line, in the middle, I would
10 substitute the word "neither" for "not," "who is neither
11 employed by the recipient nor associated."

12 MS. PERLE: And Renee raised the point that we
13 ought to have "employed or retained."

14 MS. SZYBALA: This is just to bring in the outside
15 auditor of the program, which, from the OIG point of view, is
16 ultimately where you're going to get your accountability on
17 these kinds of determinations, these investigations of
18 particular allegations of ineligibility.

19 MS. PERLE: And the ABA has issued an opinion
20 saying that you can share this financial eligibility
21 information with an independent auditor who is retained by
22 the program, because they're in a relationship and privy with

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1 the program and they owe the same obligations of
2 confidentiality.

3 MR. McCALPIN: But this doesn't permit the sharing
4 with the auditor.

5 MS. SZYBALA: That's why I'd like to see the words
6 "employed or retained by the recipient."

7 MR. McCALPIN: Oh, "employed or retained."

8 MS. SZYBALA: And that, hopefully, would do it.

9 MS. PERLE: I think employed -- you know, you
10 employ an auditor. I think the language probably is broad
11 enough.

12 CHAIR BATTLE: Do we have any other questions about
13 subsection (d), from the committee members or --

14 I understand that John Tull is supposed to be
15 hooked into us this afternoon.

16 MS. PERLE: We had a discussion, John and I, about
17 this whole set of issues and I thought it was important that
18 John be involved in this discussion since -- for several
19 reasons, first, because he represents management on these
20 issues but also because he probably has a better
21 understanding of these issues than most of the other people
22 in the room, including those of us who have worked on it for

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1 a long time.

2 And so he said he would be available by telephone
3 from Colorado, so that's what we're trying to see if he's
4 hooked up.

5 MR. TULL: I'm here.

6 CHAIR BATTLE: Welcome, John.

7 MR. McCALPIN: Happy anniversary.

8 MR. TULL: Thank you. This is a great way to spend
9 it.

10 MS. PERLE: But we left you alone on Father's Day.

11 CHAIR BATTLE: Well, thank you for joining us,
12 John. This is LaVeeda Morgan Battle and we are in the midst
13 of going through the regulations right now that pertain to
14 eligibility. And we welcome your input.

15 So, can you hear us well?

16 MR. TULL: Yes.

17 CHAIR BATTLE: Okay, good.

18 MS. MERCADO: I just have one question, I guess,
19 that was sort of still bothering me. I'm assuming that,
20 going to page 18, section -- I'm assuming it's (d), on line
21 4, about the disclosure to any person who's neither employed
22 or retained by the recipient, does that deal -- I assume, and

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1 I don't know -- does it deal with the broader category of not
2 disclosing to the Corporation or any third party?

3 CHAIR BATTLE: Yes, it does.

4 MS. MERCADO: Because that's the language that you
5 have in section 1621.3(e). I'm just saying that there should
6 be a third party aspect to it.

7 MS. PERLE: Instead of "to any person," we should
8 say "to the Corporation or any third party."

9 MS. MERCADO: Yeah, I just wanted some consistency
10 because that seems to bother me, whether people would
11 interpret that to be or not to be.

12 JUDGE DANA: I think that this is what is intended,
13 but instead of, on line 3 on page 19, where it says "with
14 respect to," I think what this meant is whether or not the
15 client had been previously identified, would reveal.

16 In other words, under the first part of this
17 section, you're not supposed to reveal your client's name.
18 But if the client's name has been identified or even if the
19 client's name hasn't been identified, you're not supposed to
20 reveal client confidences, secrets or information relating to
21 the representation of the client.

22 So I think that's what's intended by this.

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1 MS. SZYBALA: That's not what was intended, the way
2 it's drafted. We had the philosophical discussions, a number
3 of which were in the "if the tree falls in the forest and
4 there's no one there to hear it?" Is there a client
5 confidence when you cannot possibly identify?

6 If you tell somebody of your experience as a
7 lawyer, I'm extremely experienced; I've done a lot of felony
8 conviction cases, but I'm not going to -- I'm going to tell
9 you in detail what I've done. I'm not going to mention the
10 name of a client. Have I give you a client confidence?

11 I mean, is lawyer work so secret that you can never
12 discuss what you've done, with it even totally separated from
13 a client's identity?

14 If you're going to say -- it originally read
15 "identity and other secrets and confidences," and then you're
16 back to blank forms because under the rules of ethics,
17 anything relating to the representation of a client is a
18 secret.

19 What we really agreed on is that it's only secret
20 in the sense of an identifiable client. For general
21 monitoring purposes, for statistical purposes, just seeing
22 the document that shows that they did eligibility

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1 determinations isn't giving anybody's secrets away.

2 MS. PERLE: I think we do have sort of a very basic
3 kind of -- I won't say philosophical -- we have a fairly
4 basic disagreement over this issue, which we tried to resolve
5 with this language.

6 The language that Howard is suggesting is the gist
7 of what the working work language contained, and Renee and
8 Mr. Quatrevaux had argued that would produce blank forms.
9 And my response to that was that that wouldn't produce blank
10 forms because if you don't have the identity of a client,
11 then certain things that would be a confidence or secret if
12 you had the identity of the client there would not constitute
13 a secret or confidence.

14 And so I didn't think it would produce blank forms,
15 although I will admit there have been occasions where
16 programs have suggested it would produce blank forms, and we
17 thought they were wrong. We told them. When they've asked
18 for our opinion at the Center for Law and Social Policy,
19 we've said, no, that's incorrect and that you really don't
20 have to go that far.

21 So I would certainly be much more comfortable, and
22 I think the working group would agree with the formulation

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1 that Howard is suggesting, but this is language that we did
2 thrash out.

3 MS. SZYBALA: This was perceived as workable on a
4 practical level, without constant debates and differences of
5 opinion in the field, hopefully to last beyond this
6 administration, to last into the future, no matter what
7 perspective an administration of this Corporation was coming
8 from, something that could guide both sides and protect all
9 interests.

10 I still have difficulty understanding what would be
11 a secret when there's no identified client.

12 JUDGE DANA: Well, every lawyer has sat around and
13 told war stories and probably every lawyer has listened to a
14 war story and, because of what they knew from some other
15 setting, has put two and two together and guessed who was
16 being described.

17 Now, just because we do that, we make the mistake,
18 doesn't make it right, I suppose. But I'm concerned that
19 with a formulation that under any circumstances a secret, a
20 confidence or other information must be disclosed and then
21 you just have to hope that the IG or the FBI isn't going to
22 take that information and add other data that they acquire

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1 from CompuServe and figure out whose secret it is, and then
2 the lawyer gets his ticket yanked.

3 And we are -- one of the concerns I have in this
4 area is that we don't have legal services lawyers, we don't
5 have federal lawyers, we have lawyers. And they're out there
6 in Texas and in Maine and in Illinois, and they are subject
7 to a lot of restrictions that frankly, not just bar
8 association but courts impose upon them.

9 And in Maine, if a lawyer violates an ethical
10 injunction, we take his ticket away. And so we want to be
11 really careful, as a Corporation, that we don't impose that
12 kind of a burden on a lawyer where he's being paid \$27,000 a
13 year and he could be put out of business if he is forced to
14 turn over information which his client and the authorities
15 would find objectionable.

16 CHAIR BATTLE: Let me ask this, so I can understand
17 and clarify where we are, Howard. Do you have an objection
18 to the language as it is stated? And are you suggesting a
19 different configuration of the language, and can you
20 articulate it for us one more time?

21 JUDGE DANA: My suggestion is that instead of the
22 words in line 3, "with respect to," it say "whether or not

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1 the client has been previously identified, would reveal
2 client confidences, secrets, or other information relating to
3 the representation of the client without the express written
4 consent of the client or the applicant."

5 I concede, frankly, that the IG's correct that, for
6 instance, if somebody is making \$10,000 a year and that's the
7 only secret or financial piece of information that is on the
8 form, that if you take the name away, you haven't revealed a
9 client secret, but if there are on that form secrets that
10 could, under any circumstances, be determined to be the
11 client's secret, and just by taking the name away could be
12 ultimately discovered, then the lawyer involved or the entity
13 involved has got --

14 MS. SZYBALA: There's a couple of things I need to
15 respond to. First of all, I think that the words "directly
16 or indirectly" were put in by Mr. Tull to deal with that. I
17 mean, the point was anything in there that could help you
18 identify the client or by which you could identify the client
19 is out.

20 I think we need to keep in mind that we're talking
21 here about the eligibility forms, not about the client's
22 legal file, and on those eligibility forms, we're talking

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1 about, as I described yesterday, ethically protected
2 information, as opposed to attorney-client information.

3 Where information is ethically protected in the law
4 or the reg, legitimately require the subpoena or legitimately
5 require the attorney to give it, it is not an ethical
6 violation. The attorney is not going to lose his license for
7 complying with the law, with the order of a court, under any
8 circumstances.

9 CHAIR BATTLE: Are we going to, in this particular
10 reg, use generally accepted definitions of what a client
11 confidence is, what a secret is, what information relating to
12 representation is supposed to be, in order to resolve these?
13 Or are we going to devise our own definitions of that, in
14 light of the distinctions that we're trying to draw between
15 financial eligibility determinations, which in some instances
16 may impinge on representation and in many other instances
17 they won't.

18 I mean, I'm wondering if we're fighting over
19 something that has some definition somewhere else.

20 JUDGE DANA: Unfortunately, it doesn't in each and
21 every state. In each and every state, the entities that
22 determine what's a secret and what is a confidence is

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1 determined by the state ethics board and ultimately the
2 sanction --

3 MR. McCALPIN: Common law.

4 JUDGE DANA: But ultimately the court in that state
5 will determine whether or not you, as a lawyer, have betrayed
6 a client secret or confidence.

7 MS. GLASOW: I think it's important to point out
8 that in our Act, the Corporation is basically told, in
9 section 106(b)(3), "The Corporation shall not under any
10 provision of this title interfere with any attorney in
11 carrying out his professional responsibility to his client,
12 as established in the canon of ethics and the code of
13 professional responsibility of the American Bar Association,
14 referred to collectively in this title as professional
15 responsibilities, or abrogate, as to attorneys and programs
16 assisted under this title, the authority of the state or
17 other jurisdiction to enforce the standards of professional
18 responsibility generally applicable to attorneys in such
19 jurisdiction.

20 "The Corporation shall ensure that activities under
21 this title are carried out in a manner consistent with the
22 attorney's professional responsibilities."

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1 MS. PERLE: I think that's one thing that we need
2 to bear in mind throughout when we're discussing this, that
3 we are not in the position of just a federal agency giving
4 out money. We are also obligated under our Act to treat
5 legal services attorneys the way attorneys are to be treated.

6 MS. MERCADO: And I think that the way to deal with
7 that is by just very briefly incorporating that in comment,
8 that in all respects, in all the work that legal services
9 attorneys do, that they must give deference. And of course,
10 you can cite the statutory provision, so they can look at
11 that in even more detail, without having to do that, so that
12 it covers under any circumstances or under any subpart
13 regulation.

14 MS. PERLE: The problem is that when you do that,
15 when you just put it in one place and sort of assume
16 everybody will realize that, that it's applicable in all
17 situations, it doesn't get picked up. And then we have
18 fights about --

19 CHAIR BATTLE: Whether it has application in this
20 instance.

21 MS. MERCADO: No, I'm not saying don't put the
22 language that is there now, as it reads in the section. I'm

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1 saying that in addition to that, we ought to be able to make
2 some reference to the Act under 1006(b)(3) about the
3 professional responsibility.

4 MR. TULL: LaVeeda, this is John.

5 CHAIR BATTLE: Yes. Okay, John?

6 MR. TULL: I think when we discuss this, there are
7 several issues that we talk about which are the very same
8 ones that you're talking about now. And I think this is less
9 a philosophical issue, I think, than it is a practical one.

10 I think Howard's -- I certainly agree and I think
11 the management of the Corporation certainly agrees with the
12 version of the ethical requirements that Howard recited.

13 The question, I think, that we found ourselves
14 wrestling with and that Renee pushed us on was the practical
15 challenge of expressing the rule in a way which does not get
16 us back in the problem that we've been in in the past, where
17 either a local program interpret the language in an extremely
18 restrictive way and, based on that, that extreme
19 interpretation, have chosen not to provide any information at
20 all, including information that I think anyone grounded in
21 ethical requirements would say they were not prohibited from
22 giving and, on the other side, the Corporation, I think, has

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1 overreached.

2 And also, the Corporation is in a position of
3 having to stake out some ground in terms of what other
4 funding sources are seeking in terms of information.

5 Her question, is this a set of rules that are our
6 rules or is it a set of rules which are established somewhere
7 else, I think the answer to that has to be that it's a set of
8 rules which are covered somewhere else, because that's what
9 the Act says.

10 What is the challenge for us, I think, is to try to
11 state them in a way which is as clear as possible so that we
12 avoid the misinterpretations which have led to policy fights
13 and litigation in the past.

14 When we talk about this in the meetings with the
15 inspector general and with general counsel and with the
16 transition team, a piece of that puzzle which we thought was
17 critical was what is stated in the preamble? Because this is
18 not -- what I agree with completely about Howard's statement
19 is that it's not a hard and fast rule, that the degree to
20 which information may become -- is information which, because
21 of its nature, might be pieced together with information,
22 other information, or is so unusual that you could attach it

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1 to the identity of a client, that that sort of continuum of
2 circumstances as to when you should give the information out
3 or not is not a hard and fast line. There's no bright line.

4 So that the preamble should -- I think the preamble
5 needs to be a fairly thoughtful elucidation of what the
6 considerations are here and to say what Howard said. I mean
7 not in those concise words, but essentially to convey that
8 message, that the bottom line is the absolute responsibility
9 that a lawyer has to his or her client not to disclose
10 information, but that to state that that is not an easy
11 determination to make and to state what the considerations
12 are in each case.

13 And that here, the purpose of saying where the
14 client has been identified before -- the language which is
15 here now, which I heard you object to, Howard, was an effort
16 to address at least a concern that Renee raised, which is
17 that some programs do and have interpreted client's secrets
18 so broadly as to have potentially lead to the results that
19 you're concerned about, no information at all coming.

20 CHAIR BATTLE: Thank you, John. I think that
21 that's helpful.

22 I'm wondering if you break out two pieces of this,

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1 one, an instance where the client's identity has not been
2 disclosed, and talk about that piece, and then, in the other
3 instance, where a client's identity has been disclosed, that
4 maybe we can, in doing it that way, come up with something.

5 If I understand what Howard has raised, he's saying
6 in any event that the secrets and confidences and the issues
7 relating to representation in both instances ought not to be
8 disclosed.

9 What I hear and read here is that there was a
10 distinction drawn between the two.

11 MS. SZYBALA: That's an attempt to give guidance.
12 If you look at the ABA's model rules, which I think we can
13 accept as kind of the broadest rules out there that are
14 accepted in many states, and more and more states are
15 accepting them, they define client secrets as anything
16 relating to the representation.

17 So if we can accept that as a baseline, that a lot
18 of -- and I don't think it's necessarily saying they're being
19 unreasonable. A lot of programs can say anything relating to
20 this client, our representation of this client, is a secret;
21 you get nothing; go away.

22 And what we're trying to give them here is some

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1 guidance in terms of, think about it. If we don't know the
2 name, and if you can protect the name, then there's lots of
3 other information there that we can have.

4 If we do know the name, then we get nothing. I
5 mean, in that circumstance, if the Corporation already knows
6 the name, I don't think there's very much they're going to
7 get at all.

8 The attempt here was to work out something
9 practically that'll stop this constant, almost constant
10 bickering about did they give us what we asked for or not,
11 and to provide some guidance on the kinds of situations that
12 are constantly faced in the field.

13 MR. McCALPIN: I want to ask a clarifying question
14 and then be the bad guy. A while ago somebody suggested that
15 in subsection (d) on page 18, in the fourth line, that the
16 words "to the Corporation or to any person" and so on be
17 added.

18 My narrow question is, is that acceptable to the
19 inspector general?

20 MS. SZYBALA: Oh, yes. That was the formulation
21 out of -- what are we in? -- out of 1621. I mean, we had
22 hoped -- this formulation, as it currently reads, we already

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1 looked at in 1621. That's how it reads there.

2 MR. McCALPIN: So yes, I have looked at that.

3 MS. SZYBALA: That's what we have in mind here.

4 MR. McCALPIN: I wasn't sure whether that was
5 acceptable to you.

6 MS. SZYBALA: That's our compromise.

7 MR. McCALPIN: All right. Now let me be the bad
8 guy. Has anybody explored the notion that just as a suit by
9 a plaintiff for a personal injury waives the doctor-patient
10 privilege with respect to communications to the physician,
11 that an application for legal services on the basis of
12 indigency may waive the confidentiality of the information
13 leading to the establishment of indigency? Has anybody ever
14 suggested or explored that?

15 MR. TULL: I think that the ABA has an informal
16 opinion that runs counter to that. What the informal opinion
17 concluded was that where a person is seeking assistance from
18 a program for the poor and therefore indigency is an issue,
19 that that, in fact, heightened the protection that the person
20 would have in terms of their identity as being a confidence,
21 which there had been some previous opinion of the ABA that
22 identity was not a confidence under the model code.

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1 But they concluded that it was for purposes of
2 application for indigency and based on the notion that the
3 fact of indigency for some persons would be embarrassing and
4 therefore should be protected.

5 So I think to the degree to which -- I don't think
6 that question's been --

7 MR. McCALPIN: Okay, you've answered my question.
8 I just wanted to know whether that had been explored.

9 CHAIR BATTLE: Let me suggest something that might
10 get us at least past this impasse. And that is that we
11 explore putting together a comprehensive historical kind of
12 comment to this section that explains the ABA position, the
13 reasons therefor, the concerns which the inspector general
14 has raised about confidences and representation.

15 The language itself is something that we do have
16 some concern about as it relates to the top of page 19
17 because the way that it now reads, I think there is a
18 distinction and there's a compromise drawn between an
19 instance where the client's identity has been disclosed and
20 an instance where the client's identity has not been
21 disclosed.

22 I'm just wondering whether we can, at least at this

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1 point, draft all of that out, and then go back and take a
2 look at the language once we've got the history of the
3 position of the ABA, inspector general and the parties, and
4 see if that background will give some guidance to programs as
5 to how much information can or should be disclosed if
6 requested by the Corporation or some third party.

7 MS. SZYBALA: The current reg starts on page 17.
8 You can see how it reads. "The information shall be
9 preserved by the recipient in a manner that protects identity
10 for audit." That's all it said. We took that out, protects
11 identity. And this is an attempt to make this reg more
12 consistent with rules of ethics, by acknowledging that first
13 of all, when you know identity, that you have to withhold
14 basically everything relating to the representation, and also
15 to make it clear that even stuff that doesn't directly
16 identify should be out if it can indirectly identify.

17 I don't know, in terms of --

18 MR. McCALPIN: Have we provided any record
19 retention policy? "Shall be preserved by the recipient."

20 MS. SZYBALA: That's it. That's the record
21 retention --

22 MR. McCALPIN: Do we have a record retention

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1 policy?

2 CHAIR BATTLE: How long?

3 MS. PERLE: No, I think probably you apply some
4 rule, you know --

5 MR. McCALPIN: Statute of limitations?

6 MS. PERLE: Or whatever is maybe an appropriate
7 practice in the jurisdiction. I don't know.

8 MS. GLASOW: Most jurisdictions have some sort of
9 ethical guideline on how long you keep client files. Now,
10 whether they would deal with this type of issue, I don't
11 know.

12 MS. PERLE: I'm not sure that's necessarily -- I
13 mean, it may be true in some jurisdiction. Howard was just
14 saying that in Maine it doesn't; there's no guidance.

15 MR. McCALPIN: No guidance in Missouri. We came in
16 the Union together.

17 CHAIR BATTLE: John, did you have something to add?

18 MR. TULL: Yes, I did, in answer to Bill's
19 question. There is not, to my knowledge, a Corporation
20 policy which we recommend to programs, and I think that the
21 practical reality is that programs are pretty widely varied
22 in the degree to which they've addressed that issue. Some do

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1 have record retention policies and others don't have them.
2 They should have them, obviously.

3 CHAIR BATTLE: Do you think that's something we
4 need to explore in terms of a general time frame for record
5 retention, since we've got some provisions which require that
6 certain records be preserved?

7 MR. McCALPIN: I suspect that would be a piece of
8 that regulation we've been talking about off and on today,
9 about records and how kept and retained and so on, that if
10 and when we get around to that regulation, we can talk about
11 a record retention policy.

12 MS. PERLE: But we certainly could, in the
13 commentary, say that a suggestion was made that we ought to
14 include in here some kind of a record retention policy
15 requirement, and ask for comment on it. It's not an issue
16 that we addressed in the working group or that I think the
17 staff addressed.

18 CHAIR BATTLE: I think that's fine. Are we any
19 better off now? Are we making progress?

20 MR. McCALPIN: Let me state my understanding. My
21 understanding is that if -- wait till I get myself to the
22 right place -- that if the OIG and the staff of the

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1 Corporation and everybody else is willing to include "to the
2 Corporation" in the fourth line of (d), then there isn't any
3 particular reason to consider alternative 2.

4 MS. GLASOW: No, we all agree on paragraph (d), but
5 then we get into paragraphs (e) and (f), and that's what
6 alternative --

7 MR. McCALPIN: Isn't that alternative 1?

8 MS. GLASOW: No, that's another issue.

9 MS. PERLE: Alternative 1 says end section (d)
10 right after "applicant."

11 MS. GLASOW: Alternative 1 says we don't want (e)
12 and (f).

13 MS. SZYBALA: Right. (e) and (f) deal with a
14 completely different topic. So (d) is not part of the
15 alternatives. (d) is agreed-to language.

16 MR. McCALPIN: I thought --

17 MS. SZYBALA: And then alternative 1 would end
18 there.

19 MR. McCALPIN: I thought alternative 2 was (e) and
20 (f).

21 MS. SZYBALA: It would have to not displace (d).
22 (d) would be there even if (e) and (f) were in.

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1 MS. PERLE: The alternatives are, having a section
2 that's composed only of (d), the alternative is having a
3 section that has (d), (e) and (f) in it. They're not
4 alternatives. That would be in addition.

5 MS. SZYBALA: The alternative to (e) and (f) is to
6 have nothing for (e) and (f). (e) isn't there in either
7 case.

8 MR. McCALPIN: Well, what is alternative 2?

9 MS. SZYBALA: (e) and (f).

10 MS. GLASOW: Alternative 2 means we would also
11 include paragraphs (e) and (f).

12 CHAIR BATTLE: Bill, it's to include (e) and (f).

13 MR. McCALPIN: That's what I'm saying. It seems to
14 me that if you add the "to the Corporation" in (d), then (e)
15 and (f) become unnecessary.

16 MS. SZYBALA: I agree.

17 MS. PERLE: Well, I know Renee agrees. I don't
18 think Howard and I agree.

19 CHAIR BATTLE: Now, I have not read (f). If we're
20 going to consider (e) and (f) in tandem, why don't I read it
21 through so we can consider it together? We've already gone
22 through (e), which gives you a specific kind of procedure for

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1 investigation and for how actions will result after that
2 investigation is completed.

3 And (f) says, "When the Corporation is
4 investigating specific allegations or has reasonable cause to
5 believe that a recipient has engaged in a pattern or practice
6 of representing financially ineligible clients using funds
7 provided by the Corporation, (1) the Corporation may review a
8 random sample of the recipient's intake forms, so long as the
9 forms do not disclose to the Corporation any information that
10 could reveal, directly or indirectly, the identity of any
11 individual or group client or applicant for service, (2) the
12 Corporation may request from the recipient the results of a
13 random test of client eligibility performed by the
14 recipient's auditor or may request that such a test be
15 performed or (3) the Corporation and the recipient may agree
16 to take such other actions as are reasonable and appropriate
17 and consistent with the applicable rules of professional
18 responsibility and ethical obligations relating to the
19 client's secrets and confidences."

20 Now, that gets us back to what Bill is suggesting.
21 If we add the disclosure requirement to (d), do we really
22 need (e) and (f), which set out a specific procedure for

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1 instances where there is a question that the Corporation is
2 investigating, regarding the financial eligibility in two
3 instances; one, of an identified client and two, of an
4 unidentified client or group, I think, where there's a
5 pattern or practice in section (f) of representing ineligible
6 clients or client groups.

7 MS. SZYBALA: I think -- John, I don't want to
8 speak for you but management said that management's view of
9 (e) and (f) were that you're restricting the Corporation and
10 making it very inflexible, for it to determine what it wants
11 to do under particular circumstances.

12 The OIG viewpoint was that there are a lot of ways,
13 once you look at (d) and keep all the interests in mind,
14 there are a lot of ways to handle these things as they come
15 up. And basically, again, I guess it's not all that
16 different from management, this is saying this is the way you
17 will do it every time. It's not necessarily true.

18 It doesn't even allow for waivers, the way these
19 provisions are written. I mean, you could have a client who
20 says they've got an allegation, give me my file, and that
21 wouldn't be allowable, the way this is written.

22 We really object to the language, "when the

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1 Corporation is investigating," in (e) and (f), because if
2 you're reading (f), the Corporation's not allowed to
3 investigate.

4 CHAIR BATTLE: That's right because the answer as
5 to what to do is something that the recipient and the
6 Corporation agree upon, which means the Corporation has to
7 get the recipient's agreement if they find that there's a
8 pattern or practice of representing ineligible clients,
9 before they can do anything about it.

10 JUDGE DANA: Well, (e) and (f), the last phrase of
11 (d) applies to the concern of the agreement. If the client
12 agrees, you don't have an (e) and (f) problem. You're not
13 even there. You just disclose.

14 MS. PERLE: We could certainly add in (e), we could
15 certainly add an explicit reference to a client's consent. I
16 don't think that's a problem. I think that's implicit in it.

17 CHAIR BATTLE: Okay.

18 MR. TULL: Where management came out on this, which
19 is certainly the policies that are expressed in (e) and (f)
20 are, I think, consistent with the restrictions that are in
21 (d). And so the degree to which we feel that (e) and (f) are
22 not necessary is because we disagree with the kind of

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1 procedure they set out.

2 It is that -- it's a level of detail prescribing a
3 particular response from the Corporation to a particular kind
4 of allegation which it doesn't strike us is appropriate or
5 necessary to put in a regulation because it means that to
6 change them requires -- to change the policy, to go at it a
7 different way, particularly if we're in the process of
8 developing and evolving an approach to monitoring and
9 evaluation and complaint investigation, to lock up a
10 particular process into a regulation when there are many
11 other kinds of allegations that the Corporation investigates,
12 many other kinds of information that we would ask for for
13 programs, that are regulatorally required, and shouldn't be,
14 that I think (d) takes care of the legal issue, which is what
15 is the Corporation entitled to and what should programs do?

16 I mean, it will, once we arrive at language which
17 does that. And to go further than that, in terms of a
18 particular specific procedure, is not necessarily and not
19 particularly helpful.

20 CHAIR BATTLE: I tend to agree.

21 MR. McCALPIN: I'm confused, John. I thought that
22 you started out being opposed to the inclusion of (e) and (f)

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1 and now I think you're in favor.

2 CHAIR BATTLE: No, I think he still is. As I
3 understand what you're saying, John, you're saying that
4 we're looking at the whole process of monitoring and review
5 in another form right now.

6 MR. TULL: Right.

7 CHAIR BATTLE: And what this would do is to lock us
8 in to a particular methodology or approach to having to
9 address one issue that will arise potentially in a monitoring
10 situation, and that at this point, since we're on parallel
11 tracks looking at new ways to ensure compliance and to
12 monitor, that you're not quite comfortable with a regulatory
13 lock on this particular procedure, when there are going to be
14 other procedures.

15 For example, if you're in the middle of a
16 monitoring visit and you find that there might be a question
17 about eligibility or a pattern or practice, do you then have
18 to go back and take this regulation in order to finish your
19 investigation into it? Or could you, as part of that
20 monitoring, continue whatever the procedure is for discerning
21 that issue, as well as other issues that you might find when
22 you're on-site?

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1 And it seems to me that I tend to agree with what
2 you're saying, that at this point, if we have covered the
3 legal concerns in (d) about what information can at any point
4 and in any form be disclosed to the Corporation, that the
5 underlying procedure for how that disclosure should take
6 place to the Corporation is something that we ought to
7 remain, at least at this juncture, flexible on.

8 I mean, that's my sense. I don't know about the
9 other committee members.

10 MR. McCALPIN: John, narrowly, do you support the
11 inclusion of (e) and (f)?

12 MR. TULL: No. I agree with what LaVeeda just said
13 100 percent. I think (e) and (f) are not necessary.

14 MR. McCALPIN: And I gather that's the view of the
15 inspector general, as well?

16 MS. SZYBALA: Yes, that takes away a lot of our
17 objection.

18 MR. McCALPIN: But that is the recommendation of
19 the working group; is that right?

20 MS. PERLE: Yes, it is. And I want to emphasize
21 something else that John said which is that -- I don't want
22 to put words in your mouth, John, but I think that what you

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1 said was that the procedures that are laid out in (f) are
2 generally speaking the kinds of procedures that you would
3 anticipate the Corporation would be using to respond to those
4 allegations. Am I correct?

5 MR. TULL: Yes, what we do now.

6 MR. McCALPIN: Madame Chairman, let me suggest that
7 we publish, or that we go forward from this point without (e)
8 and (f) but when we get around to the point of approving for
9 publication and we lay out the potential of (e) and (f) and
10 ask for comments on them.

11 CHAIR BATTLE: I'm sure I understand what you're
12 saying.

13 MR. McCALPIN: What I'm saying is that we go
14 forward from today without (e) and (f), that assuming we
15 adhere to that position, when we get ready to approve for
16 publication, that in the publication, we describe the
17 potential of an (e) and an (f) and ask for comment on that.

18 CHAIR BATTLE: In the commentary? Is that what
19 you're suggesting?

20 MR. McCALPIN: That we ask for public comment on
21 that.

22 MS. GLASOW: In essence, it would become part of

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1 the proposed rule. In a way, it's almost like saying we are
2 going to keep it in there, and ask for comments for it.

3 It's --

4 MR. McCALPIN: Well, I thought that when we
5 solicited comments, we were going to pose some questions,
6 that this would be a question we would pose.

7 CHAIR BATTLE: Okay. That's a different format, it
8 seems to me.

9 MS. PERLE: That's fine. We've done it. I think
10 that there are actually one or two places in 1607 where we've
11 done things like that. And there are several places here
12 that may --

13 CHAIR BATTLE: We can pose a question and say what
14 do you think about these two? This has been a discussion,
15 and tell people --

16 MS. SZYBALA: At the risk of beating a dead horse?

17 CHAIR BATTLE: That's okay.

18 MS. SZYBALA: I'll take the risk. I think what
19 John has said, and I don't think that the OIG has ever had a
20 problem with the fact that (e) and (f) are consistent with
21 (d) and consistent with protecting all kinds of ethical
22 considerations. We don't have a problem with that.

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1 They are so rigid. If you read (e), (e) does not
2 allow you to ask the independent auditor of the entity for
3 this outside third party kind of view, not totally outside,
4 but at least another pair of eyes looking at it. It's just
5 not one of the -- (e) is really kind of embarrassing, from a
6 congressional standpoint, in terms of accountability.

7 If you read it closely, when the Corporation has an
8 allegation against a program, the Corporation shall fess up
9 and tell that program everything it knows, and then wait back
10 to hear from the program.

11 MS. PERLE: Excuse me. I'm not very happy with
12 that characterization. I don't think we need to kind of get
13 to that level. I think that this was a good faith attempt.

14 CHAIR BATTLE: I think we have dealt fully with (e)
15 and (f). And I think that if we pose some questions about
16 (e) and (f) and find out if there are some real concerns
17 about it. Quite honestly, it seems to me it's really a
18 policy decision for the Board to make, basically, as to
19 whether or not it wants to be constrained by a particular
20 procedure or not right now.

21 MR. McCALPIN: Ultimately it won't make that
22 decision until after it's published for comment, comments are

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1 received, we've reviewed the comments and then we make a
2 recommendation to the Board.

3 MS. PERLE: Absolutely.

4 CHAIR BATTLE: Okay, can we move on to 1611.8, the
5 retainer agreement? And if we're able to do that, we've got
6 only one more section. We just may finish this afternoon.

7 Okay, retainer agreement, 1611.8, subsection (a).
8 "A recipient shall execute a written retainer agreement in a
9 form consistent with the applicable rules of professional
10 responsibility and prevailing practices in the jurisdiction,
11 with each individual" -- I've always thought when you say "in
12 the jurisdiction," "in its jurisdiction" or something else
13 that kind of explains what jurisdiction you're talking about.

14 "With each individual or group client or named
15 client class representative who is represented by the
16 recipient.

17 "(b) The retainer agreement shall be executed when
18 representation commences as soon thereafter" -- I'm sorry, it
19 should be "or as soon thereafter as is practicable."

20 "(c) The recipient shall retain the executed
21 retainer agreement and shall make the agreement available for
22 review by the Corporation in a manner that protects from

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1 disclosure any information that would directly or indirectly
2 identify any individual or group client or, with respect to a
3 previously identified client, that would reveal client
4 confidences, secrets or other information relating to the
5 representation of the client without the expressed written
6 consent of the client."

7 Now, why don't we just deal with those first and
8 then we'll go on to, I think, (d) and (e). Are there any
9 questions?

10 MR. MCCALPIN: What if there is no prevailing
11 practice in the jurisdiction with respect to retainer
12 agreements? Then there's no obligation?

13 MS. PERLE: No, you have an obligation under the
14 reg to do a retainer agreement. That's absolute. The
15 question is what form it's going to take. There may be
16 provisions in the rules of professional responsibility in
17 terms of what kind of -- some places, in terms of what kind
18 of information needs to be included, and there may be a
19 prevailing practice in terms of how retainer agreements are
20 done in a particular jurisdiction. And if so, they should be
21 consistent with this.

22 MR. MCCALPIN: Irrespective of whether there is a

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1 prevailing practice or not, there must be a retainer
2 agreement.

3 MS. PERLE: Yes. It says "a recipient shall
4 execute a written retainer agreement." And the other things
5 relate to the form.

6 CHAIR BATTLE: I don't know if "in its service
7 jurisdiction" takes care of my concern or not.

8 Howard, did you have something you wanted to add?

9 JUDGE DANA: I'm turning into a broken record, but
10 it's the same point. It's on page 24, four lines from the
11 bottom, where it says, "With respect to a previously
12 identified client, that," we think that should say "whether
13 or not the client has been previously identified, would
14 reveal client confidences, secrets or other information."

15 MR. McCALPIN: I think you're right.

16 MS. SZYBALA: That language, if you look at it,
17 then you should take out everything you just said about
18 identity because it's totally redundant and it would just
19 read, "in a manner that doesn't reveal any client
20 confidences, secrets or other information relating to
21 representation."

22 Actually, it shouldn't even have that language. It

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1 should just say "anything that wouldn't be releasable under
2 local rules," because that's the bottom line. That's what
3 you're looking for.

4 And the problem with that, what we were trying to
5 do is give some kind of guidance that would let people know
6 that that doesn't mean you don't give any information
7 relating to the representation of a client under 6(b) of the
8 ABA model rules because that's not the way you should
9 interpret it for these purposes.

10 MR. McCALPIN: The problem as I see it, and I think
11 it's what Howard's driving at, is that the way it's presently
12 phrased, you need not -- you would not identify the client
13 but you could disclose confidences, secrets or other
14 information, because that only modifies "or if the client has
15 not been previously identified."

16 MS. GLASOW: I think what this is trying to say
17 implicitly is that if you don't -- there is certain
18 information that, for instance, you could give the
19 Corporation, that if it weren't identified with a particular
20 client doesn't really reveal a confidence or secret.

21 That's what this is trying to say, and we put the
22 word "indirectly" in there as an abundance of caution, to

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1 make sure that recipients are very careful that if that
2 information would indirectly lead to the identity of the
3 client that it should not be revealed.

4 And perhaps that's unworkable. We're really trying
5 to walk a fine line here. But if the client's identified,
6 then all that information that you perhaps could give out if
7 the client wasn't identified then it becomes --

8 CHAIR BATTLE: We're talking about executing a
9 retainer agreement. By and large, in a retainer agreement,
10 you're going to have boilerplate language about the
11 representation. You're going to have a couple of lines in
12 there that says "I'm representing you on a divorce" or
13 whatever the kind of case is, and then you're going to have
14 some lines in there about the nature of the representation
15 and what I can do and can't do without your consent.

16 So I'm just wondering, with regard to this
17 particular provision, how, you know --

18 MS. SZYBALA: We've now seen that language in three
19 places.

20 CHAIR BATTLE: What else do we need? I'm not sure.

21 MR. McCALPIN: Howard, does this help any? "That
22 would not directly or indirectly identify the client and,

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1 with respect to any client, that would reveal client
2 confidences" and so on?

3 JUDGE DANA: That's what I tried to say, yes.

4 MR. McCALPIN: In other words, both identified and
5 unidentified clients, you don't reveal secrets, confidences
6 and so on.

7 CHAIR BATTLE: Yes, and I don't think you're going
8 to have those in a retainer agreement.

9 MS. PERLE: Well, under the current -- if you look
10 at (b) at the top of page 24, when you look at what's
11 supposedly required to be in the current retainer agreement,
12 "and shall clearly identify the relationship between the
13 client and the recipient in the matter in which
14 representation is sought, the nature of the legal services to
15 be provided and the rights and responsibilities of the
16 client" -- that could include more than what you're talking
17 about.

18 And, in addition, there is language in the
19 reauthorization bill, in the House bill, at least, about
20 additional information that needs to be included in the
21 retainer agreement, and we don't have that. That's not the
22 law now, but if that passes, those retainer agreements will

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1 have to include substantially more information than the kind
2 of retainer that you're talking about.

3 MS. SZYBALA: A point again, I think, is when you
4 harp back to the language, anything involving the
5 representation of a client, and you talk here about a
6 retainer and the matter in which representation is sought,
7 that is, a divorce, a benefits problem with SSI, that all has
8 to do with representation of a client, whether or not the
9 client name is there.

10 It would be legitimate to say none of that -- you
11 can't get anything that has to do with the way we
12 represent -- that had anything to do with our representation.
13 And if that is true, LSC cannot monitor compliance with a lot
14 of the requirements.

15 MS. PERLE: I think that's a very extreme view of
16 what should be included under the rubric, under the rules.
17 And if any program called our office and said, "We have this
18 retainer agreement and this is what it says, and I think that
19 that means we take out everything except the boilerplate," I
20 think that we would say, "No, I don't think that's
21 appropriate."

22 CHAIR BATTLE: Let me just try this. Now, are we

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1 talking about making the agreements available to the
2 Corporation or a third party here, as we were in the other
3 instance? And if so, can we add that language? Let's do
4 that.

5 Now, we are having the same struggle, it seems to
6 me, around this language as we had with the other. Can we
7 handle them consistently? In other words, however we come
8 out with respect to the whole question of identity of a
9 client and client confidences, secrets and other information
10 relating to representation on one is the same place we ought
11 to come out on this hone.

12 MS. GLASOW: Would that include part 1621, too?

13 CHAIR BATTLE: Yes.

14 MS. SZYBALA: We saw this same language yesterday
15 on client grievances.

16 CHAIR BATTLE: So all three of them are in the same
17 -- and I think in our comments we need to point that out, so
18 as we get people to give us input, that they're sensitive to
19 the fact that this issue leads through to three different
20 area.

21 MS. SZYBALA: Probably more in the course of the
22 regs.

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1 MS. PERLE: It may actually work out differently
2 with respect to the three different documents because the
3 kind of information that's included in the three may be
4 different. I think the client complaint one is more likely
5 to contain information about the representation, depending on
6 what the client's about. This one is sort of in the middle,
7 and maybe the financial information one is less.

8 MR. McCALPIN: That's my question. If we're not
9 going to give financial information to the Corporation, why
10 are we directing that the Corporation can review the retainer
11 agreement?

12 MS. SZYBALA: It's consistent. We were giving the
13 same information under both. The language was --

14 CHAIR BATTLE: Well, part of what we're saying --

15 MR. McCALPIN: If we go back to (d), it says
16 "information to establish financial eligibility shall not be
17 disclosed to the Corporation."

18 MS. SZYBALA: Well, one is just in the negative,
19 one's in the positive.

20 MR. McCALPIN: Why do we say here "shall make the
21 agreement available for review by the Corporation"? Why
22 don't we simply say the Corporation can't have it?

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1 MS. SZYBALA: Shall not be disclosed except. You
2 see, the way it reads under (d) is "shall not be disclosed in
3 a manner that reveals." It could be the same language here,
4 that "shall not be disclosed in a manner that reveals."

5 I mean, the fact that one is written in the
6 negative and one is written in the positive, I think is just
7 based on the way the rules were, historically.

8 MR. MCCALPIN: I think it ought to be the same.

9 MS. SZYBALA: That's fine. I don't think any
10 substantive --

11 CHAIR BATTLE: I think that's a good idea. Can we
12 do that? Now, the question I have, and John's not on the
13 line, is how does this language begin to affect monitoring?
14 As a part of going in to see if a program is in compliance
15 with all of our rules and regulations, do we expect that
16 there will be a retainer agreements for all the clients and
17 that there's something that shows that they have at least
18 gone through the eligibility check on all the clients? And
19 how do we discern whether that's been done or not done?

20 MR. TULL: LaVeeda, what we're planning on doing to
21 address that is we have the local program monitors, as a part
22 of their financial audit, to add a component which is a

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1 compliance audit, and one of the things that they would do
2 would be to look at a sample of files to determine if the
3 retainer agreement is present.

4 CHAIR BATTLE: Okay.

5 MR. TULL: They're a part of the -- under
6 applicable rules, they are entitled to look at the
7 information, including client identity, but they're bound by
8 the same restrictions as if they were an employee of --

9 CHAIR BATTLE: Excellent.

10 MR. TULL: -- in terms of disclosure to anyone
11 else, including the Corporation.

12 CHAIR BATTLE: Well, then, are we satisfied, then,
13 that we have met the things that we normally, in the course
14 of doing our compliance checks and monitoring, whether or not
15 recipients are in compliance with the Act and with the
16 regulations, are we going to be satisfied with that being the
17 way to do it with respect to questions that might arise?
18 John?

19 MR. TULL: Well, I think there are two questions.
20 One is our general review of compliance. That is the way
21 that we anticipate moving to. It's not been done that way in
22 the past. In the past it was done as part of a regular on-

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1 site visit, and they looked at redacted retainer agreements
2 to make certain that they were present.

3 I believe that doing that, using local monitors,
4 will more than satisfy what we need to do in terms of on-
5 going compliance checks.

6 The second issue is complaint investigation. If we
7 get a complaint about a particular client, then what we do in
8 terms of investigating that complaint raises a different set
9 of issues. Then, first of all, we're very apt to know the
10 identity of the client and then the question we're wrestling
11 with now, in terms of how to express what the Corporation is
12 entitled to in a regulation become much more critical and
13 difficult because it is the circumstance where we know the
14 client.

15 MR. McCALPIN: John, you made a comment a moment
16 ago that caused me to raise my eyebrows. You said the
17 accountant is bound by the same confidentiality requirement
18 as the lawyer. In Missouri there is no accountant privilege.

19 MR. TULL: Well, I think the way that works, Bill,
20 in terms of how it's interpreted in most jurisdictions is
21 it's not the accountant's privilege. It is that because of
22 billing and that sort of thing that private firms need, the

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1 person who takes care of a firm's accounts, including if they
2 have someone audit their account, needs to have access to
3 client identity and other information. And that they, I
4 think in most jurisdictions, the law firm's ethical
5 responsibilities not to disclose information, the umbrella of
6 that protection includes, or the auditor falls under the
7 umbrella of that protection.

8 So he or she is not bound by an accountant's
9 privilege. They're bound by the same privilege that the firm
10 is.

11 JUDGE DANA: It's just a secretary and a
12 paralegal.

13 MR. TULL: I think it's just practical, because
14 they just had to -- you know, the ABA and local bars had to
15 figure out a way to have accountants do their job, which is
16 with private firms, dealing with billings and that sort of
17 thing and the lesser problem in terms of the frequency of it
18 with legal services programs, but similar.

19 CHAIR BATTLE: Okay. Now that we've struggled
20 through that, can we move on to (d) and (e)?

21 MS. PERLE: I don't know whether -- have we
22 resolved Howard's concern about whether this should say

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1 "whether or not a client has been previously identified"?

2 CHAIR BATTLE: John, did you hear that language?

3 MR. MCCALPIN: John?

4 MR. TULL: Yes. The question was --

5 CHAIR BATTLE: The question was Howard still has
6 the same concern here that he identified when we were dealing
7 with subsection (d) earlier.

8 MR. TULL: Same question, right?

9 CHAIR BATTLE: Yes. And we want to know whether or
10 not it's been satisfied here. And what I suggested is that
11 we handle the two and the language the same way,
12 consistently.

13 MR. TULL: I think that's right and I think your
14 suggestion of how to handle the whole question of what I
15 remember you saying, LaVeeda, was to develop a more detailed
16 history of the position taken by parties to this, and have --

17 CHAIR BATTLE: Have all of that available for
18 comments?

19 MR. TULL: All right. And I think that applies
20 equally here because it's exactly the same issue and could be
21 handled exactly the same way.

22 MS. PERLE: In other words, to include in the

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1 commentary the suggestion that we change the language to
2 this.

3 CHAIR BATTLE: Right.

4 "(d), a recipient is not required to execute a
5 written retainer agreement when only providing limited advise
6 and/or consultation that does not obligate the recipient to
7 provide additional service or undertake continuing
8 representation.

9 "(e), when one recipient has executed a retainer
10 agreement with a client, another recipient may extend legal
11 assistance or undertake representation on behalf of that
12 client in the same case or matter at the request of the
13 original recipient without executing a separate retainer
14 agreement, so long as (1), the additional legal assistance or
15 representation is within the scope of the original retainer
16 agreement and (2), the client has received written
17 notification that another recipient is providing additional
18 legal assistance or representation in the matter."

19 That's pretty straightforward, to me. I don't have
20 any questions.

21 MS. PERLE: The second one is, again, intended to
22 deal with the problems of support centers.

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1 CHAIR BATTLE: Yes, we dealt with the support
2 centers providing back-up representation and assistance.

3 MS. PERLE: There was some difference of opinion on
4 (d), that the original language that was proposed by the
5 working group said when only providing brief service.

6 CHAIR BATTLE: You know, that could be read a
7 number of ways. I think the language --

8 MS. PERLE: "Brief service, advice or consultation
9 that does not obligate the recipient to provide additional
10 service or undertake continuing representation."

11 MS. GLASOW: Basically, we took out the words
12 "brief service" and just left it at "limited advice."

13 CHAIR BATTLE: That's fine. Okay, no questions?
14 We're down to a committee of two, Bill.

15 MR. MCCALPIN: That's a quorum under our rules.

16 CHAIR BATTLE: We started out with a quorum so no
17 matter what, we'll end up with a quorum.

18 Let's go on to the final. And I'm just astounded.
19 It's 2:50 and we've gone through 26 pages today. 1611.9.
20 "Change in circumstances. If an eligible client becomes
21 ineligible through a change in circumstances, a recipient
22 shall discontinue representation if the change in

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1 circumstances is sufficiently likely to continue for the
2 client to afford private legal assistance and this
3 continuation is not inconsistent with professional
4 responsibilities and ethical obligations to the client."

5 MS. PERLE: This is basically exactly what's been
6 in the regulations for a long time. The only change was just
7 to recognize that there may be some broader obligation beyond
8 those of the specific client -- attorney or something -- that
9 the program may have some obligation.

10 MR. McCALPIN: The argument that this is the way
11 it's always been doesn't impress me much.

12 MS. PERLE: I understand that, and we would
13 specifically ask if there were problems.

14 MR. McCALPIN: Well, it seems to me that it would
15 be more descriptive of the situation if it would say "if the
16 change in circumstances is sufficient and is likely to
17 continue to enable the client to afford legal
18 representation," because it may be a single instance. He may
19 get a \$100,000 gift, and that makes it sufficient. And
20 whether it continues or not is inconsequential.

21 MS. PERLE: I think that's fair. I don't think
22 that that change would be --

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1 CHAIR BATTLE: "Sufficient and likely to continue"?

2 MR. McCALPIN: "Is sufficient and is likely to
3 continue to enable the client to afford private legal
4 assistance." Then when you say "this continuation, not
5 inconsistent with professional responsibilities," what we're
6 really talking about, I suppose, are the rules on withdrawal.

7 MS. PERLE: Correct.

8 MR. McCALPIN: From representation.

9 CHAIR BATTLE: Right.

10 MR. McCALPIN: And that can be both in a litigated
11 matter which is basically what the model rules talk about, or
12 a nonlitigated matter, which is less well covered in the
13 model rules.

14 MS. PERLE: I think with respect to the first point
15 you made, I think that this was drafted originally with the
16 situation in mind where a person perhaps was unemployed and
17 then got a job, and I don't think people thought about a
18 windfall. But I think it certainly is --

19 MR. McCALPIN: They happen.

20 MS. PERLE: Yes, they do happen.

21 MR. McCALPIN: You get a big settlement in a case
22 or recover a big judgment, some of that sort.

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1 CHAIR BATTLE: Or your representation, by its own
2 terms, results in the client being successful in getting
3 sufficient funds to no longer be eligible.

4 MS. PERLE: Creation of assets.

5 CHAIR BATTLE: Yes.

6 MR. McCALPIN: Let me see if understand where we
7 are. Can we expect that the revised versions of these three
8 regulations will be provided to us in advance of the July
9 meeting?

10 MS. PERLE: We're going to try, yes.

11 MR. McCALPIN: And you contemplate that we will
12 then try to review the next version and act on the possible
13 publication of these three at the July meeting?

14 CHAIR BATTLE: If we get, in sufficient time to be
15 able to review in advance, all the changes and the back-up
16 comments for these sections, and the committee has a chance
17 to review them, then I think yes, we should be able to,
18 following that -- I will work along with the working group
19 and the staff and the OIG to finalize because generally,
20 after we go through that process, there are some other things
21 that come up that will require some additional attention.

22 But after that, what I plan to do is to make sure

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1 that the committee gets the actual final draft, with a time
2 frame for reviewing it and getting back to me, if there are
3 some real serious concerns about it going out for public
4 comment. And if there are none, then they'll go out.

5 MS. PERLE: Bringing it back to the committee in
6 July.

7 CHAIR BATTLE: That's right. Yes, bringing it back
8 to the committee in July. After July, if there are some
9 changes that have to be made, then I will work along with all
10 of the respective groups to make sure that we finalize
11 something that we get back.

12 I think the procedure we used with 1607 was not
13 only to just get copies to the committee but to the entire
14 Board, to see if someone just absolutely felt that there was
15 some real problems that they wanted us to come back and look
16 at before we put it out for public comment.

17 With 1607, we did not have that problem, but if we
18 did, then we may have to do further review. But I
19 anticipate, once the final is done and we get that to
20 everybody, that we should be able to put it out for public
21 comment, probably before our August meeting.

22 MR. McCALPIN: No August meeting.

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1 CHAIR BATTLE: Well, definitely before our
2 September meeting.

3 MS. PERLE: The only question, and you can address
4 this in July, that I would ask is do you think that these
5 need to go out for comment for 30 days, or is it --

6 MR. McCALPIN: No, 60.

7 MS. PERLE: You think they need to go out for 60?

8 MR. McCALPIN: I think, as a general rule, we
9 probably ought to go to a 60-day comment period, and
10 especially if something is published in the summertime.

11 MS. PERLE: The Corporation has always used the 30-
12 day rule, and I guess I would -- I don't have any objection
13 to these going out, but I think that what you might want to
14 preserve for yourself, rather than making a new rule, saying
15 it's a 60-day rule, do it on a --

16 CHAIR BATTLE: What do the rules say? What is the
17 time frame, Suzanne? A minimum of 30 days?

18 MS. GLASOW: I don't believe our act says. We've
19 gone by the basic APA guideline, which is 30 days. We have
20 occasionally, for instance, when we wanted bar associations
21 to comment specifically on something, given it more time.

22 MR. McCALPIN: And remember, we also had the

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1 provision that we utilized in connection with the by-laws,
2 unless for some reason a 30-day period can't be met.

3 MS. PERLE: You can always extend the comment
4 period.

5 CHAIR BATTLE: Beyond 30.

6 MS. PERLE: Beyond.

7 CHAIR BATTLE: I agree with Bill, at least for the
8 summer, that 60 days probably makes sense. We have that much
9 time before we're actually --

10 MS. PERLE: I'm not suggesting that there's any
11 problem with doing it. I'm just suggesting that you might
12 want to sort of preserve a presumption that it's going to be
13 30 days for those things that are not particularly
14 problematic, so you don't --

15 MR. McCALPIN: I think we decide that on an ad hoc
16 basis.

17 CHAIR BATTLE: I was about to say that I think
18 probably the best way to handle this is for us to decide, as
19 we complete a rule and we recognize what level of scrutiny
20 the field and others may give to it and the bar associations
21 may give to it, that we try to proscribe a period that gives
22 those groups a reasonable opportunity to participate in the

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1 comment process.

2 MS. PERLE: That was really the point that I was
3 trying to make.

4 CHAIR BATTLE: Okay. All right. Is there any other
5 further public comment?

6 MR. McCALPIN: Don't you have another regulation
7 for us to do?

8 CHAIR BATTLE: No. Look, I'm telling you, it's not
9 even 3:00 in the afternoon. We're good, aren't we?

10 Are there any other public comments? We have a
11 provision on our agenda for public comment. Or any other
12 business? Anything else anybody would like to say at this
13 time? Just the staff.

14 JUDGE DANA: I would like to say again that it's
15 been nice to be back and I've enjoyed it and it's been fun.
16 You run a nice meeting.

17 CHAIR BATTLE: Thank you very much, and we very
18 much appreciate your presence and your insight and your
19 participation in this process.

20 JUDGE DANA: Thank you.

21 CHAIR BATTLE: And Lynn Sterman came in later. We
22 want to just recognize that she's here with us this

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1 afternoon, as well.

2 MR. McCALPIN: Move we adjourn.

3 CHAIR BATTLE: I'm going to second that myself. We
4 are now adjourned. Thank you very much, everybody. We
5 really appreciate everybody's hard work on this.

6 (Whereupon, at 3:00 p.m., the meeting was
7 adjourned.)

8 * * * * *