LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

COMMITTEE ON OPERATIONS AND REGULATIONS

OPEN SESSION

Friday, November 19, 2004

3:45 p.m.

The Westin Cincinnati
21 E. Fifth Street
Cincinnati, Ohio

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chairman
Michael D. McKay
Lillian R. BeVier

OTHER BOARD MEMBERS PRESENT:

Maria Luisa Mercado (by telephone)
Ernestine P. Watlington (by telephone)

STAFF AND PUBLIC PRESENT:

Helaine M. Barnett, President
Mattie C. Condray, Senior Assistant General Counsel
Victor Fortuno, Vice President for Legal Affairs, General Counsel and Corporate Secretary
Dean Andal, Stockton, California
Mary Asbury, Executive Director, Legal Aid Society of Greater Cincinnati

C O N T E N T S

P R O C E E D I N G S

CHAIRMAN MEITES: This is the meeting of the Operations and Regulations Committee, Legal Services Corporation. I'll call the meeting to order.

APPROVAL OF THE AGENDA

CHAIRMAN MEITES: We have a proposed agenda, and I will ask for a motion to approve it.

M O T I O N

MS. BeVIER: So moved.

MR. McKAY: Second.

CHAIRMAN MEITES: Are there any motions to amend the proposed agenda?

M O T I O N

MR. McKAY: Mr. Chairman, I move that we amend the proposed agenda, so that we can consider an act on Mr. Dean Andal's petition for rulemaking first. I understand he has a plane to catch, and we're happy to accommodate him.

CHAIRMAN MEITES: Is there a second to that motion?

MR. McKAY: Karen.

CHAIRMAN MEITES: All right, and I move we

vote on the motion as amended. All in favor?

(Chorus of ayes)

CHAIRMAN MEITES: The agenda is adopted as amended.

M O T I O N

CHAIRMAN MEITES: Now I'll entertain a motion to approve the minutes of our meeting of September 11th, 2004.

MS. BeVIER: So moved.

MR. McKAY: Second.

CHAIRMAN MEITES: All in favor?

(Chorus of ayes.)

CONSIDER AND ACT ON MR. DEAN ANDAL'S PETITION FOR RULEMAKING TO AMEND LSC REGULATIONS ON CLASS ACTIONS, 45 CFR PART 1617

CHAIRMAN MEITES: All right. We'll now proceed with item four on our agenda, which consider and act on Mr. Dean Andal's petition for rulemaking, to amend LSC's regulation on class actions, 45 C.F.R. Part 1617. Mr. Andal?

MR. ANDAL: Thank you.

MS. WATLINGTON: This is Ernestine Watlington.

CHAIRMAN MEITES: All right. Can you hear us now?

MS. WATLINGTON: I can hear you now.

CHAIRMAN MEITES: All right. Everyone is instructed to talk directly in the microphone.

Mr. Andal, our name tags have been lost in transit. I'm Tom Meites -- Mike McKay and Lillian BeVier. We are the three members of this committee and next to Lillian is Helaine Barnett, the president of Legal Services Corporation.

Thank you for coming from California to testify in front of our committee. We at our last meeting considered your petition. It was pointed out to us after our consideration that you might be interested in appearing personally, and we, with the board's concurrence, deferred action on your petition until this meeting, and we'd like -- if you have remarks to present us, we'd love to hear them now.

MR. ANDAL: Thank you very much, and I do appreciate the opportunity to speak to you. I want to give you a few caveats about me personally before I start. I have a long public service career, but I

don't want anybody to be misled. I'm not an attorney, and my remarks should --

MS. WATLINGTON: I don't hear anybody.

MR. ANDAL: Oh, I'm sorry.

CHAIRMAN MEITES: Is that better? Yes, okay.

MS. WATLINGTON: I can hear you, Tom, but not Mr. Andal.

MR. ANDAL: Yes, okay. My name is Dean Andal, and I'm not an attorney, and the reason I have an interest in this before I start my prepared remarks is I live in Stockton, California. I'm a long-time elected official in Stockton, and I became interested several years ago in a case called Hernandez v. Board of Education of Stockton Unified School District, a 34 year-old desegregation case that was brought and maintained by a LSC recipient, California Rural Legal Assistance.

I also would like -- my remarks were prepared in haste. They are my own, and I saw some pretty tough words in here. So maybe I can apologize along the way. I do feel very strongly about this, and I was reading it before I sat down, and I said LSC staff have no

interest in enforcing Congress' directive to limit funding away from class action lawsuits.

I suspect that you have some interest in that, so as I go through, maybe I'll temper my words a little bit. I wrote this two days ago.

CHAIRMAN MEITES: We'll consider your remarks tempered as appropriate. So go ahead.

MR. ANDAL: Okay. Mr. Chairman, members of the committee, I appreciate very much the opportunity to speak to you today. I'm here to advocate a modest change in LSC regulations Part 1617 involving the Congressional prohibition against use of Federal funding by LSC recipients to initiate or participate in class action lawsuits.

I also intend to bring the committee's attention my opinion that LSC staff have little interest in enforcing Congress' expressed directive to limit Federal legal aid funding only to individual poor Americans, and instead continue to tolerate largely political class action lawsuits that were banned in 1996, over eight years ago.

Today's presentation to you represents the end

of a long personal journey to stop the unlawful involvement of one LSC recipient, California Rural Legal Assistance, CRLA, from their continuing involvement in a 1970 desegregation case, Hernandez v. Board of Education of Stockton Unified School District.

In my home town of Stockton, California with a March 2004 audit finding by your Office of Inspector General, this violation has been confirmed, and that goal has been achieved.

What I learned in the process of stopping this unlawful use of Federal funds has made me determined to correct the inconsistencies between Congressional appropriations restrictions regarding class action lawsuits, and regulations, your regulations, that implement those restrictions.

I'm astonished by the continued involvement of LSC recipients in class action lawsuits. Right now today, there are seven in California alone, given how clear the instructions from Congress were eight years ago.

My presentation to you today will be my last effort to persuade the LSC on this issue, before

seeking redress from my Congressional representatives. After I have finished with my remarks, I think you will agree that I have made extraordinary efforts within the LSC's process, to solve this problem.

My contact with the LSC began in the fall of 2002, when I asserted the CRLA was unlawfully participating in adversarial negotiations, court hearings and correspondence in Hernandez, a class action desegregation case.

If you would turn to my request for regulatory amendment, I think you have that in front of you, Tab 1 represents the modest amendments I propose to Part 1617 class actions, Section 1617.2. My proposed changes are in red.

First, I propose you comply with the Federal mandate, to get LSC recipients out of politically charged class action lawsuits. My proposed amendment adds to the definition that any lawsuit where the plaintiffs cannot be individually identified by name, and give their consent to the lawsuit, is not eligible for LSC funding.

I think Congress clearly meant to prohibit

lawsuits on behalf of groups when they said class action lawsuits. Your current definition gives legal room in some states, including my own, for group lawsuits to continue with Federal funds. This standard also lacks uniformity, because each state has a different definition of class action lawsuit.

Second, I propose replacing the term "representation" with "legal services," in the definition of initiating or participating in any class action lawsuit. Limiting this prohibition to representing a client in court or other proceedings is a cutback in the Congressional prohibition against class action lawsuits.

I do not believe Congress wanted LSC recipients involved in class action lawsuits at all.

Third, I propose striking a portion of subsection (b)(2), which is in direct conflict with subsection (b)(1). Subsection (b)(1) prohibited activity includes "initiating or participating in any class action means involvement at any state of a class action prior to or after an order granting relief," a fairly all-inclusive clause that I do think reflects

Congressional will.

And the first part of subsection (b)(2) does not conflict with this standard because it simply allows a lawyer to help a client to get out of an existing lawsuit. The rest of subsection (b)(2) clearly conflicts with (b)(1).

By defining "initiating or participating in any class action" as not including "non-adversarial activities, education, legal advice and other legal services."

Whoever wrote this conflict into the regulations either did a poor drafting job, or intentionally wrote the conflict so as to allow LSC recipients, like the CRLA, a hook, to continue to violate Congress' specific direction to stop this practice.

This is a short history of the complaint that I filed. In the fall of 2002, I phoned the Washington office of the LSC Office of Inspector General, to bring to their attention the ongoing violations of LSC regulations and Congressional prohibitions by the CRLA.

I was directed to Anthony Ramirez in the

Office of Inspector General, and I had a lengthy conversation with him where I did not identify myself, but gave the information that I had about the violations and asked him for an investigation.

Later in the fall, I was curious as to whether or not anything had happened. So I did call him again. I identified myself, and I asked Mr. Ramirez if any effort had been made to confirm my allegations. He asked me to send him physical evidence of the wrongdoing, and I promised I would.

So I spent my entire Christmas vacation preparing that. It was a great education, and it was pretty tough work for a non-lawyer. On January 31st, 2003, I filed a substantial formal complaint with the OIG against the CRLA. I don't think that is in your records, but I know that you have it somewhere.

CHAIRMAN MEITES: We received copies of that material.

MR. ANDAL: Excellent, okay, which I hope you will read before you make your decision on these regulatory changes that are proposed.

In this complaint, I allege that the CRLA is

violating prohibitions against using LSC funds in a class action and a desegregation lawsuit, both of which are prohibited by Congressional action.

I sent this complaint by Federal Express, received confirmation the complaint had been received by OIG. In this complaint, I provided substantial documentary evidence of CRLA's wrongdoing, including court transcripts, CRLA letters to the Stockton Unified School District, which were adversarial in tone if nothing else; Stockton Record newspaper articles, which showed the CRLA commenting on the case and being actively involved in negotiations, and a defiant letter from the CRLA to Congressman John Doolittle.

This complaint took quite a bit of effort. For the next 11 months, I heard absolutely nothing from the OIG or LSC regarding my complaint. Finally, I called California Congressman John Doolittle, to ask for his advice on how to proceed and get action on this complaint that I had offered.

He subsequently wrote a letter to Leonard Koser, I believe is his name, acting inspector general, seeking a status report on my complaint. Within two

weeks of Congressman Doolittle's letter, Mr. Koser organized a formal investigation of my complaint.

Two absolutely outstanding OIG auditors were sent to Stockton, California, and I was interviewed by them on January 21st, 2004. In a letter from Mr. Koser to me dated March 12th, 2004, I was informed that the audit concluded in relevant part "The CRLA's involvement in the Hernandez case in 2002 and 2003 violated statutory and regulatory prohibition of participation in class action lawsuits."

So my complaint was proved true. The OIG then demanded a commitment from the CRLA to petition the court to withdraw from the case, and they have.

After 34 years as a participant in the case, and eight years after Congress said "No more class action lawsuits," the CRLA finally petitioned the court to withdraw from this class action lawsuit, still protesting, by the way, that they had done nothing wrong, and they don't agree that they violated the prohibition.

To this day, the CRLA claims the ambiguity in the LSC regulations allow them to participate.

The point of reciting this torturous history is to illustrate a single point. It took one private citizen, working on his own, to prepare a lengthy formal complaint, with documentary proof, close to a year with no investigation oif the complaint, the intervention of a member of Congress, two auditors flying to California and over 18 months, to determine the CRLA was violating class action prohibitions.

Of course, the CRLA was allowed to continue using federal funds to unlawfully participate in this suit during this lengthy period. We're relying, and I ask this in a general sense -- we rely on ordinary American citizens like me to make sure that Congressional directives on the use of federal tax dollars are respected.

Where is the staff oversight? Why isn't your regulation clear? Regarding the LSC management's response to my regulatory change, I won't spend too much time on it. But it has two basic themes.

One is that the current definition of class action in the LSC regulations was explicitly accepted by Congress, and two, since I have only identified one

example of continued involvement in class action lawsuits, and that has been corrected, there is no big problem that needs regulatory attention.

I strongly disagree with both points. First, Congress has never accepted the watered-down version of the class action lawsuit prohibition in the current LSC regulations. In fact, until now, I don't believe the issue has ever been brought to their attention.

A 1996 Congressional compromise that staff mentions was to continue the laudatory efforts of the LSC, to provide legal representation to individual poor Americans. I want to make this very clear. I approve of that mission of the LSC.

At the same time, clearly prohibit the type of political advocacy inherent in lawsuits for groups or classes of people. For any reasonable person, the Congressional prohibition against class action lawsuits means all cases funded by federal taxpayers, need to have the plaintiffs' names individually listed in the court filings, as I have proposed in these amendments. There can be no uncertainty in that case.

Second, the difficulty I experienced as an

individual American, in preventing the continued misuse of federal funds by the CRLA, is evidence that your oversight of the LSC recipients is impotent.

The staff's position, and I put outrageous position -- that might be a little tough -- that since I did their job for them, by finding the only violation of class action prohibitions, that all other recipients are not violating the law.

They then used this incompetence to recommend that you don't amend the regulations, as suggested, to come into compliance with the Congressional prohibition on class action lawsuits. Basically, hear no evil, see no evil, speak no evil is the standard operating procedure. It's wonderfully convenient.

Here's the steps that I am requesting of this committee:

Study my amendments to see if they provide more clarity than the existing regulatory language. The standard should not be whether or not it's needed or not; it's what's the best language to effect Congressional intent. I then place my proposed regulatory amendment before the LSC Board of Directors

for their review.

Two, read both the December 11th, 2003 OIG compliance audit of the CRLA, my January 31st, 2003 complaint against the CRLA, and the March 12th, 2004 audit of my complaint against the CRLA, to understand how the poorly-written language in Part 1617.2, is used by LSC recipients like the CRLA to blithely ignore Congressional restrictions.

Three, direct staff to notify the CRLA and Neighborhood Legal Services of Los Angeles County, to remove themselves from the seven identified California class action cases that pre-date 1996 Congressional prohibition against this type of involvement.

There is no controversy over whether these particular cases are class action, and they have had over eight years to petition the court to withdraw as counsel. OIG has forced the CRLA to do this in one case; why not the rest?

Four, direct staff to provide a report on how many cases currently using LSC recipient funding are class actions under your current regulatory scheme, and how many additional cases would be considered class

action lawsuits under the regulatory changes I have proposed.

This information, I think, would be enlightening to both the board and Congress, and you should expect your staff to isolate these differences for you, so that you can make an informed decision.

Once again, I appreciate the opportunity to be here, and I'm happy to answer any questions.

CHAIRMAN MEITES: Thank you very much, Mr. Andal. You stay for a while. I'm sure the committee has some questions for you. I have read your proposed changes, and I think I understand them. I am, however, unfortunately not in a position to discuss very knowledgeably the particular case that you mentioned.

We received the materials; they were very thick, and we know that the Inspector General and you and CRLA have had extensive correspondence. But I for one have not studied what the actual issues are. I don't know if my fellow committee members have.

So I would prefer not to discuss that individual matter in any detail with you, because simply we're not only not prepared, but it's really, I

think, beyond what our agenda item is.

However, I think that the points you raise about our existing rule are germane, and we should address them.

Let me work backwards, if I can. As I understand your essential point, is that there has to -- a rule has to be clear, so our grantees will understand what is permitted and conversely what is not permitted.

That kind of has led you to two concerns. One is that either our grantees are confused or they are being clever lawyers and are not adhering to the spirit of the rule, even though arguably the letter --

And the second point is that you are concerned that unless the rule is clarified, our oversight task will be very difficult.

My sense is a little bit different than yours, because we hear more general information, of course, than you would be expected to get in California.

As I understand it, as part of our oversight task, both the inspector general and our compliance staff do review the activities of our 140-plus grantees

for compliance with a number of regulations, all regulations, but in particular the class action regulation.

That shouldn't be a surprise to you, because that obviously is of considerable concern to Congress, and a continuing concern to the Congress. We were unaware, as you would expect, of any particular case that arguably is or is not in compliance.

We rely on our staff and they have, in the audits we receive of our grantees, brought to our attention, from time to time, issues that may be close to the line. But in general, I don't -- have not observed there is a general problem of our grantees not understanding either what our regulations mean, or what Congress means.

I'm not going to tell you that there are not some clever fellows out there who think they can push the envelope. Whatever you write in whatever area, there will be people who try to test you out. But I at least have not seen it in my service on this board, that there is a more general problem.

That leads to kind of point two. If our

grantees get it in general, to change the regulations has some cost to it. That is, whenever you change something that seems subtle, there's always the possibility that you might cause some problems.

Let me point out one problem that I see in what you propose. In your changes to 1617.2 (b)(2), where you would strike out the last part of the sentence, about obtaining the benefits, obtaining the benefit of relief ordered by the Court and so on, in fact, in a lawyer's sense, a member of a class action is there not by choice. He or she is an individual who finds themselves part of a lawsuit, which often they knew nothing about until they get some notification from the Court.

In seeking to file a claim or otherwise participate in what the Court has ordered, it is often necessary for the clients of our grantees to have legal advice. The "obtaining benefits" is as an individual, because typically you have to file your own claim.

So the changes you make in (2), although I understand that you would see them as clarifying what the intent of Congress is, in fact I believe

unwittingly would kind of contradict what you said about your concern and our concern, about aiding individuals in obtaining their, what's due.

As for your proposed changes in (a), you've kind of hit a nerve, because in fact lawyers don't really understand the limits of a class action. A class action, as our rule is written, at least as I read it, are a comparable state procedure.

I think it's more expansive that maybe you're reading it. Rule 23 is a Federal rule, and we know what that means. Many states have adopted Rule 23 verbatim. My state of Illinois has not at all -- our state supreme court has a totally different theory of representative actions.

There are other statutes, and William and I talked about this, for example, a statute in California called 17.200, which is something that nobody understands. None of us is a California and we are at sea that that is.

I think the sense of our compliance people, both on the Inspector General's side and on Legal Services Corporation staff, is to look carefully at our

grantees' activities. If they see something that looks like a comparable state statute or rule, I think they will put the burden on the grantee to explain why it is not prohibited by the rule.

So rather than trying to expand our rule, which may be beyond what lawyers are comfortable with, I would prefer to stay with what we have, and assure ourselves, and I think we can assure ourselves, that our compliance staff and the Inspector General understands what is meant by this, which is, as you point out, an action where people find themselves part of a case not of their choosing. Is that a fair statement of where you're at?

MR. ANDAL: Very much so.

CHAIRMAN MEITES: Let me turn to other questions.

MS. BeVIER: I just have a very specific question, and that is can you provide us with the citations to those other seven cases that you describe, because that -- it seems to be a matter of some dispute, where there are any.

MR. ANDAL: Yes, I can. Not a cite, but I can

tell you how I know that.

CHAIRMAN MEITES: You can provide us with that in writing if you'd like or --

MR. ANDAL: But I also -- I think you can find it too in your own staff. There was a response from your Inspector General to Congressman Doolittle. As a result of my conversation with him, he posed several questions to Mr. Koser, and one of them was how many other California class action lawsuits, other than Hernandez, are still around.

He responded that there were a total of eight, including Hernandez, and he listed them in the letter. And this might help a little bit, because that would be a big thing if we could get to that, and that wouldn't require regulatory amendments.

The response why there was no effort to ask those LSC recipients to withdraw from the case like they did CRLA was they said there was no activities in the cases. Well, my read on that would be Congress prohibited you from doing this in 1996.

There's nothing going on. This is a good time to get out. I made an assumption, maybe not a good

one, that if there's seven or eight in California, there's probably some cases elsewhere too.

MS. BeVIER: So you're thinking this is the tip of the iceberg, and not an isolated incident?

MR. ANDAL: Yes. I think the CRLA knew exactly what it was doing, and I think if you -- you know, in the back and forth of the auditors, and your auditors had this difficulty with them.

The key phrase in the subsection (b)(2) was non-adversarial activities. What they think is non-adversarial and maybe what you think is the subject of great debate.

It is the main problem in this. They threatened the school district in letters over the years; they attended court hearings. A lot of things that I consider adversarial CRLA still doesn't think is adversarial. And so I assume if they don't, there's probably others that feel the same way.

CHAIRMAN MEITES: Thanks for your presentation. I found it very helpful, as well as your written materials. I have to say, after listening to your presentation, I am not troubled by the

current -- the way our regulation is currently drafted.

I am troubled about the question about oversight. It's supervision of compliance and it's something, you know, based on Your information, it's something I've been concerned about. So we'll take a closer look.

But I must say I don't see your changes being particularly helpful. I think it's important that we vigorously enforce what we have in place. That's what happened in the CRLA matter, and I think we need to take a closer look and make sure we're doing a good job, and I think your presentation has been very helpful, at least for me.

MR. ANDAL: Can I just respond, because when you go through this effort to propose a regulatory change, you put everything in that you would like to see happen.

But the key part, I think, and the part that may not be resolvable by better compliance oversight, is that last part of (b)(2), where non-adversarial activities, including efforts to remain informed, explain, clarify, educate, advise others.

I consent to obtain the benefit of relief ordered by the Court, as long as it's on behalf of an individual, would be consistent with what Congress has asked you to do.

But the rest of that is, to me, in direct conflict with (b)(1). B-1 says no involvement, and this says "Well, you can be involved if it's non-adversarial," if you want to give advice.

The word "advice" is a pretty all-reaching term, and that just involves misunderstandings between you and your recipients over what that means.

CHAIRMAN MEITES: Mr. Andal, I understand what you -- I read (b)(2) a little differently, and let me give you my reading and see if this solves your problem.

The introductory phrase of (b)(2) talks about an individual client. I read the rest of (b)(2) as also talking about individual clients. I may be wrong, but my reading is of all of (b)(2) is what we talked about, is the representation of individual clients or eligible entities.

I did not read the second clause, the clause

that you had question, as in any way broadening the exception. I may be wrong, but that's --

MS. BeVIER: What about the part that says "or advise others" about the terms of an order granting --

CHAIRMAN MEITES: Oh, I see what you're doing. Others would not be the same as individual clients.

MS. BeVIER: Yes. I mean it seems to broaden what it is --

CHAIRMAN MEITES: Advise other individuals.

MR. McKAY: You know again, just I agree with the chairman. That's the way I read it. Advise others. You know, if it was "advise the whole class," I'd be troubled. But advising others who come in for advice is the way I read that.

CHAIRMAN MEITES: In most of these cases, in most of these cases, take the eight in California that are in Congressman Doolittle's response, including the CRLA. These predate 1996 so they're at least eight years old now.

They, are by the terms of this letter I've described, they say they're inactive. So the best way would be just to get out of it, to petition the court

formally, get out of the case. You made the point.

These cases, as I understand it, predated both the enactment and our regulations. I have to tell you that I am in some pretty old cases too, and I kind of forget about them.

I wish I could forget about some of them. But a lawyer's basically passive. Unless there's some reason to file a motion or petition, you're not going to do it.

As I understand what you're saying, is given that Congress has enacted the prohibition and we've adopted a regulation, you would expect our grantees to take some affirmative action to clear out their dockets, so they would signal, at least to individuals who are interested, that they do recognize their obligations.

MR. ANDAL: That would be the easiest way to solve this problem.

CHAIRMAN MEITES: Well, thank you very much, Mr. Andal.

MR. ANDAL: Thank you. I appreciate your time.

CHAIRMAN MEITES: And any time you have a good idea for us, come back. Thank you.

MR. ANDAL: Thank you. This is enough. Thank you very much.

MS. BeVIER: We really do appreciate how much time and effort you've put into it. It's really quite a labor of love.

MR. ANDAL: It is, and it's probably what Congress got into the business of restrictions, because in our town this case has probably been the most consequential court case in the history of our very historic city.

In over 150 years, it dramatically changed our city and ran our school district of 42,000 children, basically by judicial fiat, rather than our elected representatives, and probably could have been stopped years ago if the CRLA hadn't maintained their involvement. So that's why I got interested in it.

I have to also say that I had a wonderful mentor, who was a former LSC board member. He gave me my first job out of college. His name was Norm Shumway, and he's the one that convinced me that

federal funding of the LSC is a worthy thing, that poor Americans do need legal representation, and I feel just as strongly about that as I do that these other things should be respected.

I have copies of this if you need.

CHAIRMAN MEITES: Thank you very much. I appreciate it. Would you -- we've made certain assertions about what we understand the regulations to mean. I would like some clarifications from staff if we're even remotely connected to that, I'm concerned.

(Simultaneous discussion.)

CHAIRMAN MEITES: My reading is that in (b)(2), the advice is, as always, limited to people who are eligible for our services on an individual basis.

MS. CONDRAY: If it's a person who's a client. For the record, this is Mattie Condray, Senior Assistant, General Counsel for LSC. If they're providing in fact advice to a client, someone they've accepted as a client, it's got to an individual.

If I can provide a little bit of -- just kind of a little bit of context on how that particular exception, the particular language in (b)(2) came to be

there.

As you said, as you noted, a lot of these cases were class action suits that our grantees were legally involved with prior to the class action ban, and even prior to many of them, there had been a final order entered years before the class action ban.

So what happened was the attorneys, our programs were still technically -- the counsel of record for a case that was essentially dormant, where there was no particular activity going on and there was a lot of testimony consideration at the board level, when the class action regulation was being adopted.

One of the things that was talked about that in that situation, it's often very difficult for counsel to be relieved of being counsel of record at that point.

So although I appreciate Mr. Andal's suggestion that the remaining class action lawsuits in which our grantees are counsel of record, leading from post-order, that they should just seek to withdraw, that it may not be as simple as that, that given the posture of the case, the courts are probably going to

be reluctant in many situations, since there's no other activity going on, and it's going to be very difficult to find substitute counsel at that point who's not involved in the case.

CHAIRMAN MEITES: Hold on to that point. Certainly you'd agree that if a so-called dormant case revived, the grantee has to withdraw?

MS. BeVIER: Absolutely, and that's exactly what happened in the Hernandez case. The case had been from, I believe, 1974 through 2002, had been dormant, and CRLA's participation from 1996, when the ban came into effect, through -- up until 2002, was consistent with the regulations, because it was this dormant case and they weren't doing anything adversarial.

When the motion was filed to, I guess, it was to vacate the order, at that point the case became not dormant any more, and the activities of CRLA, as the OIG found, were in fact had popped out of that non-adversarial position. I realize CRLA argued that they believed it was non-adversarial. I believe the finding of the OIG was that that was an adversarial activity is correct.

At that point, it was in fact incumbent upon them to withdraw from the case. They should have done it on their own but they didn't. At the conclusion of the OIG investigation, they did so and it's my understanding that they have been able to find substitute counsel, and that they have withdrawn from the case.

CHAIRMAN MEITES: So maybe if I understand it, the staff's position is let sleeping dogs lie until something happens?

MS. CONDRAY: Well, I would say another way of putting it would be that perhaps amending the regulation is a solution in search of a problem, that I don't think that there's a significant amount of activity going on out there.

You know, the seven cases, my understanding is that the other seven cases in California are these sort of long-dormant cases in which there is not activity. If there was a petition in any one of those cases to vacate the order or change the order and the case became once again, you know, undormant, then the recipient would be obligated to try to withdraw from

the case.

CHAIRMAN MEITES: But you see, that puts us in kind of -- at least puts me in kind of an uncomfortable position, that I understand all this. But if a layman like Mr. Andal goes to the courthouse or goes on line to Pacer and looks at the docket sheet, he's going to see Santa Monica Rural Legal Assistance represent Inflamed Citizens of Santa Monica versus the Santa Monica School District, and he'll see that in 1973 this case was certified as a (b)(2) class action, and he sees nothing that indicates that Santa Monica Legal Aid has withdrawn. What do you all think about this?

MS. BeVIER: It may be that the violation of the law that is taking place, continued involvements in class actions, is not creating the kind of problem to which Congress was addressing itself. But that does not necessarily mean that it's not a problem legally.

I mean the fact that they are still involved in these class actions in that way, any minute it can become adversarial. It seems to me it's tricky, and I understand what you're saying, is that they're not doing anything. The case was over a long time ago.

But I wouldn't think that Hernandez would be a unique situation, in which there would be a petition to --

CHAIRMAN MEITES: Well, it's not. In Chicago, we have this ancient school desegregation decree entered in 1980, and out of the blue the Justice Department two weeks ago filed a petition to hold the Chicago Board of Education in contempt.

I don't believe the Legal Assistance Foundation was involved in that. But that can happen, and the first thing that the newspapers are going to report in the first hearing, that the plaintiff's appearance in the case are represented by one of our grantees. What's the cost of that?

MS. CONDRAY: I can't give you a dollars and cents answer to that. Sitting here, I don't know. I think you would -- there is something I guess we could look at.

We would also have to balance out the effort required, versus the number of cases in which the effort that the grantee would be expending in attempting to find other counsel who would take the case, and whether or not really the likelihood is that

the court is in fact going to permit them to withdraw from the case.

CHAIRMAN MEITES: That's a good point. If they're class attorneys for a certified class, there's no way the judge is just going to let them walk away, without someone substituting.

MS. CONDRAY: Particularly if under -- since under the current regulation, those activities are not -- they're not illegal. They're currently legal, it's just that something could happen to create a situation where the continued activity would be illegal, and if absent --

Certainly absent a change in the regulation, I'm not a regulator but I think a grantee asking to be relieved of their obligation to be the counsel of record when their being counsel of record does not in fact cause a regulatory violation for them, is going to decrease their chances of being allowed out. That's -- I'm surmising that.

CHAIRMAN MEITES: I see your point. Mike?

MR. McKAY: So what you're saying, Mattie, is that it's not a violation of the regulation right now

for most of those cases, because it's non-adversarial. It's dormant.

MS. CONDRAY: That's correct.

MR. McKAY: It's only when it passes a line, which lawyers do understand, that they would have to withdraw?

MS. CONDRAY: That's correct.

MR. McKAY: I suppose in that situation, knowing how little federal judges like to have a class without an attorney, it may cause more trouble for our grantees and more confusion to the public than keeping the status quo.

MS. BeVIER: I don't know. I want to think about it some more. To my mind, it would need to be coupled with rather effective oversight on the part of staff, because one of the issues that I see him having raised is a kind of unresponsiveness, frankly, from the LSC, and a situation in which he was proved -- his allegations were proved correct. So that's troublesome to me. I think it's more troublesome than this language.

CHAIRMAN MEITES: Yes. My sense is the

language is not where the real focus is.

MS. BeVIER: Yes.

CHAIRMAN MEITES: Mike?

MR. McKAY: Well, to a large extent we're -- I'm operating in a vacuum. I'm also thinking about, as I think all of us are, is to make sure that Congress knows how strongly we feel about enforcing these regulations, regardless of how we feel about these restrictions.

We're going to do our duty and execute. I agree with the concern that the lack of responsiveness in this particular case is troublesome, and I guess, you know, geez I -- it's such an important issue; that is, faithfully executing and making sure that we are in compliance with these Congressional restrictions.

It's probably worth it to at least get a list of the dormant cases that are out there. I mean, I'd feel a little better knowing and then maybe, you know, take it from there.

We should get a feel for what these cases are about, and maybe communicate with them if we decide that, as the chairman just mentioned, that maybe under

the circumstances it's best we let sleeping dogs lie, as long as we're satisfied is in compliance with the regulations; that we make sure we communicate with them our understanding, our expectation of them, that should it become adversarial again, we've got to get out.

But I'm kind of thinking a couple of moves down the chessboard. I guess it makes sense to me to maybe get a better feel for it. How many cases are there? We were told there are seven or so in California. Let's confirm that. Let's see how many others there are out there.

MS. BeVIER: It seems to me there must be quite a number here, because I think it was that kind of litigation that caused Congress to pass this. So maybe it was only what was going on in California. But my guess would be -- I mean I have no idea.

MS. CONDRAY: I don't either. I've been given to --

MS. BeVIER: How hard would it be to find?

MS. CONDRAY: I've been given to understand that some of these cases kind of go away every year, but I cannot sit here and obviously I can't address the

actions of the Office of the Inspector General in investigating this case or compliance, but I'm sure we can get that information.

CHAIRMAN MEITES: Well, that's the question. How would the Corporation staff go about answering Mike's question, put together a list of these dormant class cases?

MS. CONDRAY: I would imagine that -- I suppose I really should let the folks in charge of compliance and enforcement answer that question.

CHAIRMAN MEITES: Okay, all right. So let's stop you there. If there's public comment at this time, we'll just come forward if you'd like to speak. Be sure to identify yourself.

MR. McKAY: Even though we know who you are.

PUBLIC COMMENT

MS. ASBURY: Thank you very much. This is Mary Asbury and I am the executive director of the Legal Aid Society of Greater Cincinnati, and am in charge of an LSC grantee program.

I do want to make a couple of comments in response to the testimony you've heard, and also some

of your questions. First of all, I do think that the grantees are generally very well aware of the ban on class action participation. They understand the letter of the law and the spirit of the law, as well as the political sensitivity of this issue.

As was pointed out, that doesn't mean that in a nationwide program you won't have one or two instances which might be under the heading of pushing the envelope. But I think they are aware, and I don't think that's really the outlook of most grantees.

Specifically, though, I do want to say that there is a dwindling number of cases post-1996. We were required by the LSC staff at that time, and I was presiding over our same program then, to send in a list of any case in which we were counsel of record, and to express what we were going to do. Were we going to withdraw at that time or not? Were we seeking alternate counsel?

We had a pretty tight time line in which to do that, and those of us who had class action litigations pending went forth with that. We also were asked to list any case that we were not seeking to withdraw,

although it was still technically pending.

That was a small number of cases around the country in '96, and I agree with Ms. Condray's comment. It's a very dwindling number now, and I will at some risk with my colleagues, say I don't think it would be burdensome for the staff to ask us to update that report.

MS. BeVIER: Could you continue to talk right into the microphone, because we've got two people who are just longing to hear more than one word out of every 17 that is uttered.

MS. ASBURY: I will try. I admit that I'm sensitive to the feedback when I do that. But I'm sorry to those of you on the phone. I will try.

I just want to say that I think it's a reasonable request to get an update. I think we have not been asked by LSC staff per se. But I want to tell you that you have another oversight mechanism in place that is quite effective, and that is your OMB A-133 single audit process.

This is the audit of not only finances but of grantee compliance. You have in place a detailed audit

manual that every private auditor uses, and they have very specific questions about participation in class actions.

They require us every year to give an update of any in which we are counsel of record, and if we are, why that is permitted under the regulation. I can tell you as someone who was a litigator prior to my executive director experience, you have a pretty good idea of case that may reactivate.

It has been our practice, and I believe of most of my colleagues, to have sought outside non-LSC private or non-profit, whatever it is, substitute counsel if there was any active monitoring and the proposition of potential contempt, etcetera.

I do want to say that the rule as written applies to some cases that aren't post-'96. It really applies to something I think you referred to, which is people every day are being affected by class actions that we didn't bring before 1996, but they were -- they're simply, by definition of the class, their rights are affected.

This might be some lawsuit about consumer

credit or who knows what it is. So if they come to our office with that notice, how we read this regulation is that we can tell them what that notice is and whom they should contact. That, I think, people take a conservative view here frankly, and I want you to be assured of that by and large.

MS. CONDRAY: It seems most unlikely that Congress would not have wanted you to do that.

CHAIRMAN MEITES: That's helpful. Mattie, I think the sense of our group was we'd like that 1996 list to be updated, and if possible by our next meeting, to let us take a look at it and see if we need any more information.

MS. CONDRAY: Certainly.

CHAIRMAN MEITES: Thank you very much. I think that at the end of our last deliberation, it was our committee's view that we believe that the rule, as presently written, was adequate. I heard Mr. Andal's testimony as well as the testimony of staff and public comment.

I believe that our prior determination is appropriate, though I found Mr. Andal's remarks

appropriate.

MS. BeVIER: At the risk of putting this off one more time, having just gotten this big packet from him, I mean, I'm inclined to go the way you are, and I think it may be appropriate, and I have certainly learned a lot that persuades me that, you know, maybe he was overreading this reg.

I'm happy to take it up next time, and I hope that's not too late. I just want to make sure I really know what happened and what kinds of questions we need to be asking, in terms of staff in the future.

CHAIRMAN MEITES: Why don't we continue this discussion -- we'll just continue this discussion until our next meeting.

MS. BeVIER: Certainly.

CONSIDER AND ACT ON NOTICE OF PROPOSED RULEMAKING ON FINANCIAL ELIGIBILITY, 45 CFR PART 1611

CHAIRMAN MEITES: Thank you very much. Okay, our next agenda item is Rule 1611. As we know, we have discussed 1611 at several of our meetings, and I for one naively thought we were finished with 1611. After

all, we had done the retainer issue and we'd done the group issue.

Imagine my surprise when I opened my materials and saw pages and pages of red ink, indicating that we were rewriting the entire foundation of the Western world.

MS. BeVIER: Remember how short the constitution is.

CHAIRMAN MEITES: Exactly. My sense is that it would be very helpful if Mattie you could walk us through the rest of the changes. Not retainers, not group representation.

We only have an hour left this afternoon. We have lots tomorrow. I do not believe we will finish today, but at least we'll make a good start.

I think the place I'd like you to start is with some of the history, because as I read the materials that were provided us, it looks like all or virtually all of what I'll call the new materials, the materials our committee hasn't covered, were in fact discussed extensively in the 2002 review. So why don't you give us some history of this, if you would?

MS. CONDRAY: Sure.

CHAIRMAN MEITES: Maybe we'll take a one second break while we get some -- coffee break, yet.

MS. CONDRAY: Absolutely.

(A brief recess was taken.)

CHAIRMAN MEITES: We have a lot on our plate this afternoon. What we really -- I'm afraid we kind of squeezed you on time. We're only going to give you about 20 minutes this afternoon on 1611, and then we're going to start talking about the reorganization.

So why don't you give us as much background as you can?

MS. CONDRAY: Okay, and I'll try to be complete and curb my New Yorker tendencies to try to talk too fast to get this in.

CHAIRMAN MEITES: No, but we're not going to finish this time. We're going to pick this up again in February. So get as much as you can done in 20 minutes, and we'll just pick up wherever you left off.

MS. CONDRAY: Well, ask me to start with the history, so that's what I'll do. The current version of the regulation was last amended in 1983. So the

current version of the regulation has been in place since 1983. I will say from my perspective of someone working in the Office of Legal Affairs, it is a regulation that every year generates a number of requests for opinions, because the regulation is not particularly well-written.

There are aspects about the regulation, even without any substantive change. The regulation is in need of reorganization, and language and cleaning up. Then there are substantive issues.

There was a rulemaking undertaken in 1995, purporting to -- looking to do something similar to this, a significant overhaul of the regulation. A notice of proposed rulemaking was published in 1995, but then with the advent of the '96 restrictions and the need to engage in the rulemaking that was necessary to implement those restrictions, the 1995 rulemaking kind of just fell by the wayside. It was never completed.

Back in 2001, the then board of directors initiated the current rulemaking that's still gong on now, and it initiated it as a negotiated rulemaking. A

negotiated rulemaking, in case anybody isn't familiar, is convened with representatives of the organization, as well as representatives of the interested community. In our case, we had individual grantees on the working group.

We had representatives of the ABA and NLADA and CLASP on the working group as interests in addition to the individual grantees, and we had representatives of the Office of Compliance Enforcement, the Office of Legal Affairs, and a liaison from the Office of the Inspector General.

We convened three times under -- with the assistance of an outside contracted facilitator, and developed a notice of proposed rulemaking. Again, that notice of proposed rulemaking did two main things. One, it significantly proposed to reorganize the regulation, to make it clearer to understand and easier to use.

It was the belief of the working group as well as management that a better-organized, clearer regulation would be easier for our grantees to understand, easier for them to implement properly, and

would aid the Corporation in enforcing the regulation. In addition, there were some substantive areas that the Corporation and that the working group thought could be changed.

In November of 2002, the Corporation, after the approval of the board of directors, published a notice of proposed rulemaking in the Federal Register, which proposed a significant change to the regulation. The board at the time was poised to take up a final rule, based on the proposed rule at its meeting on January 31st and February 1st of 2003.

On the eve of the meeting, we received a request from Chairman Sensenbrenner of the House Judiciary Committee, asking the Corporation to hold off on any action on the regulation, given that the Corporation was poised on the verge of having a new board of directors.

The Corporation did so. The regulation kind of just sat there for a while, until your board has come on, and then with the appointment of Helaine as president, you now are taking up that open rulemaking.

CHAIRMAN MEITES: Okay. With the exception of

retainers and group representation, all the other proposed changes in 1611 were published for public comment in November 2002; is that correct?

MS. CONDRAY: That's correct. What you have in front of you -- what we're looking to do now, what the Corporation is proposing, would be basically another round of comment, because it's been two years.

CHAIRMAN MEITES: What kind of comments did the proposed rule receive the first time it was published? Again, I'm not talking about retainer or group representation.

MS. CONDRAY: The comments were all supportive. There were -- you know, we may have gotten one or two small comments on well, you could tweak this here or you can tweak that there. But by and large, they were all supportive of what we proposed.

Part of the rationale for a negotiated rulemaking is that you work out most of the issues ahead of time, so the product that was put out for comment was one that was developed in close consultation with representatives of the field. It provided a lot of very good comment about how the

regulation works in real life.

CHAIRMAN MEITES: Has anything happened from November 2002 to the present that would suggest to you if we put out for comment again you would get adverse comment. I believe that to the extent there were things that the working group didn't object to and there were slight differences of opinion and those differences of opinion reflected in the comments, I think we would -- you know, we would see that again, but I don't think we would -- leaving those two issues aside, I don't think we would see any significant difference of opinion.

CHAIRMAN MEITES: Okay. But you understand that our committee has to work our own way through all the changes.

MS. CONDRAY: Absolutely.

CHAIRMAN MEITES: All right. Maybe that's a good place to start. Why don't we just -- Mike, is that okay? Just table this today, and at our February meeting we will go through all the new red ink, every line of it, and we'll ask you and the public for their views on the proposed changes.

MS. BeVIER: This sounds like much too much fun.

CHAIRMAN MEITES: We'll have to wait until February, no matter how much fun it is, and hopefully by the end of our February meeting we will be in a position to recommend to the board a regulation, and proposed regulation to be published.

MS. CONDRAY: Published for an additional round of comment?

CHAIRMAN MEITES: Yes.

MS. CONDRAY: Okay. If that's what you want to do, that's fine.

CHAIRMAN MEITES: Thank you very much. Okay, we're ready. We're now going to go into closed session, I believe. But hold on. Stay for one minute more, because I think there's a couple of remarks we want to make before we go into closed session.

We're going to take a short break. We're going to reconvene at five to 5:00.

(Off the record.)

CHAIRMAN MEITES: All right. The next item on our agenda is a briefing by the LSC president on

proposed changes to organizational structure. This is in a closed session. I will entertain a motion to go into closed session.

M O T I O N

MS. BeVIER: So moved.

MR. McKAY: Second.

CHAIRMAN MEITES: In favor?

(Chorus of ayes.)

CHAIRMAN MEITES: All right. Thank you very much, ladies and gentlemen. We'll see you tomorrow.

(Whereupon, at 5:17 p.m., the meeting was adjourned to closed session.)

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