LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS & REGULATIONS COMMITTEE

OPEN SESSION

Saturday, September 11, 2004

10:00 a.m.

The Best Western Helena
835 Great Northern Boulevard
Helena, Montana

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chair,am
Lillian R. BeVier
Frank B. Strickland, *ex officio*

BOARD MEMBERS PRESENT:

Robert J. Dieter
Herbert S. Garten
David Hall
Helaine M. Barnett
Florentino A. Subia
Maria Luisa Mercado
Ernestine Watlington (by telephone)

STAFF AND PUBLIC PRESENT:

Helaine M. Barnett, President
Victor M. Fortuno, Vice President for Legal Affairs, General Counsel & Corporate Secretary
Patricia Batie, Manager of Board Operations, LSC
Karen Dozier, Executive Assistant to the President
Mattie Condray, Senior Asst General Counsel, LSC
John C. Eidleman, Acting Vice President for Compliance and Administration
Michael Genz, Director, Office of Program Performance
David Maddox, Assistant Inspector General for Resource Management
David Richardson, Treasurer and Comptroller
Laurie Tarantowicz, Assistant Inspector General & Legal Counsel
Anh Tu, Program Counsel
Kirt West, Inspector General
Bernice Phillips, Nominee to LSC Board of Directors
Bruce Iwasaki, Legal Aid of Los Angeles
Don Saunders, National Legal Aid & Defender Association
Linda Perle, Center for Law & Social Policy
Klaus Sitte, Montana Legal Services Association (MLSA)
Neil Haight, former Executive Director, MLSA;
and other staff and members of the public

C O N T E N T S

MOTIONS: 4, 118

P R O C E E D I N G S

MR. MEITES: I call to order the meeting of the operations and regulations committee. Ernestine will be joining us in a minute by telephone.

APPROVAL OF AGENDA

M O T I O N

MR. MEITES: First order of business is to approve the agenda. Do I have a motion to approve the agenda?

MS. BEVIER: So moved.

MR. MEITES: And the agenda is adopted.

APPROVAL OF COMMITTEE MEETING MINUTES OF JUNE 5, 2004

M O T I O N

MR. MEITES: The next item is the approval of the minutes of our last meeting. Do I have a motion to that effect?

MS. BEVIER: So moved.

MR. MEITES: And the minutes are approved. We have a number of substantive matters on our agenda today. And we hope that, with at least several of them, we can conclude our committee's consideration and make a full recommendation to the board.

CONSIDER AND ACT ON RETAINER AGREEMENT AND GROUP REPRESENTATION ISSUES RELATING TO LSC OPEN RULEMAKING ON FINANCIAL ELIGIBILITY

MR. MEITES: The first substantive matter on the agenda is to consider and act on the pending proposed changes to rule 1611, with regard to retainer agreements and eligibility of group clients.

I ask that the staff persons who are prepared to speak on this come forward and identify themselves.

MS. CONDRAY: Hi. I am Mattie Condray with the office of legal affairs.

MS. TARANTOWICZ: Good morning. Laurie Tarantowicz, with the office of inspector general.

MR. MEITES: Good morning. We have discussed and looked through these separately. Let us first discuss the retainer agreement.

There was considerable discussion two meetings ago on the staff's proposals to amend retainer agreements. Perhaps, Mattie, you could recapitulate for us and for the record that prior discussion, and what has happened since then.

MS. CONDRAY: Sure. The current regulation requires grantees to obtain retainer agreements, executed retainer agreements, with clients. In practice, it has been in extended service cases. In practice we have not required it in advice and counsel cases or in brief service cases.

The current regulatory language, however, doesn't really fit the current practice. The current regulatory language provides for an exception for brief advice and counsel.

And the management -- I will go back just a little bit to say that the -- during the negotiated role-making working groups meetings, the field had asked that LSC management consider recommending -- eliminating the retainer agreement entirely.

The then-management was not so inclined. The then-board, taking up the notice of proposed rulemaking, agreed with the field. And what was published in 2002, as a notice of proposed rulemaking did, in fact, not include any retainer agreement requirement whatsoever.

In -- because of the request from Chairman

Sensenbrenner that we hold action on the rulemaking, the corporation held off until you new members were appointed and we had our new president in place, and we have had an opportunity to take a look at these issues anew.

At the last board -- well, I guess two board meetings ago, when we had taken this up, the management recommendation was still to generally keep the existing requirement as practiced. That retainer agreement should be required only in extended service cases, and not required in brief advice, or advice and brief service or advice and counsel cases.

And that continues to be the management recommendation. It is the requirement that has been in effect for 21 years. There was a discussion at that meeting about whether the information in the retainer agreement is duplicative of this sort of information that otherwise comes out in intake, and we don't believe it is.

And management continues to believe that a retainer agreement in extended service cases is of considerable importance to the client, to the program,

and to LSC.

It provides the client with a written understanding of the scope of the relationship between the attorney and the client. It provides the program with documentation of that understanding, should there arise later a -- some confusion thereover. And it's important to LSC in performing its oversight function in those matters, to be able to see that there was a written understanding.

There was also -- one of the things that management, however, had proposed previously was that in brief service cases, that there be some sort of written notice to the client that didn't have to be executed, because part of the administrative burden that we heard was in brief service cases, often times the service is done and the client is long gone, and then the program is spending resources trying to chase after the client to get an executed retainer agreement, and that that wasn't an effective use of resources.

We still thought that some sort of notice to the client was important, and had proposals regarding client service notices. That would be one-way

communications. And then there was considerable discussion at the meeting, and some presentation by the field that a lot of what we were talking about was already being captured in best practices by, like, closure memos or closing letters, and that adding a separate agreement on top of -- requirement on top of that, that they provide that service at the front end and then to the back end. I mean, provide some sort of notice, that that again would be duplicative and not a good investment of resources.

So, management went back and further considered this issue, and agrees that there are some amendments to make the regulation clearer and to remove some of the administrative burdens faced by grantees.

One of the recommendations with respect to brief services, we do request that there -- we do believe there should be some written communication, which the regulation currently doesn't speak to, one way or the other. Again, we think it's important for the client, for the program, and LSC.

But we do believe that such -- that that purpose can be served even if the written communication

is provided after the services are completed in something like a closing letter, which we understand that most grantees are doing, and it's certainly a best practice that the corporation has recommended.

So, we feel that we could kind of use that practice that's already happening, and just memorialize that in regulation. Again, we would be recommending an exception for the safety of the client. You know, if you have a domestic violence situation, we're -- actually sending the letter home, to that client's home would, in fact, increase their danger. Obviously, that's not useful.

In addition, management is also recommending an elimination in the current -- eliminating the current requirement of prior approval of retainer agreements. And a simple -- right now the regulation specifies a number of things that are required to be in the retainer agreements. We believe --

MR. MEITES: Ernestine, are you there?

MS. WATLINGTON: Yes.

MR. MEITES: Good. Thank you. Proceed.

MS. CONDRAY: We believe that the regulation

can be simplified to specify that retainer agreements need only be in a form consistent with the prevailing rules and practices of professional responsibility, stating -- that they must state the legal problem for which representation is sought, and state the legal services to be provided, that those are the key pieces of information that the corporation feels really is important to have in the retainer agreement.

Again, we would propose that the regulation be made clearer to continue the current practice, that in cases that are only advice and counsel, that no retainer agreement is required, and no other form of written communication setting forth the limitations of the scope of the representation.

Another issue that had come up that we hadn't previously addressed in the redline text that we had sent you, and thinking about it further we -- management -- decided it would be best to address it in the text of the regulation itself, has to do with PAI and referral notices.

Under the -- the current regulation is silent with regard to the application of the retainer

agreement requirement in PAI cases handled by PAI attorneys pursuant to the private attorney involvement program.

The long-standing interpretation of the corporation has been that the retainer agreement applies to those PAI attorneys, as well. And so, grantees have been required, basically, to make sure that the PAI attorney executes a retainer agreement, and have a copy of it.

As we heard repeatedly throughout the negotiated rulemaking, and in subsequent discussions, that creates quite a bit of an administrative burden on the program, because they can't necessarily control what the private attorney chooses to do, and the amount of -- again, the amount of resources spent chasing after the private attorney is not commensurate with the benefit that they are getting.

So, management is recommending elimination of that particular requirement which has been, through interpretation, as administratively burdensome. At the same time, management does believe that some written communication from the program to the applicant for

service is appropriate.

Thus, what we're recommending is that the rule include a provision specifying that PAI cases, the program shall provide a written notice of referral to the person being referred -- that they are being referred to an attorney who is not an employee of the program, and that no further attorney-client relationships between -- will exist between the program and the person being referred.

And then it would be a matter of whatever practice that the local jurisdiction had, and/or the private attorney handling the case, whether they chose to execute a retainer agreement with the client or not.

And the only other issue that I would raise is with respect to referrals to other programs providing extended service. The current regulation does not speak to this.

One of the things that the field had been interested in was having an expressed statement in the regulation that -- where one program begins extended service with a client and executes a retainer agreement, and then, for one reason or another,

transfers that client and another program picks up the representation, that the second program not be required to obtain its own executed retainer agreement.

Management does not favor this proposal. We would prefer that -- we're not recommending any change to the current regulation and the current status of this. We are -- if the program has the client and it's an extended service case, they need to get their own executed retainer agreement.

Again, that furthers the purpose of -- the client may have understood their relationship with one program to be one thing. If they have a new relationship with a new program, that should be memorialized.

And I think that's as quick a summary -- I tried not to leave too much out, but not to go into too much detail.

MR. MEITES: Thank you.

MS. BEVIER: Mattie, I have one question, and that has to do with the written communication with respect to providing brief services.

I think I understand the rationale for that

requirement, and I understand that it is relatively flexible, the way you have drafted it now, because it doesn't have to be before, and it can be after, and so forth.

But what I am wondering about is the -- not just the administrative burden, but the cost that this may impose, extra cost, on grantees. That is, you know, it's a piece of mail. And not only do -- I mean, they have to draft it and send it.

Now, what you have implied, what you have suggested in your presentation is that this is something that could be accomplished through a closing letter or other compliance with best practices in the community, right?

MS. CONDRAY: Right. If they -- if the program is currently sending out closing letters -- I believe the Legal Aid of Baltimore person talked about the fact that the information that we're talking about is in a closing letter that they send to everybody, anyway.

MS. BEVIER: Well --

MS. CONDRAY: So, in that case, there would be

no additional cost.

MS. BEVIER: Right.

MS. CONDRAY: In addition, it could be mailed. If the client was communicating by e-mail -- and some do -- it could be e-mailed, which would be an even smaller cost.

MS. BEVIER: Right.

MS. CONDRAY: Than even a piece of stationery letter, a --

MS. BEVIER: But if it is best practices to do this already -- and basically the assumption is what we don't want this board to be doing is prescribing in great detail how the grantees should conduct their practices -- I mean, we even worried about requiring a retainer agreement because it is best practices to do that, and we don't need to.

So, I'm just wondering whether we really need to have this requirement of a written communication.

MS. CONDRAY: Well, I think that at some point there is -- you cross a line that something that's a recommended practice is something that you think becomes important enough that you want to make sure

that everybody is doing it because it's that important.

MS. BEVIER: Mm-hmm.

MS. CONDRAY: Not just because it's a good idea in the abstract, but because there are certain things that rise to the level of being so important that you want them to do this.

And in some ways, having a written communication with a client in a brief service case, to the extent that one of the main benefits of having a written communication is an understanding, a memorialization of the mutual understanding of the relationship between the attorney and the client and what the attorney is going to be doing for the client -- and in brief services in particular, what the attorney is not going to be doing for the client -- to the extent that brief services are limited or bundled -- or unbundled, I guess, is the phrase that gets used now -- services, it's at least arguably more important that that client and that program have -- the attorney and the client have that understanding.

Because there is arguably more opportunity for misunderstanding about, well, we're not going to go to

court, we're just going to write the letter.

MS. BEVIER: But that's sort of undermined by the fact that you can send this after it's over. So what you're defending is to clarify the relationship when it begins, and --

MS. CONDRAY: Well, and there is an argument that -- I mean part of the reason that we had -- it was originally proposed, thinking of it at the outset, was because of that.

We are trying to capture still some of that, and have a written record of it in a more flexible manner. You know, because it's more flexible, it's not as perfect at getting at everything we might want it to get to. But we don't live in a perfect world.

And so, management was trying to balance a variety of interests here: the interests, you know, in the client, the interest in the program, the interest in LSC's enforcement abilities, and try to come up with something that was flexible yet still provided some written record of the communication.

MR. MEITES: Let me ask you something a little different.

MS. CONDRAY: Sure.

MR. MEITES: Because maybe I'm not understanding management's proposal.

Under the proposal, no written retainer agreement or other written documentation would be required if the only thing provided is advice and counsel.

MS. CONDRAY: Mm-hmm.

MR. MEITES: Now, is that brief service?

MS. CONDRAY: No, no.

MR. MEITES: So --

MS. CONDRAY: Advice and counsel is --

MR. MEITES: There are three categories.

MS. CONDRAY: Yes.

MR. MEITES: There is regular representation, advice and counsel, and brief services.

MS. CONDRAY: Right.

MR. MEITES: And the brief -- and you -- nothing is required in advice and counsel.

MS. CONDRAY: Correct.

MR. MEITES: Which is a hotline kind of situation, I imagine. Brief services, what Lillian

just asked you about, and regular representation is the other.

Let me -- why don't you go ahead -- see if -- the inspector general's office as well, at this time.

MS. TARANTOWICZ: We don't have any specific comments on the retainer agreement portion, other than to say that we are supportive of management's recommendation.

MR. MEITES: Okay. We had extensive discussion last time. I think we would like to hear from the field, public comments if there are any, if you would like to make public comments, and then I think Lillian and I are prepared to give you our views on this. Please identify yourself.

MS. PERLE: Thank you. My name is Linda Perle. I am with the Center for Law and Social Policy, and I represent the civil division of the National Defender Association.

I also was a member of the negotiated rulemaking working group that worked on this regulation. And just so that you know, I am the staff person to committee of the civil policy group of NLADA

that addresses regulatory issues. And so these comments come from consultations that I have had with the members of that committee, which sort of set policy on regulatory matters for NLADA.

First of all, I want to thank the staff of the corporation for taking -- giving us an opportunity to state our views on these, and take a number of the concerns that we raised into consideration. And that, I think, was a very helpful process in sort of getting to where we are right now on the staff recommendation.

Having said that, we still disagree with the staff's recommendation on both the retainer agreement and on the, I guess, the client service notice. I don't know exactly what to call it, the notice to clients, the written notice to clients.

I am going to let Bruce Iwasaki talk somewhat more at length about some of these things, but the retainer agreement, like many other things that lawyers do in practicing law, may be a good idea. It may be totally appropriate under certain circumstances. It may be necessary under certain other circumstances. It may be required under the rules for professional

responsibility.

But it is still the issue of what is the best practice for what you are doing, given the relationship, the particular relationship that you have with your client, and the circumstances that you are operating with.

We do not believe -- we have never believed, since this was instituted in 1983 -- that this was something that the corporation ought to require as a matter of regulatory compliance. It's not required any place in the statute, and we don't think that the corporation should be in the business of mandating best practices.

I am sorry I didn't hear everything that Ms. BeVier said, because we were out in the hall taking care of something, but what I did hear I think I agree with what she was suggesting, which is that we maybe should encourage programs to do things, we might give them models for things that are best practices, but we should not be mandating them.

I think programs are in the best position to determine when a retainer agreement will serve the best

interest of both the client and the program.

And I am -- I haven't yet really heard a rationale for the retainer agreement that suggests to me that there is a real compelling reason for --

MR. MEITES: Before you go on.

MS. PERLE: Yes?

MR. MEITES: Assuming that we recommend a retainer agreement be kept.

MS. PERLE: Yes?

MR. MEITES: Management has proposed that they clean up section A.

MS. PERLE: Yes.

MR. MEITES: Do you have any problems with the revisions to section A, as proposed, if we decide to keep a retainer?

MS. PERLE: If you decide to keep it. No, I think that this is a helpful --

MR. MEITES: Okay.

MS. PERLE: And in fact, this is part of the discussion. I think this was something that was reached after Victor Fortuno and I had this -- a little back and forth, and I think that this was the

suggestion that both of us made on how in the event that you're going to keep it, it should be cleaned up. So I do agree with that.

MR. MEITES: Okay. And then the next point is that --

MS. PERLE: The client service -- honestly, I haven't heard any rationale, really, that would support imposing what I consider to be a really intrusive additional administrative burden.

Don't forget. This is not -- this has never been required. The language of the current rule is kind of odd, and it doesn't really address whether it should be required or not. But the practice of the corporation, since the beginning, is that it hasn't been required of brief service cases. So, this is an entirely new rule.

I got information from one of the members of the Reg/Neg group, who is also a project director, indicating that in his program, which does a lot of telephone intake -- they're not a hotline program -- that this would require them to send 4,000 notices a year, that -- and that, you know, that, sure, maybe

some people could do it by e-mail.

But for the most part, that means typing something, putting it in an envelope, putting on a stamp. And when you're talking about doing that in 4,000 cases, it will -- you know, when what you have done is made a phone call to a landlord that took 10 minutes and resolved the person's problem, that that really is an incredible burden.

And for those programs that are hotlines, many of which do much more than advice, I mean they do a lot of brief service, those numbers could be even more daunting. And I just don't -- I just haven't heard any rationale from the corporation for why this is an important thing.

I mean, I do understand that some programs do make a tremendous effort to follow up with the clients, and do send out written materials. And fine, if that's the way they do their business, and they think that's a good use of resources, I am all for it. But I think that should be their decision.

I would like to give Bruce an opportunity to address these two questions, if that is okay.

MR. MEITES: Well, we --

MS. PERLE: I do have one question on the PAI, the intention to require those only in those situations where a retainer would otherwise be?

MS. CONDRAY: Yes, yes.

MS. PERLE: I think that needs to be clarified in the language --

MR. MEITES: Well, before you pass it --

MS. PERLE: Okay, sure.

MR. MEITES: There are two other -- three other changes that are -- I want to go through them and get a position of the field on them.

MS. PERLE: Okay.

MR. MEITES: The first is to change the -- what is now 1611.8(b), to make a slight modification in the language, changing functionally the phrase "providing brief advice and consultation" to "providing advice and counsel to the client."

MS. PERLE: Right. Well, I think that makes it consistent with the language that's used in the CSR, and the definitions that are --

MR. MEITES: So you would support this?

MS. PERLE: Yes, I do.

MR. MEITES: Okay. And the next change proposed is a new -- I will use the letters here -- a new section D. "Recipient shall maintain copies of all retainer agreements and all other documentation generated in accordance with this section."

Is there any objection from your constituents to that change?

MS. PERLE: No, I think that's currently -- you know, it just hasn't been stated.

MR. MEITES: And the next and last -- the two other proposals, one is -- we do not have language on this -- one is a -- I just got the language on this. It's coming overland. It has arrived.

(Laughter.)

MR. MEITES: The next is a text with regard to what Mattie spoke about, when a referral is made to the PAI program, the referral -- there should be a referral notice which indicates, among other things, that the legal services representation as being sought, that a person is being referred to a private attorney who is not an employee of the recipient, and that no further

attorney-client relationship exists between the person being referred and the recipient. Your views on that, please?

MS. PERLE: My view is that that's -- if -- this is assuming that you're going to continue to require the retainer agreement.

MR. MEITES: Understood.

MS. PERLE: If you don't require a retainer agreement, I don't think you need it.

My suggestion is that this be a subsection of the retainer agreement.

MR. MEITES: A subsection of?

MS. PERLE: Of the retainer agreement provision, because I think it needs to be clarified that this is only required in those situations where you would otherwise require a retainer agreement. So that's where my recommendation would be, that it would be a subsection of --

MR. MEITES: Why would that be? For whatever reason the grantee decides that it -- that the client, prospective client, would be better served by a private attorney, it may be a case where the grantee has not

made any determination whether retainer agreement would be required, they just leave that up to the private attorney.

By putting it in the retainer section, and limiting it to those cases, you're kind of asking the grantee to make a decision that I'm not sure the grantee needs to be burdened with.

MS. PERLE: Well, I think that, you know, the notion was that this would be a substitution for what is now a retainer agreement requirement in PAI cases, which has been a real problem.

I think that at the outset, that the program can probably make some sort of reasonable determination about whether it's likely that it will be an extended service case or not.

MR. MEITES: Well, I understand that. My sense is that if we go this route -- and I think this is really for the grantee's benefit more than for the client's benefit, but that's okay -- it kind of pushes the whole matter off on the private attorney, which is where it belongs.

MS. PERLE: Right.

MR. MEITES: Because the private attorney and the client are going to make a decision whether there is going to be a relationship.

MS. PERLE: Right.

MR. MEITES: So, if we adopt this, my preference is probably keep it as a separate section.

MS. PERLE: But there are -- I'm sorry.

MR. MEITES: Go ahead, please.

MS. PERLE: But there are situations where programs are referring people and then the private attorney is just going to give them advice in counsel, or brief service.

So then this is -- then it's a burden that wasn't there before. It's a -- I think the notion was that this is to lessen the burden on programs. And then if you do that, it becomes a situation where there is a new obligation for --

MR. MEITES: Well, I understand. But if, in fact, there is going to be referral to a private attorney, there has to be communication. The prospective client has to know if John Smith is the person to call.

So, there already is a practical communication required.

MS. PERLE: But often times that's done by telephone, is that right? I think that Bruce might be a better --

MR. MEITES: Well, please, whoever is prepared to --

MS. PERLE: Since he deals with it on a daily basis.

MR. MEITES: Yes, go ahead, please.

MR. IWASAKI: Let me address some of these things. I think if we were gathered to design a handbook for best practices in legal services -- and one of the most exciting things that's developed in the last year from the corporation is a focus on an agenda for quality -- this would be -- we would probably go beyond this.

But the -- and I can say, as a manager, I ask -- I certainly ask my staff, I demand of my staff, much more than the regulations, and much more than this in many instances.

But the -- it's tempting at times to mandate

and require what's good for you. But I think we do have to make a distinction. And if Bill Whitehurst were here, he would hammer this point home much better than I do, about the distinction between what's good for quality, what's the best practice, and what ought to be a regulation.

And that's why I believe this -- the retainer agreement requirement as a regulation -- should not be adopted. However, there are plenty of ways that we can look at how case handling procedures and calendaring procedures and tickling systems and all sorts of other ways, including retainer agreements, are a good practice.

MR. MEITES: Now, I read this quite differently. I thought this was a provision that the field wanted to protect itself from a claim by a prospective client that they hadn't been advised that there was not going to be an attorney-client relationship.

MS. PERLE: That was never a rationale that was before --

MR. MEITES: That was --

MS. PERLE: That was a rationale that was put forward by the --

MR. MEITES: Well, that's what I -- so that assuming we retain -- keep a retainer agreement, the field would not support the subparagraph D?

MS. PERLE: We would support subparagraph (d) in the current text of the retainer agreement.

So, in other words, in lieu of a retainer agreement, we would support, in a PAI situation, being required only to do this referral. And that was like the --

MR. MEITES: I understand.

MS. PERLE: -- the original notion that was --

MR. MEITES: Let me stop you there. Let me ask the management what -- if (d) were limited to the retainer situation, would that fulfill what you understand its purposes are?

MS. CONDRAY: Well, let me say that it's my understanding that to the extent that we have required the PAI attorneys to -- that the current practice is that PAI attorneys are required to get -- to execute retainer agreements, and that it's the program's

responsibility to ensure that that happens, that responsibility carries as far as the current responsibilities on programs.

MR. MEITES: Yes.

MS. CONDRAY: So, we have never been saying the corporation has not said, you know, "You, the program have to get a retainer agreement in an extended service case, but you have to make sure that the PAI attorney has one in all cases."

So, I think the original thought was as a substitute for when the PAI attorney is now required to get -- to execute a retainer agreement, that this would substitute in for that.

If I gave the impression that that would -- that the field had requested --

MR. MEITES: You did not --

MS. CONDRAY: -- the referral notice, I apologize for that. No, the field's position has been that that whole requirement -- to the extent that there shouldn't be a retainer agreement requirement, there should certainly not be a requirement for the program to make sure that the private attorney executes a

retainer agreement.

MR. MEITES: I think I more or less understand, so that given that you see proposed (d) as a part -- as incurring the retainer relationship, you wouldn't have any problem if we were to adopt D, but be modified to say, in effect, when there is a retainer relationship with a client and that client is referred to a private attorney, then (d) kicks in.

MS. CONDRAY: I don't believe that management considered the question in that much detail, and I don't feel comfortable stating a definitive management position on that.

MR. MEITES: Okay.

MS. CONDRAY: I will turn it over, because I know John wanted to say some stuff.

MR. EIDLEMAN: This is John Eidleman, acting vice president for compliance and administration. And I thought it was incumbent upon me just to talk a little bit about what the compliance office does and how retainers help us.

When we go and do our work, make sure the regulations are being complied with, programs can only

do cases within their priority. So it's very helpful to us to see, in a retainer, what type of work is being done, is it within the priorities.

Programs, obviously, cannot do fee-generating cases. Very often, a retainer agreement may have a provision about a fee. That's usually where it is. Same thing with class actions. All that is very, very helpful to us.

If a recipient is representing someone in a type of case and they close the case, and the client comes back within the same year for the same issue, that is not a new case. They have to open the old case. So there is no duplicate case. So therefore, the retainer helps us, looking at that issue.

We get a lot of complaints from clients saying that they're not getting appropriate service. So the retainer agreement helps us, when we investigate those complaints, and makes it very easy. Very often, just looking at the retainer will help us close the case. So all those are reasons why we think the retainer agreement is very important.

As far as the notice on the brief service

cases, that also would be helpful to us in doing investigations, even though it's after the fact. It gives us one more piece of evidence or information to look at.

It's also -- the corporation, a number of years ago, sent out characteristics of hotline assistance. And one of the characteristics was that in all cases, including fee service, there should be some notice to the client. And it was my understanding that the best practices is, in hotline cases, brief service and others, they do send some notice out.

So, I think, on the other hand, it may not be quite as burdensome as you have heard. Yes, it costs money, but it really is tremendous protection for the program to have that notice sent out on the brief service cases.

MR. MEITES: Let me -- I follow that. I am still hung up on this proposal, which it seems doesn't fit very well anywhere. I'm not sure -- my question is do we have to deal with (d) at all? If it's not to protect the grantee, and if there is a retainer, clearly you are already going to give client notice

that the case has been referred to the private attorney. Why do we need proposed (d)?

MS. PERLE: Let me respond. I didn't mean to suggest that the field had not asked for the proposed (d). We had.

MR. MEITES: Okay.

MS. PERLE: But we had asked for it in the context -- if you're going to have a retainer agreement requirement, we want it to be a less burdensome situation in -- when there is a referral, because it's very difficult to get the private attorneys to do those --

MR. MEITES: I understand that. I don't see how (d) answers that question.

MS. PERLE: Well, what it does is it says in a PAI case, all the program is responsible for is notifying the client that they are going to be referred out.

MR. MEITES: But there is nothing in our regulations now that say that the grantee is responsible for anything with regard --

MS. PERLE: It doesn't say that, but it's --

particularly in the last few years, since the whole CSR issues have kind of come in focus, what's become clear is that many programs have not been able to get these retainer agreements, and the corporation has said they're out of compliance in PAI cases.

MR. MEITES: Well then, what you're doing is you're asking us to kind of make an exception to a rule that doesn't exist.

My problem is if we said in our regulations that grantee has an obligation to see that the private attorney gets a retainer, then I can understand (d), an exception.

MS. PERLE: But that's --

MR. MEITES: But our regulations do not say it.

MS. PERLE: The regulation may not say it, but in practice that's what the corporation has required.

MR. MEITES: But the last thing you want is us to amend our regulations and impose that --

MS. PERLE: No --

MR. MEITES: Wait. And I think that by asking us to put (d) in, you're getting yourself in more

trouble than you need.

MS. PERLE: Well, I would happy if, instead of (d), it said the retainer agreement requirement does not apply to PAI cases.

MR. MEITES: Well, I'm not about to recommend a regulation that lets anybody off the hook. So, my sense is since (d) came in over the transom, Lillian and I -- I will speak for Lillian -- are somewhat baffled by this.

Because I think we are prepared to make a recommendation as to the retainer agreement proposal, but probably leave (d) for another day.

MS. BEVIER: I agree with that. I think that it seems to me quite likely that this is a practice that most grantees would comply with anyway, is to have a referral communication between the -- you know? The grantee and the client, with respect to a referral to the PAIs --

MS. CONDRAY: If I may address that, part -- the issue ends up coming up because although the regulation does not expressly state PAI attorneys are required to do this --

MS. BEVIER: To get retainer agreements?

MS. CONDRAY: To get retainer agreements. Generally, because of the way the PAI cases have to be eligible, cases that they have to come in through the grantee, be accepted, and then referred back out to kind of count, the corporation's consistent legal position is that the requirements that apply to the program apply to the PAI attorneys, unless there are places where there are specific exceptions, therefore.

So, to the extent that the regulation is silent, that creates -- it creates a requirement.

MR. MEITES: I understand.

MS. CONDRAY: And so --

MR. MEITES: Well, let me ask you this. Why don't we just add to A that when a recipient or a private attorney provides extended service? Let's make it explicit, then we will put your exception (d) in there.

MS. PERLE: I don't -- I'm not sure I understand that --

MR. MEITES: Well, we will change the retainer agreement to govern not just grantees, but also private

attorneys who receive referrals. Then we will give the exception, which is your (d).

MS. PERLE: But I don't -- okay.

MS. CONDRAY: But then I think that's not going to work, because it seems to me if we require -- I mean, I thought the problem was that the grantees were being told that they had to get a retainer agreement that is executed by the private attorney, and that that was just too burdensome.

MS. PERLE: Yes.

MS. BEVIER: It was too difficult for them to do. And essentially, what I thought we had decided was, fine, we're not going to require that. We think that the private attorneys should execute retainer agreements, but we're not going to say they must execute retainer agreements.

But that's not what (d) says. To my mind, what (d) says is nothing about retainer agreements, and only --

MS. CONDRAY: Well, because the requirement that we're getting at is the requirement on the program. Right now, the program has a requirement to

chase down the executed retainer agreement.

And what management wants to say is that the program is not required to chase down the retainer agreement, but that the program is required to provide -- where they would previously have had to chase down the --

MR. MEITES: I understand. Our problem --

MS. CONDRAY: I'm happy to try to rework this, certainly --

MR. MEITES: Our problem is this, is you've told us there is a requirement imposed on recipients, which is not in our regulations.

MS. CONDRAY: Well, it is imposed through an interpretation of our regulations.

MR. MEITES: I know, yes, an interpretation, implication, the usual stuff that lawyers do. But the fact is that we feel uncomfortable about writing a specific part of the regulation to respond to something that is not otherwise explicit in our regulations.

So, I guess my feeling is we do nothing on (d) at this time, until and unless someone wants us to affirmatively impose the obligation that we get an

exception to, which I don't want to do --

MS. CONDRAY: Well, to the extent that you choose to do nothing, which is entirely, you know, then the current situation continues to --

MR. MEITES: Well, we understand that, and I think that --

MS. MERCADO: But it can't, because it's not in the regulation.

MR. MEITES: Well, it can, because --

A PARTICIPANT: Sure it can.

MR. MEITES: Well, hold on. It can, because if the compliance office is looking for that, that's a reality.

A PARTICIPANT: That's a reality.

MR. MEITES: And I understand that. But you understand where we're at? We're not regulation-happy, and particularly a regulation of this kind.

We have got a number of things to do, and I would prefer to -- for us to deliberate now on this. If anybody has anything that we have not heard from --

MS. CONDRAY: Sorry, I have one other point to bring to mind, which is just a reminder that among the

concerns expressed by Chairman Sensenbrenner in his letters was a concern over the corporation's -- in 2000 -- proposal to eliminate the retainer agreement entirely.

MR. MEITES: Yes, that was in our material.

MS. CONDRAY: Okay.

MR. MEITES: Although, let me speak briefly on that.

MR. IWASAKI: Could I just speak very briefly?

MR. MEITES: Oh, please, I'm sorry. Absolutely, I'm sorry.

MR. IWASAKI: Just to address the burden issue, there are many, many occasions when, especially in telephone service provision, we do brief services. It's not only counsel and advice. That is, we will call a landlord, call the welfare department, work things out, get somebody's check back. Those are brief services. But this would require an additional piece of writing to go out.

The other thing is, at least in our program, any documentation we need to have translated in about six languages. There are burdens for all sorts -- all

of these things that one often doesn't think about, and I urge the committee to consider that, as well.

MR. MEITES: Thank you. Lillian, let me tell you where I'm at very briefly, and then you can tell me where you manifest --

MS. BEVIER: I can tell you where to go, then.

MR. MEITES: Exactly.

(Laughter.)

MR. MEITES: I think that we have heard that all sides are in agreement that -- with the proposed amendment -- to subsection (a), which just clarifies what the retainer agreement is.

As to the maintenance of a retainer agreement, I kind of come at it a little differently. If this were 1983, I might have opposed retainer agreement on the grounds of leave it to the states and best practices.

But this has been in effect for 21 years, and the world seems to be able to function with it as it is. So I am inclined to recommend that we keep the retainer agreement with the changes that are proposed in the text.

I understand that it may be a best practices issue, but it's kind of a bright line which tells the world that -- when our grantee is involved there will be a formal memorialization. And we want that to be part of what we require.

As for the brief service, I am impressed that -- I think it's a good idea. I think it's a good idea for a reason that actually I have seen in my practice, when a prospective client who has been through three or four attorneys -- which does happen -- comes in with the usual pile of papers under their arm.

It is very helpful to have some communication memorializing the name and phone number of the private attorneys, because -- is there a problem with the phone here? Ernestine, are you still there?

MS. WATLINGTON: I'm listening.

MR. MEITES: Good, thank you.

MS. WATLINGTON: You guys -- I have to keep with you.

MR. MEITES: Okay. Stick with us. It's helpful to have. But on the other hand, I am persuaded, both because of the burden arguments but

also the best practices argument, that this is kind of micromanagement, which I am not inclined to get into.

As for the others, no one seems to have troubles with changing the essentially old (b), which is when nothing is recorded, changing brief advice and consultation to advice and counsel. No one has trouble with the requirement that retainer agreements be retained, which only makes sense.

And my sense is about the proposed (d), we had an entertaining discussion about -- is that we don't touch it with a 10-foot pole at this time, that management and the field keep squabbling about whether or not there is an obligation. I would prefer that they meet and come up with a unified proposal which defines the obligation and then gives the grantees a way to deal with it.

MS. PERLE: We can do that, because I don't think we're really --

MR. MEITES: There is no consensus here yet. And I think that those are the operative -- Lillian?

MS. BEVIER: I agree with everything. I do think that -- I think it's prudent, and I think it's

appropriate to retain the retainer agreement requirement.

I'm sorry that the field feels so burdened by it and feels it's so unnecessary, but I think that at least with the change in the language, giving you some flexibility to comply with what the best -- in getting those with the best practices in your community, that's a reasonable peace offering, I guess you might say, on our part.

I do not think that the required written communication on brief service is something that we ought to require by memorandum, although I do think it probably is something that offices will be wanting to do in many, if not most, of their brief service cases.

But the variety of brief services, it seems to me, to be really enormous. And conceivably, this could be very burdensome, and I don't think we ought to require -- especially since it's new, it has never been done before.

I agree that we don't -- I agree with Tom, with respect to old (b). And with respect to new (e), and also that we should just leave (d) out of it for

now. And also, I do -- I very much endorse his request that management and compliance in the field get together and figure out if there is a problem, and how it ought to be handled.

MR. MEITES: If you understand where we're at, it may be helpful for our deliberations this afternoon, if Vic and his magic typewriter can produce a clean draft setting out what we have just said.

MS. CONDRAY: That would be fine. May I ask one clarification, then?

MR. MEITES: Sure.

MS. CONDRAY: Is that if -- you would like us to eliminate (b)?

MR. MEITES: Yes.

MS. CONDRAY: That then what's currently □), which would then revert back to (b), would explicitly state that not only -- that that applies not only to advice and counsel, but also applies to brief services, that the regulation should be clear that --

MR. MEITES: Yes, yes.

MS. BEVIER: Yes.

MS. CONDRAY: That this applies here, this

doesn't apply to these two other cases --

MR. MEITES: Right. That fills in the --

MS. CONDRAY: Rather than perpetuating the gap that we have now.

MS. BEVIER: Yes, good. I think that's good thinking.

MR. MEITES: All right. Thank you. Let us now turn our attention to 1611.9, representation of groups.

MS. CONDRAY: I have one other question before we --

MR. MEITES: Sure.

MS. CONDRAY: Would you like us to try to work on this PAI language prior to the board --

MR. MEITES: No.

MS. CONDRAY: Or not?

MS. BEVIER: No, not prior to the board meeting.

MS. CONDRAY: Got you.

MR. MEITES: All right, 1611.9, let me make a -- suggest a slightly different approach. We had extended discussion of this at a recent meeting, and in

light of our substantial discussion, management has come back with a modified proposal.

And the significant change, I believe, is that 1611.9(a)(2) now would allow representation of groups if the group has -- and I'm quoting -- as its principal activity, the delivery of services to those persons in the community would be financially eligible, and so on.

Management has eliminated the provision that gave us considerable difficulties, which I will paraphrase, providing services to groups whose principal activity is advocating. We were troubled by the "advocating" language for reasons we discussed. I think that the change as suggested is in line with a discussion that our committee was having last time.

Mike isn't here, but it is -- my recollection is he was also tending towards this position. Rather than a detailed presentation from management on this, I would like to hear from the inspector general on this provision, and I would also, of course, like to hear from the field. So, if we can start with the inspector general on this.

MS. TARANTOWICZ: Thank you for the

opportunity to share with you the OIG's concerns regarding this proposal for representation of groups.

Our concerns are basically two-fold. One is that in terms of a corporation's statutory authority and responsibility, we don't see that the corporation has that authority to expand permissible group representation to include principal activity groups.

And our other area of concern is around the fact that we view the proposal to lack appropriate standards for demonstrating and documenting eligibility.

I will go into those briefly. As we read the LSC Act, LSC is authorized to provide financial assistance to programs furnishing legal assistance to eligible clients. This proposal would allow the corporation to provide financial assistance to programs furnishing legal assistance to groups that service eligible clients.

Now, the regulation, as proposed, does say that the group has to be unable to afford legal counsel. But our read of the LSC Act is that the corporation is required to provide guidelines to

determine eligibility standards that go beyond a mere inability to afford legal counsel.

And our review of the legislative history in both these areas indicates that the congress was interested in allowing group representation, but the discussion and the legislative history, you know, as I said, we don't read the statutory language to authorize it. So whether or not the legislative history is implicated is up for discussion.

But since it was discussed in management's memo, we did review it. And our review indicates that Congress was interested in allowing representation of groups, but groups primarily composed of eligible clients, and the corporation would devise eligibility standards not just governing individuals, but also governing groups. And as I said the --

MR. MEITES: Yes. Let me stop you there, because the point you have raised is, I think, important. And the last thing we want is for Lillian and I to be defendants in a lawsuit defending it.

The Act defines "eligible client" as any person financially unable to afford legal assistance.

"Person" is not defined to be an individual, so it is within a reading of "person" to be groups. And in fact, that's just what you have said, that you agree that Congress at least contemplated that persons could be groups.

But your problem is not that it's groups, your problem is that you would read persons as limited to groups composed of persons. And proposed (a)(2) is not membership groups. Instead, it is groups providing services to such persons. And that's a step beyond what you see Congress having in mind. I'm paraphrasing.

MS. TARANTOWICZ: Yes, that's correct.

MR. MEITES: The word "person." Management's response to that is, like most legislative history, you only get half a loaf.

It is clear that they contemplated groups composed of eligible persons. They don't say anything directly about step two, which is what we're talking about now. And I suppose the question that our attorneys will have to argue, if we were to adopt this, is whether taking this next step is prohibited by

Congress or is in the range of what Congress contemplated when it said "any person financially able."

We heard yesterday from -- in response to a question I asked -- from the representatives of Montana Legal Assistance, that they, through pro bono lawyers, do represent groups, small battered women's shelters, so on, who, no way in the world they have money to represent themselves.

We heard in -- we met with the people from Nebraska and Iowa, particularly in rural areas, they represent small groups of farmers in kind of commercial transactions, not in litigation.

In both these, it seems to me -- and I will have to let Lillian speak for herself -- seems to be areas that there is a reason for corporation funds to be used. There is a real need, and it is an effective way to use corporation funds to represent these groups in their day-to-day difficulties.

We did not go for the idea of representing advocacy groups. That's a different kettle of fish. I guess where I come out is the advocacy is a step I'm

not prepared to take. But I think this step is -- I would read the statute as being within the spirit of the statute. Though I respect the inspector general's interpretation as being a cautious reading, I think in this case we -- it would be reasonable for us to go beyond that.

I interrupted you, so why don't you continue with your second point?

MS. TARANTOWICZ: Okay. Just to finish, in terms of the proposed language and our view that it lacks, standards -- one aspect is that -- and I think you alluded to it -- is that the reg doesn't define what a group is. And I think that the corporation's intention is that in representing the interest of groups, we are talking about more than representing a class of individual interests.

And so, we had recommended to management that perhaps a definition of a group, or the scope of permissible group representation be somehow discussed in the regulation. Because as it stands, I am not entirely sure what a group is.

MR. MEITES: Well --

MS. TARANTOWICZ: I understand a corporation, and that's easy. But if we're talking about a collection of individuals who happen to have the same interests -- or are we talking about a group with an interest separate and apart from an individual interest?

MR. MEITES: Well, as written -- I think I can back into what you said a different way -- 1611.9 proposed (b) says, "In order to make a determination that a group, corporation, association, or other entity," so on and so forth.

It might be better that if (a)(2) were written "an entity," because that is the generic description under (b). So, if (a)(2) were -- instead of using the word "group" representation of entities, throughout -- because "group" is not much of a legal word. I'm not really -- I can't come to any statutes that talk in terms of groups. But "entity" is a common word. Does that help to --

MS. TARANTOWICZ: Well, that helps, in terms of the principal activity groups, but I guess I was trying to convey a concern regarding when you have a

membership group that is composed -- even is composed of, or primarily composed of eligible clients, is the representation permissible under this proposal the representation of the group, in terms of because these people came together with similar individual interests, or a common group interest. Am I making myself --

MR. MEITES: I understand what you're saying. I guess where I come out is under (a)(2), because you're talking about something that has a principal activity, kind of by definition it's not just 12 people sitting in a room, talking about the problems in Poplar, Montana. It already has some existence. Because if it's delivering services, then there is a "there" there.

MS. TARANTOWICZ: I understand -- I'm sorry.

MR. MEITES: Go ahead, please.

MS. TARANTOWICZ: I understand that, but I think I was talking more in terms of (a)(1).

MR. MEITES: Oh, (a)(1)?

MS. TARANTOWICZ: Yes.

MR. MEITES: Okay. Well, let's look at (a)(1), then. And I will use the word "entity," rather

than "groups," because I am enamored of it.

(Laughter.)

MR. MEITES: The entity, or for non-membership entity the organizing or operating body of the entity, is primarily composed of individuals.

Point 9(b) requires that the entity collect information to determine that, in fact, they are primarily composed of individuals. Does that satisfy your concern?

MS. TARANTOWICZ: Well, I have an additional concern with that.

MR. MEITES: Go ahead.

MS. TARANTOWICZ: But I guess I'm not making myself clear, and I'm sorry.

MS. BEVIER: I wonder if what your worry is is that it may be that the group just happens to be composed of individuals who are eligible for the LSC funded legal assistance, but the group itself has, as a purpose, something completely other than helping those people. Is that --

MS. TARANTOWICZ: No.

MS. BEVIER: It's -- okay.

MS. TARANTOWICZ: I'm sorry, it's my fault.

MS. MERCADO: It's more like is the junior league doing a battered women's shelter, and so you think the women's league, junior league, ought to be able to fund its own attorney and do its own representation, although when they're doing a pro bono volunteer service, it's to create this shelter, to help women go through protective orders and whatever else, they themselves, as members of that organization of the, you know, junior league that's running the women's battered shelter are not financially eligible as clients.

But what they do, the services that they deliver, is solely for poor people, poor women who are in that situation, and so that their mission and their work is for financially-eligible clients.

MR. MEITES: Go ahead.

MS. TARANTOWICZ: That's the principal activity.

MS. MERCADO: And that's what she is opposed to.

MR. MEITES: No, she is -- go ahead.

MS. TARANTOWICZ: I'm sorry. It is my fault. I will see if I can make this clearer. Otherwise, I guess I will give up.

Maybe an -- okay. If you have a membership group, so you have a number of individuals that get together and form a group. We're permitting the corporation's grantees to represent that group in providing legal advice to the group, or representing the group in some interest that affects the group, as opposed to representation of a group of individuals who have individual interests that are all common, somewhat like a class.

MR. MEITES: I got you. I think I do. The entity happens to be composed of -- just -- it's happenstance that it's composed of individuals who are eligible.

MS. TARANTOWICZ: Right.

MR. MEITES: But the representation does not relate to the issues of membership? A bunch of poor people formed a poor people's league of northern Montana, and they decide to build a racetrack. Is that what you were worried about, that the representation

will be not related to their poverty?

MS. TARANTOWICZ: Well, I mean, that's a concern, but not the one I'm trying to articulate. I'm sorry.

MR. MEITES: We will let you off the hook for a minute.

MS. TARANTOWICZ: Okay.

MR. MEITES: Let's hear from some other people and maybe you can come up with a more clear formulation. Mattie, you want to go next?

MS. CONDRAY: Sure. Where do I start? With respect to the statutory authority issue, I agree with you. I don't need to belabor that point.

With respect to the point that you were asking about, which was not the point that Laurie was making -- and I won't respond to that -- I don't -- as long as the representation that they want is something that is otherwise permissible under the rest of the LSC statute and regulations, and including in accord with the program's priorities, I just don't see a problem with it.

MS. BEVIER: You mean the grantee's

priorities?

MS. CONDRAY: Yes.

A PARTICIPANT: Right.

MS. CONDRAY: The grantee's priorities.

A PARTICIPANT: Okay, mm-hmm.

MS. CONDRAY: You know, I'm not sure if someone wants to come in and build a racetrack, that that's really going to be within the grantee's priorities. If it is, fine. If not, no, you know. That question is really kind of -- I think that question is besides the point.

I don't think any of the legislative history suggests that groups of individuals may only be represented if the representation has to do with a group interest above and beyond the collection of individual interests. I don't think that's a distinction that is made.

MR. MEITES: I agree that my point was off the mark.

MS. CONDRAY: To the extent that I understand Laurie's concern with the documentation and verification standards, or that -- I may be moving

ahead to a point you haven't made yet --

MS. TARANTOWICZ: Yes.

MS. CONDRAY: Okay. Then I guess I will hold off on that.

(Laughter.)

MS. CONDRAY: I think that's all I will say about that.

MR. MEITES: Let's get back to Laurie, then, because she has not spoken about the verification of standards yet.

MS. TARANTOWICZ: Okay. The last thing is that the rule now requires that the recipient collect information that reasonably demonstrates that the group is eligible.

As I mentioned previously, we did not read the rule to articulate standards for eligibility, other than unable to afford legal counsel. And our concern in this respect is sort of compounded, because we don't see any real eligibility requirements in the rule. And then the reasonableness standard is some sort of undefined notion of what -- okay, what is required in order to demonstrate eligibility? What must the

recipient document?

And what guidance is the corporation providing to allow the grantee to demonstrate that this group is eligible? Do you have to do an eligibility determination of the clients? Management's discussion is, "No, you don't have to do a full eligibility determination of 51 percent of a membership," but -- so I'm left with the question, okay, what is required?

MR. MEITES: I understand that you're talking specifically about proposed (b). The first part of what you said, I think as I read proposed (b), the eligibility requirements are not only that they have no practical means of obtaining funds to obtain private counsel, but also that they meet either sub(1) or sub(2).

MS. BEVIER: Yes. It says "and either."

MR. MEITES: And your other point I think is the more important point. What constitutes a reasonable demonstration? And "reasonable" is a weasel lawyer word.

An earlier version of this had some numbers in it, which wasn't entirely satisfactory, either.

Lillian, do you have any ideas on this?

MS. BEVIER: Well, I don't, but I -- except to say that this may be a situation where we sort of leave it to the field to figure it out. And then perhaps there will be disputes about whether they have reasonably done it.

But right now, I think trying to specify would be -- would probably be -- a mistake. I mean, it may be just one of these things where we want to do it by this very loose standard, rather than by a rule that says you have to do this and you have to do this.

Because again, it may be -- it seems to me that it's likely to be a situation in which there are a lot of different kinds of groups that are going to be potentially eligible here, and in particular, if we assume good faith on the part of the grantees -- which I think is appropriate -- I don't know that we can do better than this.

And if we can't do better than this in terms of specifying criteria, then we have to choose either to permit this kind of representation or do without it entirely. And I'm sort of more inclined to try to

permit it.

MR. MEITES: Well, let's go on and hear from the field about this first. We can get more comments from management if we need it.

MR. IWASAKI: Thank you very much. Again, Bruce Iwasaki from SCLAID, and Legal Aid Foundation in Los Angeles.

This is a very important regulation, and I am very happy that the board is taking it up, and very happy with the dialogue that has taken place to get to this point. So, on behalf of SCLAID, we support this regulation with one possible tweak that I will mention in a bit.

But the corporation has always had the authority to fund grantees to represent groups. And there has always been a regulation that has allowed this to happen. The only issue has been how restrictive the language is on defining "group."

I would caution a little about using the term "entity," only because -- maybe it's only my ear -- it sounds a bit more formal than the collection of tenants in a housing project that don't have a president or

anything, they all just meet in somebody's kitchen, and that's a group we represent.

Now, are they an "entity?" Well, if we're going to say a group is different from an entity, some lawyer will say that's not an entity. So I would just be cautious about that. I understand a "group" is a pretty --

MR. MEITES: No, I -- it's my idea, and I --

MR. IWASAKI: -- slippery term. So I --

MS. BEVIER: Why don't we say a group, corporation, association, or entity?

MR. IWASAKI: Right. I think that covers it. And rather than using entity as something separate, yes.

MR. MEITES: All right. Well, keep the word "group" and just -- otherwise, you would support the proposed regulation?

MR. IWASAKI: I do, with one concern, and that is the language in (a)(2), "The group has, as its principal activity" -- we could say "has as a principal activity."

Now, let me give you some examples. There are

-- we don't represent any formal religious bodies, but we do represent organizations that are -- they're not formal corporations, but they are related to religious bodies: a priest who got people together in the neighborhood to raise funds to build a drop-in center for teenagers.

We helped negotiate the construction contracts and the architect contracts and helped them get financing, and all those things. I believe that body's principal purpose was to do a lot of things in the community, some with a variety of First Amendment-protected interests.

You know, whether they would sign on the dotted line if that was their principal activity was the delivery of services to people in the community would be financially eligible, they would say, "Well, it's one of them, but that's not the principal one. It is a principal one." And I would urge that that will not open any big loopholes and allow us to do exactly what you want to do.

MR. MEITES: Lillian, what do you think of that? I'm worried about that.

MS. BEVIER: Yes, I am, too. It's, you know --

MR. MEITES: Well, let's think about that for a minute. Let's solicit some other -- any other comments from either the field or management?

MS. PERLE: I agree with everything that Bruce said, and I think that this -- that the issue of just changing this to "a" or "one of," "one of its principal activities," would cover -- there were two examples that were given to me by members of my group.

One was the church example, where the principal activity, I would say of the church, is to provide religious guidance to its flock, but that it has many important activities which might include the services to the low-income community in which the church operates.

Or, another one was Indian tribes, where their principal activity is being the governing body for their tribal community, but that they might need assistance -- and maybe not all of the members were low-income, or probably a lot of the tribes they would be -- but that there might be very important activities

that they wished to do on behalf of the low-income members of their tribe, and they didn't have the resources to do it.

And so this just slight tweaking of the language would permit those activities to be done. I mean, one of the things that Mattie and I were talking about with regard to this earlier was, you know, we could limit the language to say that the representation had to be with respect to this activity.

MS. BEVIER: That's exactly what --

MS. PERLE: And that was actually language that was in an earlier -- I think it actually was in the version of the rule that was proposed. And I don't think that we would have any objection to incorporating that language --

MR. MEITES: Mattie, why don't you and Vic write (a)(2), along with that suggestion? That, I think, will solve the problem.

MS. CONDRAY: That's easily done. That's easily done.

MS. PERLE: And if that were done -- I mean obviously, this doesn't go as far as the Reg/Neg group

and the board did last time, but I think that this goes -- this is a terrific compromise. I think it really does get to the point where most of the groups that really are important to be served in our community would be able to be served.

I think it gives a very clear, crisp line between those programs that could be served and those who couldn't be. So it's not difficult to follow, and I think the field would be very happy.

MR. MEITES: Let's go back to Laurie, if she wants to resume her -- okay, all right. Pull up a chair and introduce yourself, and --

MR. WEST: I am Kirt West, I am the newly appointed inspector general as of September 1st, so I'm sort of the new kid on the block.

But I just wanted to respond a little bit to Lillian's comment about the reasonableness, and sort of where our concerns are.

MS. WATLINGTON: Excuse me?

MR. MEITES: Yes, Ernestine?

MS. WATLINGTON: I have to go to the restroom for a moment; I will be right back.

MR. MEITES: Okay. We look forward to your return.

MS. WATLINGTON: All right.

MR. WEST: My concerns are the political realities down the road as we get a letter from some congressman concerned about some group representation, and we're called to go look at whether it was in accordance with our regulation.

And then my staff has to go make a determination of reasonableness, which I don't think is, given what's in the regulation, that we would have the ability to do it, and I don't want us to just impose our view of reasonableness on the corporation and then -- so that's sort of the general concern about the need for a little more specificity.

MS. BEVIER: You know, I appreciate that concern. I guess what I would say is what your staff would do then is put the burden on the grantee to come up with an argument that their -- what they have is -- would meet the reasonableness threshold.

Now, I realize that it is open-ended, and it is standard. There -- you're completely correct that

it is not specific. I don't think at this point it is possible to make it specific. That's my point.

MR. MEITES: It kind of leaves a dilemma for you, but I think I side with Lillian. I would rather see this in practice for a while. And if your staff, or anyone else says, "This is not a good solution," you then could come back to us with the benefit of experience as to the kind of problems that you have actually encountered.

So I guess I'm inclined to go along with Lillian, to leave this for the time being.

MS. BEVIER: What I'm wondering is -- here is a -- I don't know whether this works, but it seems to me that as part of the oversight, compliance, and so forth, it might be appropriate for an inspector general and the office of program compliance, and so forth, to ask about group representation and, "Would you show us what you have got, by the way of documentation," and begin to develop a sense for what the grantees are, in fact, accumulating in that. And you might be able to begin to get a feeling for what's, you know, what's being done.

MS. CONDRAY: I would just like to add that the current regulation doesn't address any documentation standard for groups. So, right now it's kind of like this hole, although -- and management felt that, to the extent that we would have a documentation standard written in for individuals, it's appropriate to have one written into the rule for groups.

What we are proposing is what has been the standard in practice, at least with respect to primarily-composed-of groups. We don't really have experience -- at least not since 1983 -- of what that experience would tell us with respect to primary activity groups, because our grantees haven't been able to represent those groups with LSC funds.

But with respect to the primarily-composed-of groups, we have, you know, 20-something years of experience with respect to applying the standard in practice that just wasn't written down.

MR. MEITES: Which is this "reasonably demonstrates" practice?

MS. CONDRAY: Right. That's what has been the standard in practice, and you know, unless John wants

to come back and talk about specific OCE experience, I don't believe that we have been receiving a lot of specific complaints about this aspect of the rule.

MR. MEITES: Lillian?

MS. TARANTOWICZ: I was just going to make a suggestion which I think -- we had discussion with management some months ago.

Perhaps -- I understand Professor BeVier's concern about setting out a specific standard, but perhaps we could provide at least some guidance in the supplement information to a company that gives some examples of what Mattie was talking about, that the corporation has found to reasonably demonstrate to provide some information to the grantees and to us as to what we're looking at, what we think reasonable is in this situation or that situation.

MR. MEITES: Makes sense to --

MS. BEVIER: And you would put that in the reg?

MS. TARANTOWICZ: In the preamble to the reg, the --

MR. MEITES: Let's go --

MS. MERCADO: Yes, you could do that. But also, the inspector general's own guidelines -- for example, you have an auditing guide that you write that is not part of a regulatory process, you know, that is sort of a best practices type thing as to what it is that you look at, whether in the financing aspect of a corporation that you're investigating, or checking for compliance.

And the same thing for programmatic issues, there are some guidelines that you're going to develop over time. And I know since I've been here, that auditing guide has been amended several different times to include, you know, as you work with it and find that maybe this is a recommendation that you ought to have as a grantee, things that you ought to comply with -- or not ought to, but are guidelines that you ought to keep to conduct your business -- then part of the difference between setting in a regulation the specifics of the how-to, "We will determine what is reasonable," I think becomes dangerous.

Because then, if one program didn't do number C at the category, now all of a sudden they're in non-

compliance, and you know, they are subject to be either, you know, tagged with reduction in funds, or terminated as a program, or whatever else, because that's the extent of where it gets to.

And depending on who you have, if you have a reasonable IG, that's great. But if you don't, if you have, you know --

(Laughter.)

MS. TARANTOWICZ: I'm sure we do.

MS. MERCADO: If you actually have the other extreme, which we have had in the past, then you're creating those situations where you're setting them up for failure, because you were asking for specifics from A to Z, when in effect the reasonable standard allows you that they ought to have something -- so they know that they're going to look at making sure that this entity can represent poor clients in a particular area, either because they're primarily composed of those members, or because one of its functions, the functions that they are representing with our grantee dollars, is for low-income people.

And that, in and of itself, shows that those

funds are being appropriately used, and you have met your fiduciary obligation to make sure that we're not mismanaging or misusing funds for non-poor people.

But the whole intent -- and part of the reason that the former board, you know, wanted to look at not creating more burden, more situations in which our grantees are both strapped by all the additional documentation they have to do, but they're also being set up for failure to say, "Aha, got you," you know, like they are out there purposely committing fraud or deceit against the federal government or Legal Services, which they are not.

As it is, they are trying to figure out how to stretch that dollar the best they can to represent as many people as they can. And they are certainly not going to jeopardize intentionally to misuse those funds so that they can then turn around and lose them.

And to set up more specific restrictions on what they ought to be able to have to document, to prove, to provide evidence that they are representing only eligible clients, creates the greater problem. And I think we are better served to say "reasonable."

I mean, it's like in a tort case, you know? What is the reasonable standard? I don't know. What is that reasonable standard, you know?

MR. MEITES: I usually call it the weasel word, I guess --

MS. MERCADO: I know.

A PARTICIPANT: The weasel word?

MR. GARTEN: I would echo those comments. I urge extreme caution on incorporating examples. We're going to get a can of worms, it will be likely to turn around and --

MR. MEITES: We would not incorporate examples in our regulation. We do not trouble ourselves or pass on what the preamble says, and --

MR. GARTEN: And I think that the term "reasonable" or "reasonably" is generally accepted as terms that can be interpreted by --

MS. BEVIER: When it's reasonably used, it is.

(Laughter.)

MR. MEITES: All right. Look, to wrap this up, Lillian, I am inclined to -- with the change that was just proposed to recommend --

MS. BEVIER: Me, too.

MS. WATLINGTON: I'm back.

MR. MEITES: Thank you, Ernestine. Rob, please?

MR. DIETER: I have one comment, and it doesn't -- it concerns the language in paragraph A, the last sentence where it says "practical means of obtaining funds to retain private counsel."

I am wondering if the funds to retain private counsel should just be -- should be changed to "legal representation."

MR. MEITES: I agree with that. Whoever made the --

MS. MERCADO: Just to retain counsel?

MR. DIETER: Obtain legal representation.

MS. BEVIER: Legal representation.

(Several people speak simultaneously.)

MR. DIETER: The idea here is I sympathize personally with the comments of the IG, in terms of standards of enforcement, because I don't want to create a situation where we are creating lots of problems with people being too creative in how they

interpret this.

And I would -- was interested in their comments, with regard to the sort of threshold test of the group, or whatever, you know, is the "practical means," you know, a standard that, you know, will clearly be forced, I guess, or documented, you know.

By way of personal illustration, we had a situation where we required clients in certain situations to bring back letters from private counsel saying that they would not represent this situation. It was sort of our practical means of determining, you know, that we would pick them up.

MR. MEITES: So we would change it to read --

MR. DIETER: Well, the "retaining private counsel" is a -- conceptually, a little bit different than, you know, that you don't have the funds, practical means otherwise, you can't obtain pro bono assistance --

MR. MEITES: Would you make it, then, "has no practical means of obtaining representation?"

MR. DIETER: Or "legal representation."

A PARTICIPANT: Legal representation.

MR. MEITES: Okay.

MS. CONDRAY: If I just may respond to that, just for your edification, that although it shows in red as new language here, that's partially because of the -- of reorganization of text.

MR. MEITES: This has been here before, this --

MS. CONDRAY: Yes. What the current regulation reads with respect to the inability of the group to afford legal representation --

MR. MEITES: Which --

MS. CONDRAY: It's 1611.5□), "A recipient may provide legal assistance to a group, corporation, or association if it is primarily composed of persons eligible for legal assistance," and "if it provides information showing that it lacks and has no practical means of obtaining funds to retain private counsel."

So, the "retain private counsel" phrase is something that has been in the regulation. Certainly free to change it, but I just want you to know that that's where that came from.

MS. PERLE: It's been in the regulation since

1976. So there is pretty much of a common understanding of what that means. It's not -- it's language that has been there almost 30 years.

MR. MEITES: Rob, does that change your view, or --

MR. DIETER: Well, you know, to say that you can't retain private counsel is a little bit more narrow than that you can't --

MR. MEITES: Yes, I would prefer to change it to the broader term, "obtaining legal representation."

MS. BEVIER: I like it. I like it better.

MS. MERCADO: And you have to have Federal Register notice to do that, because it's not what has been considered.

(Several people speak simultaneously.)

MR. MEITES: They have to republish it because we made so many changes.

MR. IWASAKI: If I could, I'm not sure I understood the reason. If it has to do with not able to get pro bono counsel, that would definitely swallow up the rule. We're not talking about that, right?

Because everybody has the means of getting --

has enough money to get a free lawyer.

(Laughter.)

MR. IWASAKI: I wouldn't want us to go that way.

MR. MEITES: I guess what I'm looking at is, you know, we should be the counsel of last resort in a situation. But if there are -- that, you know, we have a finite ability to serve. And if we're going to create another category of claim on our services, we have to be sure, I think, that that claim is a last resort to us.

Because if, for example, with the junior league example or the church example, they can obtain pro bono counsel to do their work, you know, I would prefer to see a push, you know, "You need to try this. Have you exhausted this alternative first," before we start sending our attorneys doing that kind of work and spreading them even thinner. That's why I just --

MS. MERCADO: Right.

MR. DIETER: The -- I would assume that that's part of the, you know, has no practical means of obtaining, you know, legal representation, other than

this as a sort of last resort. In that case, we step forward and fill that hole.

MS. MERCADO: Yes, but the reality is that most of these group representations really are the example that Bruce gave, which is it's this group of tenants that -- they're all, you know, living in a rat hole that's falling all around them, and as a group in looking at whether it's sort of trying to take care of the whole plumbing problem for everybody, or the whole utility cut-off for everybody, you know, as that group or entity that has that.

Although that junior league example does exist, it's sort of a smaller percentage or category of people that are represented in that category --

MR. MEITES: Yes, I understand what Rob is saying. The problem I have -- it goes back to what the IG was saying -- that if we were just a practical means of obtaining legal representation, as part of their good faith demonstration they are going to have to show they called every other pro bono advocacy group available. And that's a burden that I don't think is desirable.

MS. CONDRAY: You know --

MR. MEITES: Let me finish.

MS. CONDRAY: I'm sorry.

MR. MEITES: Also, we have once again stumbled into something we had no idea that this language had been there since 1976.

MS. BEVIER: Right.

MR. MEITES: And that's -- you have raised a totally new issue about whether we are the provider of last resort or the provider of resort, which is something we should discuss. I don't think that I want to take that on in the context of this regulation. I would rather discuss that more generally at another time.

So, what I'm inclined to do is leave the language we have now for this iteration of the rule, but then get back to your point about whether that should be our place in the representation chain or not.

MS. BEVIER: I think it comes up when we're talking about legal need.

A PARTICIPANT: Yes.

MS. BEVIER: It's a broad issue.

MR. MEITES: All right, let's -- now, because we have talked this through, is it -- we can now act on this today because of the hash we have made of your draft?

MS. CONDRAY: Well, I can --

MR. MEITES: We would very much like to act on this today.

MS. CONDRAY: We have --

MR. MEITES: The board --

MS. CONDRAY: The committee can make the recommendation to the board to adopt these positions.

MR. MEITES: Right.

MS. CONDRAY: Moving forward from here --

MR. MEITES: Oh, I got you. The board can say "published for comment."

MS. CONDRAY: Right. Actually, what I would really suggest, quite honestly, is -- because this is just two pieces of a much larger rule. These were the two pieces of the rule about which management -- then-management -- and the field and the board had disagreements.

MR. MEITES: I understand.

MS. CONDRAY: There is the entire rest of the regulation to be acted on. That's just, you know, a proposed rule was out there, needs to be acted upon.

Certainly procedurally, technically, if the board wished to just -- if the board was comfortable with the entire rest of the rule, the board could proceed directly to adopting the other changes in the rule.

The changes to the group representation and the retainer agreement would have to go back out for comment, for sure. But --

MR. MEITES: I got you. So you're saying we -- the board -- we should -- if we're inclined to, we should recommend to the board that it approve these changes for publication, but not order them published now. Rather, we come back in our next session, do all the rest of the changes to 1611, so there is only one publication? Is that where you're at?

MS. CONDRAY: That's correct. That's where -- I thought -- I knew I could hear it myself, but that's exactly where I'm going, that I think it would behoove the committee and the board to --

MR. MEITES: Okay.

MS. CONDRAY: When you take a look at the whole rest of the reg to do that.

MR. MEITES: We're persuaded. So I believe Lillian and I will recommend to the board that both 1611.9, as we have discussed it, and 1611.7, as we have discussed, be approved for publication and comment, subject -- but not at this time -- to be held until the rest of the rule is considered by first our committee and then the board. Is that --

MS. CONDRAY: Right. If the recommendation is that you're going to want to republish, I guess the best way to say it would be that you are -- the board directs management to bring in front of it the full notice of proposed rulemaking with the other changes, incorporating these policies, as set forth --

MR. MEITES: Do this for us. Would you prepare a proposed resolution for the board that incorporates what you just said?

MS. CONDRAY: Sure.

MR. MEITES: And also has clean copies of 16.9 and 16.7, as we have approved them?

MS. CONDRAY: You bet.

MR. MEITES: Okay. Let's move on to the next item on the agenda. We ceded so much time to our finance committee, there is no time for a bathroom break.

(Laughter.)

MR. MEITES: We're going to go out of order, because management has told me it's absolutely essential we correct a -- I wouldn't say error, but a misperception. So we will go to the grant assurance provision on our agenda.

MS. CONDRAY: Oh, are you skipping over the petition for rulemaking?

MR. MEITES: We can come back to that.

MS. CONDRAY: Oh, okay.

MR. MEITES: So, Mike, you want to discus this?

A PARTICIPANT: What page is that on?

MR. MEITES: 116. If I can make a suggestion, rather than reading the memo, listen to the scintillating oral presentation we're going to make.

A PARTICIPANT: I don't think we had that one.

MR. MEITES: You're -- just as well. Go ahead.

MS. MERCADO: It was confidential to ops and regs.

MR. MEITES: It's toward the --

MS. MERCADO: It's 116.

(Several people speak simultaneously.)

MR. MEITES: Go ahead. Please identify yourself.

CONSIDER AND ACT ON MANAGEMENT'S CLARIFICATION OF LSC GRANT ASSURANCE

MR. GENZ: Thank you, Mr. Chair, members of the committee. I am Michael Genz, director of the office of program performance. The purpose of this item is to correct a mistake in a presentation that was made at the June provision committee meeting.

In June, you were presented with our proposed 2005 grant assurances. That was a several-page document. And what you had was a version that indicated what the old sections were, and that highlighted the new sections.

The mistake we made was in paragraph 24, and

what was highlighted, with respect to the difference between Fiscal Year 2004 and Fiscal Year 2005. So it -- in the memorandum, it should have that footnote, footnote one. That's what we presented to the committee.

And we indicated that the third underlined sentence, the third sentence that was underlined in bold, it was new. And in essence, it wasn't new, it was essentially the same as the old version.

So, because of our mistake, we thought we should call it to your attention. We are not advocating that the sentence be returned. That would be up to the committee and up to the board. However, because it was the board's expressed intention at that time that we retain the status quo, we just wanted to make sure that it was clear, what the status quo was. You may wish to retain the 2004 version of that sentence.

MR. MEITES: Yes, I think that we do understand the position. Our overall conclusion was that we wanted management to develop, before the next iteration of this grant assurance, some proposed

procedures that are less than a determination, but more than nothing.

And our consensus was that until those were developed, we wanted to keep the status quo. We were under the impression that the status quo was just the -- did not include the sentence beginning -- the sentence, "Non-renewal of a multi-year grant does not constitute a termination or suspension under LSC regulations," so we eliminated that.

You have now told us that, in fact, the current grant assurance of Fiscal Year 2004 does have that sentence. So I guess where I come out, since we wanted to maintain the status quo, we should keep the 2004 format, bring it up again next year, when you have the proposed procedure to go along with the --

MS. BEVIER: I agree.

MR. MEITES: So we will so recommend to the board.

MR. GENZ: Thank you. And we are indeed intending to work on that draft, to have it for you to --

MR. MEITES: Public comment -- if the field

has any comments on --

MS. PERLE: Well, I just want to reiterate my -- what I said at the last board meeting, which is that despite the fact that the language was in there before, I still don't think that programs, you know, understood that if they got a three-year grant, that at the end of the first year, that the corporation could just say, "Okay, we're not going to renew your grant."

The expectation is that the corporation made a decision that you should get a one-year grant, in which case at the end you have to recompete, or you should get a two-year grant or you should get a three-year grant, and that grant should not be taken away unless you did something that was worthy of termination of your grant.

And I think that that -- that if you -- if at the end of the year in a -- you know, I'm sorry. If, at the end of -- I'm trying to figure out how to say this. If, after one year of the two-year grant, or after two years of the three-year grant, the corporation just makes a decision that they're not going to fund you next year, I think that that needs to

be treated in the same way as a termination, that there be a hearing, that all the protections that are in place ought to be afforded to the program.

Otherwise, I think it's -- that the corporation should have an obligation to take seriously its decisions on how long this grant should be, and once they have made that decision, they should be required to stick to it.

MR. IWASAKI: I guess this is one issue where everybody was surprised. And I must say I am surprised, because it was always my impression that getting a three-year grant was at least one year better than getting a two-year grant.

And if that's not the case, and we govern by grant assurance and not by regulation and not by procedure, I think that's a serious problem.

MR. MEITES: Well, I -- by ducking the issue and keeping the same language, we will just keep this on the boil for another year. And I expect that the field and management will thrash this out. And if you disagree when you come back to us next May, then we will have a full discussion on the matter.

MS. MERCADO: And I would certainly want to know, as an LSC board, what -- or an entity -- what our liability exposure would be to a breach of contract, and just what a grant assurance is, basically, between a grantee and LSC.

To say, "You're getting a three-year contract," and then we're going to decide a year later you're not going to get it, in spite of the fact that there aren't any overwhelming findings of malfeasance or, you know, non-compliance of the grantee --

MR. MEITES: Well, that's right. That's what we hope you all will come back to us -- maybe three years only means one year at the top of it, or --

MS. PERLE: Yes, I just wanted to kind of reiterate one point that Bruce made, which is that, you know, over the years there has been this accretion of grant assurances. And if you look at them, in many respects they appear to me to be regulation by grant assurance.

And I think that there needs to be a rethinking of what kinds of changes between -- in the relationship between the corporation and the grantee.

In this kind of a situation, where basically the corporation staff decides something and then it's imposed on the grantee, because yes, it's a contract, but it's a contract of adhesion. They don't really have any --

MR. MEITES: Well, you're right. We were asked to pass on the grant assurance provision, which kind of took us by surprise. We weren't knowledgeable about them.

On the other hand, they are not adopted by management, they are adopted by the board. So it's kind of a middle ground between regulation and --

MS. PERLE: Well, the board is not really consulted in the development --

MR. MEITES: There is a more serious question you have raised, and we will let Vic spend a year thinking about this. Do they rise to the level of regulations which require the whole formal procedure? Are they simply contract terms which the board should approve, or are they something less?

But let's leave that all until next year. There is one other matter we have to take up today.

MS. PERLE: And we are committed to thinking it through. So --

MS. MERCADO: Well, it's actually not next year, because you're fixing to start around competitions within the next several months. I mean, it's something that within the next three to four months, actually, the board needs to sort of look at it.

And I know we spent at least a whole day looking at all those grant assurances several years ago. And then, somewhere in the process they got revised and done, or whatever else, without ever necessarily coming back to the board.

And so it would behoove us at some point in time for ops and regs to devote some time at one of its meetings within the next several months --

MR. MEITES: You don't think it can wait until we get to the next contract cycle?

MR. GARTEN: Yes, sure.

MS. MERCADO: Well, but the next contract cycle is coming up.

MR. MEITES: Oh, I understand. When

management in the field feels it's appropriate to bring it back to us, I'm sure --

MS. MERCADO: Oh, yes. I was just thinking a year, like --

MS. PERLE: Yes, I mean I guess the only caveat is, you know, we get the -- if we have an opportunity to review the grant assurances, it's two days before the meeting. And you know, there is no opportunity to get any input into it.

MR. MEITES: But you're on notice now that we expect to have a discussion at its next iteration, so you all have to start working as soon as --

MS. PERLE: That's fine. I mean, if that happens, I'm --

CONSIDER AND ACT ON MR. DEAN ANDAL'S PETITION FOR RULEMAKING TO AMEND LSC REGULATIONS ON CLASS ACTIONS

MR. MEITES: All right, let's move on to the petition of Dean Andal, of Stockton, California. Who is going to -- Mattie, are you going to make a presentation on this?

All right, on June 1, 2004 the Legal Services Corporation received a petition for rulemaking from

Dean Andal of Stockton, California. Under our regulations, any person has an opportunity to petition this board to adopt or change any existing rule.

Our committee of the -- Mr. Andal's petition was referred to our committee. Lillian and I have both read the petition. Mr. Andal also asked that supplementary material relating to a lawsuit in Stockton, California be provided to the committee. Lillian and I have both read those materials.

We have also received a memorandum from the management, which reviews Mr. Andal's petition, and also I received a phone call from the executive director of California Rural Legal Assistance, whose name totally escapes me.

MS. CONDRAY: Mr. Jose Padilla.

MR. MEITES: Thank you. And he asked me, in that phone call, whether the committee would benefit from his appearance today, since his agency is directly involved in some of the underlying events.

I told him that I did not believe -- he certainly was free to attend, and if he attended we would certainly hear any presentation he made. I told

him I did not know whether Mr. Andal was appearing or not, but I told him that if in fact the committee was of the view that his views were needed, we would certainly give him the opportunity to appear in person.

So, what we are doing today is our -- beginning our consideration of Mr. Andal's petition, which may or may not be finished today. All right, Mattie, if you would begin?

MS. CONDRAY: Sure. I will cut -- in the interest of time, I will cut to the bottom line first, which is that management is recommending that the committee recommend to the full board that the board deny the petition for rulemaking.

Management does not believe that the -- that there is sufficient basis existing at this time for amending the regulation in the way suggested by Mr. Andal.

He suggests two areas of change. The first is a definition of class action. The current regulation defines a class action basically with respect to rule 32 of the Federal Rules of Civil Procedure, and/or state or local rules that do the same thing. It's been

a term of art.

He suggests broadening it, that the corporation consider initiating a rulemaking to broaden the definition to any lawsuit where each individual plaintiff is not named. As I said, we don't believe there is sufficient basis at this time for amending the regulation in that way.

We believe -- the current management believes -- the current regulatory definition reflects the intent of Congress when it chose the term "class action." The term "class action" is a term of art. I mean, we -- I think all of the lawyers here -- are used to it as something that comes to mind.

And its use, I will note, predates the 1996 ban. There was a limitation -- there is a limitation in the original act on engaging in class action suits. And that, the act, does not define class action, it was just merely a -- its usage appears to be usage in the term of art. The corporation has always defined "class action" with respect to rule 23 and similar state actions.

We note that the petition did not identify a

specific problem with the definition, nor does the petition specify what actions the proposed definition is intended to reach.

We can speculate, I suppose, that the proposed change would be intended to reach representative actions, such as the unfair competition law in California, section 17-200, or representative actions under the Fair Labor Standards Act, and there may be some other states' statutes that are similar.

We will note that the petition, again, does not address how those are particularly -- actions are contrary to the will of Congress, and Congress has never indicated that representative actions are intended to be covered by the term "class action."

As I said, the current -- the original definition of the term in the regulations specified -- talked about class actions as that term of art exists. Although the definition has come under a few changes, none of them have affected that particular aspect of the rule. There have been some language changes, but they haven't gone to the limitations, the meaning of class action as class action lawsuits.

In 1996, the -- when Congress instituted the full ban, again, it just used the word "class action" against at least the backdrop of our existing regulation and the existing definition of "class action."

And it did not choose to provide, then or at any time since, a more expansive definition of "class action." I can -- as a kind of counter-example, there had been limitations in the act on representations relating to abortions which, in 1996, those limitations were turned into an absolute ban, and Congress was quite clear about expanding its -- what it meant there.

We will also note that representative actions are not a significant source of grantee activity, in terms of balancing -- making a change versus what activity this would be getting at.

And we note that under the current regulations at 45CFR part 1636, grantees are already required to identify plaintiffs. So, to the extent that the proposed definition would define a class action as any lawsuit where each individual plaintiff is not named, part 1636 requires plaintiffs to be named, unless there

is -- and the only exception in 1636 is if there is a particular -- like a protective order, or some particular reason, and we wouldn't be requiring the grantees to defy those orders.

The other aspect of the petition is a request for an amendment in the definition of the term -- the phrase -- "initiating or participating in any class action." The petition proposes broadening the definition to include all legal services, and to prohibit non-adversarial activities which are currently permitted under the regulation.

Again, management's recommendation is that there is not sufficient basis for changing this definition at this time.

The petition sites as its justification for the proffered change CRLA's participation in the Hernandez case. In that case, CRLA had been participating in a class action at a time before the 1996 ban. After the 1996 ban, it was still involved with the case to the extent of being involved in non-adversarial post-order activities as permitted by the regulation.

For a number of years, CRLA acted in this way. There was -- a further proceeding actually happened in the case, which turned the case from its non-adversarial to its adversarial position. CRLA stayed in the case at that point, and acted in an adversarial manner.

A complaint was made. The office of the inspector general investigated the complaint, found that their behavior, which had been legal and permissible, had changed. And they were instructed to leave the case, which -- my understanding is that they have since done that. And so, from a technical standpoint, that particular matter has been closed.

We believe that CRLA's behavior in this case really is an isolated incident, and not indicative of an overall pattern of grantee behavior. We don't believe there are lots of grantees out there essentially hiding behind the non-adversarial post-order activities, exclusion from the definition to backdoor their way into actually participating in adversarial activities.

In addition, the exclusion of post-order non-

adversarial activities from the rule was done for a very specific reason. For a lot of the cases that these -- by the time they get -- these class actions that our grantees had been previously involved in, by the time of the ban, once they got rid of their, you know, the active cases, they had cases where there had been a final order and -- but the case was still around.

And at that stage, there was a certain impracticality, if not an impossibility, for the grantee being permitted by the court overseeing the case to withdraw from the case at that stage.

Generally, at that point, the grantee is really -- and what the term excludes -- is acting as a more or less passive receptacle or trader of information, and that -- there was a discussion at that -- at the time of the adoption of the rule that at that point in the case, the grantees are not likely to be allowed to get out of the case.

And rather than putting the grantee in that kind of a Catch-22, the board at the time was comfortable that the main congressional concern

appeared to be insuring that programs not act as the driving force in prosecuting class action suits, which the definition of "initiating or participating in a class action," it fulfills that statutory purpose.

We would also note that because there is no new class action litigation and hasn't been any since 1996, the number of cases in which grantees are engaged in post-order or non-adversarial activity is diminishing. You know, as these cases eventually go away, there will be fewer and fewer of these cases around.

The petition notes -- the petition itself also does not actually express any discomfort itself with actual, honest non-adversarial activities that are currently permitted. The concern of the petitioner is that this -- that there is a loophole created.

And it is management's position that the remedy suggested would actually preclude activity which the petitioner himself concedes is not inconsistent with the congressional mandate. That's a --

MR. MEITES: I think we follow all that.

MS. CONDRAY: -- pretty --

MR. MEITES: That's a good summary.

MS. CONDRAY: A good summary.

MR. MEITES: Let me respond, because this is what I do for a living. This is close to my heart, class action litigation. I actually know something about this, as distinguished from many other things I open my mouth on.

(Laughter.)

MR. MEITES: Going from the last provision first, participating in non-adversarial activities, Mr. Andal's papers, supporting papers, make clear that he was concerned that an old school desegregation decree in the state courts in California involving his home town of Stockton had been the vehicle for improper activity by CRLA.

What happened is -- as happens in many of these cases -- the case law is dormant for literally decades. The school district one day wakes up to something they can't do under this ancient decree: building a new building, or changing the color of the buses.

The lawyer says, "You're stuck unless you go

back to court and petition the court to relieve you of the injunction," which is called -- in order to do that you have to make a determination that unitary status has been reached.

Stockton's school district did this. And CRLA, which had been the attorneys for the class throughout this litigation -- and, indeed, in a period when it was appropriate for it to be -- received a notice from the court, and from the school district, that the case was being reopened.

CRLA then proceeded to participate in the conclusion of the case. CRLA characterized its action as non-adversarial, under -- which would be permissible under our 1670.2(b)(2).

And our inspector general investigated Mr. Andal's complaint and found that, in fact, it was adversarial. And I have read this, and it was adversarial. I know what adversarial is, when the other side says "A" and you say "B," and that's what was happening here.

Mr. Andal is apparently concerned, from his position, that other grantees will claim that activity

is not adversarial. My sense is that he needn't be -- worry about it, that our inspector general investigated his complaint and found that, in fact, that our rule was being violated, which indicates to me that our rule is a practical bright line guidance for the conduct of our grantees.

In addition, as Mattie pointed out, the proposal on (a)(2) or (b)(2) would eliminate many activities which absolutely are necessary for our grantees typically in a class action.

There are many small claimants who get notices from the court which, since I write them, I can tell you are not written with perfect clarity. And they sometimes contain valuable rights. And also sometimes they indicate that you are going to be losing valuable rights unless you act affirmatively.

Our regulation (b)(2) now allows people who have every right to come to us, our grantees, for legal assistance and take those notices to our grantees and ask, "What does this mean?" In that capacity, they are acting as individuals. They are asking questions about their own personal claims. And (b)(2) protects the

client's right to get counsel from that. And I don't think Mr. Andal has any complaint about that at all, as Mattie pointed out.

The other change is essentially -- would change the definition of "class action" which Legal Services Corporation has essentially used since 1976. He actually has an interesting point, which I don't know much about, so I won't talk much about.

Some states have procedures that aren't clearly class actions, but allow an attorney to nominate himself to represent lots of people. I don't know -- our state, Illinois, does not have that. But some states do. Those are not included within our definition of class action, and I think he would like them to be.

My difficulty with that is it's a universe we know nothing about, and for example, what about a key tom action, when an individual can file a case on behalf of the United States? Is that a representative action, or not? Well, it's certainly not a class action; it's a whole different set of rules that apply, and rules that essentially are protective of the

general interest that self-nominees don't take on more responsibility than they are entitled to.

I think that it may be an interesting question to address in general terms, whether the ban should be much broader than that. That's not, I believe, a question that at present Congress has given us to add. They have used the term "class action," which both our regulations and by other congressional action has a clear meaning.

I don't believe it is appropriate for us to go beyond the terms used by our regulations and I believe incorporated by Congress in its amendments. So, even though there are actions that are representative that are not within class actions -- which Mr. Andal is worried about, and I can understand his concern -- it is a large universe that I don't think Congress has asked us to look into. And I would be -- prefer, and I believe I would recommend, that we stay within the definition of class action that both we and Congress have apparently been comfortable with since 1976. Lillian?

MS. BEVIER: I don't know anything about this,

so I am persuaded by you, which I think is the better part of wisdom. I agree, and I think -- and I am also persuaded by the memorandum that you have prepared, Mattie. So I don't think we should honor the petition, in other words.

MR. MEITES: So that will be our recommendation. Two things. I would like Mr. Andal's submission to be made a part of the record.

MS. CONDRAY: Sure.

MR. MEITES: And I would like someone, probably Vic, to communicate to Mr. Andal, first of all, we appreciate his interest in both our Legal Services Corporation and our regulations. We didn't know that anybody ever read them, and we're glad that someone does and takes them seriously.

And urge him, if he has other matters that he believes we should look into, certainly to communicate with us. And for the reasons we have given, our recommendation is that his petition be denied. Please?

MS. MERCADO: Mr. Chairman, I think in order for the record to reflect on what basis the committee and the board acted, that if you are admitting into the

record the documents that Mr. Andal submitted to the board, that it is only appropriate to submit the memoranda that management and the office of general counsel prepared for us, which gave us the legal reasoning and history, congressional history, on it as part of the record as well.

Since that was a confidential memo that has not been shared, I would propose at this time to take it out of confidence, or do a clean copy that goes to the record.

MR. MEITES: Right. I would do that now. Once again, I failed to ask the field for comments, but I thought since this was more or less directed to us, that that was appropriate.

MS. PERLE: I think that we agree with what both the committee and the staff --

MR. MEITES: And also part of the record, my remarks and Lillian's remarks should also be made part of the record.

MS. BEVIER: Not the part that I don't understand it.

(Laughter.)

MR. MEITES: All right. I think that we have gone through the substantive part of our agenda. Let me ask if there is any new business that anyone would like to raise.

(No response.)

M O T I O N

MR. MEITES: If not, I will accept a motion to adjourn.

MS. BEVIER: You have it.

MR. MEITES: Adjourned.

(Whereupon, at 12:06 p.m., the meeting was adjourned.)