

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

Sunday, September 14, 2003

2:30 p.m.

The Melrose Hotel
2430 Pennsylvania Avenue, NW
Alexandria, Virginia

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chair
Lillian R. BeVier
Michael D. McKay
Frank B. Strickland, ex officio member

BOARD MEMBERS PRESENT:

Robert J. Dieter
Herbert S. Garten
David Hall
Maria Luisa Mercado
Florentino Subia

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STAFF AND PUBLIC PRESENT:

John N. Erlenborn, LSC President
Victor M. Fortuno, Vice President for Legal Affairs,
General Counsel & Corporate Secretary
Randi Youells, Vice President for Programs
Mauricio Vivero, Vice President for Government
Relations & Public Affairs
John Eidleman, Acting Vice President for Compliance
and Administration
Leonard Koczur, Acting Inspector General
Laurie Tarantowicz, Assistant Inspector General and
Legal Counsel
David Maddox, Assistant Inspector General for Resource
Management
Mattie C. Condray, Senior Assistant General Counsel
David Richardson, Treasurer and Comptroller
Danilo Cardona, Director, Office of Compliance and
Enforcement
Alice Dickerson, Director, Office of Human Resources
Patricia Hanrahan, Special Counsel to the Vice
President for Programs
Cynthia Schneider, Senior Program Counsel, Office of
Program Performance
Elizabeth Cushing, Board Liaison
Linda Perle, Senior Attorney/Legal Services, Center
for Law and Social Policy
Melville D. Miller, Executive Director, Legal
Services of New Jersey
Sarah Singleton, American Bar Association's Standing
Committee on Legal Aid and Indigent Defendants
Luis Jaramillo, Farm Worker Project Group
Richard Zorza, Zorza Associates

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P R O C E E D I N G S

1
2 CHAIRMAN MEITES: My name is Tom Meites, and I
3 am the chair of the Operations and Regulations
4 Committee. The other members, Lillian and Mike, are
5 here. And I will call our meeting to order.

6 I have asked the president if it's all right
7 if we end early. He indicated it was.

8 MR. ERLNBORN: As a matter of fact, I
9 encourage it.

10 CHAIRMAN MEITES: Right. So if we do, we do.
11 All right. The first item on our agenda is
12 set out in the meeting book. The first item is
13 approval of our agenda, and I'll ask for a motion to
14 that effect.

M O T I O N

15
16 MR. MCKAY: So move.

17 CHAIRMAN MEITES: Seconded?

18 MS. BEVIER: Second.

19 CHAIRMAN MEITES: The agenda is approved.

20 Next item is approval of the minutes of our
21 meeting on June 27, 2003, which are also in the
22 materials. Do I hear a motion to that effect?

M O T I O N

1
2 MS. BeVIER: So moved.

3 MR. McKAY: Second.

4 CHAIRMAN MEITES: And it is approved.

5 We now begin the formal agenda. Let me give
6 you a brief overview of -- we're going to start out
7 with an informational report on the responsibilities of
8 the Office of Compliance and Enforcement. We thought
9 this made sense as background to really the rest or
10 almost all the rest of our agenda, which is to review
11 outstanding and open and potential rulemakings.

12 But we thought it made sense that before we
13 started talking about rules, that we get some idea of
14 how the rules that are adopted by this board actually
15 are implemented.

16 So I'll start with the -- I ask for the staff
17 who was going to present this report to step forward
18 and begin.

19 MR. EIDLEMAN: Mr. Chairman, John Eidleman,
20 acting vice president for compliance and
21 administration. With me is Mr. Danilo Cardona, who is
22 the director of the Office of Compliance and

1 Enforcement.

2 Members of the committee, board members, thank
3 you very much for this opportunity to give you this
4 brief overview of the work of the Office of Compliance
5 and Administration (sic).

6 OCE is the office at the Corporation that
7 discharges our obligation under Section 1006 of the LSC
8 Act to ensure the compliance of recipients with the
9 provisions of the statute, regulations, congressional
10 appropriations, guidelines, and rules.

11 OCE strives to conduct compliance with a
12 system that has integrity and that all participants,
13 both LSC and recipients, are confident addresses their
14 interest in a fair way and ensures compliance.

15 OCE's current staff has existed since Congress
16 in fiscal year 2001 appropriations mandated that OCE
17 hire additional staff to conduct routine investigations
18 of LSC's recipients to account for their compliance.
19 The primary way that this review of recipients'
20 compliance is accomplished is through the case service
21 report and case management system onsite reviews known
22 as CSR/CMS reviews. I'll speak about those in a little

1 bit more detail later.

2 OCE has a number of responsibilities, and they
3 include:

4 To review, assess, and respond to public
5 complaints against LSC recipients.

6 To provide prior approval to recipients for
7 major expenditures of LSC funds under Regulation 1630.

8 To review and respond to recipient request for
9 waiver related to private attorney involvement
10 requirements, fund balances, and fund deficits under
11 Regulation 1614 and 1628.

12 To review and approve recipient sub-grant
13 agreements under 1627.

14 To review and approve recipient retainer
15 agreements and intake forms under Regulation 1611.

16 To provide follow-up activities related to
17 recipient questioned cost under Regulation 1630.

18 To provide follow-up in accordance with the
19 OMB Circular A-50 to the findings and recommendations
20 contained in the recipient's audited financial
21 statements.

22 To review recipients audited financial

1 statements to ascertain compliance with the LSC
2 accounting guide for recipients.

3 To routinely conduct investigations to account
4 for the compliance of recipients with the congressional
5 requirements, the LSC Act, regulations, instructions,
6 guidelines, and grant assurances.

7 And to provide technical assistance to LSC
8 recipients when we are on site as requested by
9 recipients or suggested by the Corporation, and to
10 conduct new executive director training requested by
11 recipients.

12 All this work is done, obviously, in
13 conjunction with our other offices, and we coordinate
14 with the Office of Program Performance when scheduling
15 our visits.

16 An important device used by OCE to carry out
17 its work is the use of onsite review process. There
18 are five types of reviews that require OCE to have a
19 presence on site. These reviews are: the CSR/CMS
20 reviews; complaint investigations; technical assistance
21 reviews; LSC regulation training and new executive
22 director training; and the A-50 follow-up reviews.

1 This fiscal year, OCE at the end of the year
2 will have conducted 40 onsite reviews. Today I'll
3 concentrate on the first type, the CSR/CMS review,
4 which is utilized by OCE to routinely assess compliance
5 with LSC regulatory requirements and congressional
6 restrictions.

7 The major objectives of this type of review
8 are to assess the following policies and procedures
9 adopted by recipients:

10 First, under 1611, the guidelines to determine
11 financial eligibility.

12 Second, retainer agreements under Part 1611.

13 Third, to assess what constitutes a case, as
14 required by 1620.

15 Fourth, eligibility of clients under 1626
16 concerning citizenship and eligible aliens.

17 Fifth, establishing priorities as required
18 under 1620.

19 Sixth, contemporaneous timekeeping records
20 that support activities for which funds are expended
21 under 1635.

22 Seventh, that the recipients are following

1 1636 by adequately identifying clients and giving a
2 statement of facts in any complaint that is filed in
3 court or in pre-complaint settlement negotiations.

4 Eighth, under 1614 concerning the private
5 attorney involvement, that the regulation is being
6 followed.

7 And ninth, for use of non-LSC funds under
8 1610.

9 This review also assesses a recipient's
10 compliance with basic client eligibility, intake, and
11 case management, regulation, and statutory requirements
12 to ensure that recipients are correctly implementing
13 the 2001 CSR handbook, and to determine the cost of any
14 significant noncompliance with any legal authorities.

15 In selecting a recipient for a CSR/CMS review,
16 the following criteria is utilized:

17 First of all, OCE reviews the self-inspection
18 reports and the general CSR statistics that we receive
19 from recipients. They also look at the length of time
20 since the last visit conducted by LSC; review any
21 serious complaints filed against the recipient; review
22 the compliance findings reported in the audit report;

1 and any congressional requests.

2 Once a recipient is selected for a visit, a
3 telephone call is placed by the -- to the executive
4 director to inform them about the visit, discuss dates
5 and the onsite review process, and to inquire if the
6 executive director has any questions or concerns.

7 A letter is sent afterwards to the recipient
8 informing them what the review would entail, the period
9 of the review, the list of documents to be provided to
10 OCE. The request is consistent with Grant Assurances 9
11 and 10 and Section 509(h).

12 Further, the recipient is informed that in
13 accordance with the LSC access to record protocol, it
14 should promptly advise OCE in writing if the recipient
15 believes that furnishing any of the requested
16 information in the specified format would violate the
17 attorney-client privilege or would otherwise be
18 protected from disclosure to LSC.

19 After the document request letter, a second
20 letter is sent by the director of OCE to the recipient
21 to follow up and confirm the dates, the size of the
22 visit, the size of the team, and setting forth the

1 agreement of the process to follow onsite in a review
2 of the documents.

3 The review generally has a scope covering two
4 years of activity and includes a visit to all the
5 branch offices and interviews with upper management,
6 middle management, and staff. A standard data
7 collection instrument is used to ensure uniformity in
8 gathering information.

9 The visit usually concludes with an exit
10 conference which discusses the preliminary findings and
11 recommendations. Often a training is also conducted at
12 the end of the visit to help programs who need
13 improvement in certain areas. A draft report is then
14 sent to the recipient, and after opportunity to
15 comment, a final report is completed and sent.

16 For the past several board meetings, I've
17 provided you with a status report on the work of OCE.
18 You'll find that report in your board book today at
19 page 65 to 73. This report covers only through
20 July 31st. August was a very productive month, in
21 which eleven final reports concerning CSR/CMS reviews
22 were issued. You'll hear a little bit more about this

1 in the president's report, and also make that
2 information available to you for your November meeting.

3 I hope that you find these reports to be
4 helpful and informative. If Mr. Cardona or I could
5 give you more information, please let us know.
6 Compliance is usually very straightforward and very
7 routine. It's not a scintillating topic. It's also
8 not a topic that usually generates a lot of interest.

9 However, it's very necessary. It's an
10 obligation to ensure appropriate, high-quality,
11 efficient, and effective legal services to clients. I
12 believe that OCE fulfills this obligation with
13 diligence and understanding of a recipient's
14 obligations to its clients.

15 I hope that in the future we'll have other
16 opportunities to present to you some of the work of OCE
17 and how that work is helpful to our recipients in their
18 representation of clients. If you have any questions,
19 I'd be happy to answer them, or perhaps Mr. Cardona can
20 answer them.

21 CHAIRMAN MEITES: Yes. I have kind of a
22 general question. What do you do that the inspector

1 general doesn't, and vice versa?

2 MR. EIDLEMAN: Danilo?

3 MR. CARDONA: Sorry?

4 MR. EIDLEMAN: What do we do that's different
5 than the inspector general?

6 MR. CARDONA: Well, the inspector general has
7 the functions of overseeing waste, fraud, and abuse.
8 He has the opportunity to investigate that. Also, the
9 inspector general was charged by the United States
10 Congress with reviewing -- with the audit policy of the
11 Corporation. And those are the basic functions of the
12 Office of the Inspector General.

13 CHAIRMAN MEITES: So you don't really have an
14 overlap in function?

15 MR. CARDONA: We may have a little overlap
16 with regards to -- if a project, for example, that the
17 inspector general carries, like, for example, the CSRs,
18 they did a project on that. We constantly do CSRs as
19 part of the mandate from Congress. And there may be
20 some overlap there. But generally speaking, there is
21 not.

22 MR. EIDLEMAN: Right. What happens very often

1 is with the A-50 audits, once the information is
2 gathered, if there's a question, it's sent over to
3 management and management must enforce the regulations.

4 MR. ERLENBORN: Mr. Chairman?

5 CHAIRMAN MEITES: Please.

6 MR. ERLENBORN: I'd like also to call the
7 board's attention to the job of OCE for teaching
8 programs, how they can be in compliance. We're not
9 waiting until -- in this regard, not waiting until they
10 got in trouble, but rather teaching them how to follow
11 the rules and regulations so that they don't get in
12 trouble.

13 CHAIRMAN MEITES: Questions? Lillian? Mike?

14 MR. MCKAY: We got sideways with Congress a
15 while ago for not being in compliance with some of
16 their restrictions. And this relates directly to the
17 funding question because funding is one of the main --
18 is probably the most significant issue we heard
19 discussed at the committee meeting this morning.

20 And so one of the better ways to continue to
21 get funding from Congress, and perhaps get more, is to
22 make sure we're in compliance particularly with the

1 restrictions that they've imposed upon us.

2 Are you both satisfied that we have enough
3 resources in your shop, in OCE, to do what needs to be
4 done?

5 MR. EIDLEMAN: Well, I guess -- let me just
6 start off, I guess all of us would say we all need more
7 resources to do our work. I think with the staff
8 Danilo has, they do a yeoman task. I've been with them
9 on a number of field trips. They work very hard. They
10 spend as little money as possible in doing their job.

11 And I think we're able to do it. But Danilo,
12 I won't speak for you. You may have another point of
13 view.

14 MR. CARDONA: Well, there is two things, two
15 parts to that question. As far as compliance with the
16 restrictions, with the regulations, there is two ways
17 of doing that. One is on an annual basis, is done
18 through the compliance supplement to the audit guide by
19 the Office of the Inspector General.

20 At the end of every fiscal year, the
21 independent public accountants of the programs have to
22 what is called a compliance checking, that every year

1 the independent public accountants conduct a compliance
2 check, it's called, which involves a review of all the
3 restrictions that Congress has imposed on our work, the
4 legal services programs.

5 That is complemented by ourselves at the
6 Office of Compliance and Enforcement when we go to
7 programs in those 40 onsite visits that we conduct in
8 every fiscal year to do our job.

9 Pretty much there is so far, as we have seen
10 based on the reports of the independent public
11 accountants through the inspector general and through
12 our visits, that there is substantial compliance with
13 the restrictions out there.

14 As far as being -- needing more staff to do
15 more work, of course we could do more work. We could
16 do more visits. But that requires more staff. The
17 visits are intensive. They have an average of five
18 working days. There's about seven or eight staff of
19 the Office of Compliance and Enforcement that goes to
20 those CSR/CMS reviews.

21 And the visits are becoming more intensive
22 because of the bigger the programs are becoming. Now

1 we have a lot of more statewide programs, more programs
2 that are 14, 15 counties. And we need to review them,
3 and so it is intensive as far as personnel is
4 concerned.

5 MR. MCKAY: If I may, Mr. Chairman, the
6 president just pointed out appropriately the
7 prophylactic effect. I mean, instead of waiting and
8 saying, I gotcha, you know, you all train --

9 MR. CARDONA: Correct.

10 MR. MCKAY: -- folks on how to be in
11 compliance rather than just coming around and trying to
12 catch people not to be in compliance. And I applaud
13 that. I think that's wonderful, and it creates a
14 synergy with our recipients.

15 Do you do that at the time you conduct these
16 audits, or are they done separately?

17 MR. CARDONA: We do them in various ways.
18 Sometimes at the end of a CSR -- at the end of a visit,
19 a program will say -- when we give them an exit
20 conference and we told them, you know, the state of
21 affairs in their programs, they come to us and say,
22 would you come back, and I will have a program-wide

1 staff meeting here in which I want your personnel to
2 come and give us a training and an orientation of how
3 to comply better with the regulations. So we will
4 return within two weeks, within three weeks, within a
5 month, usually no more than three months.

6 Also, sometimes if the program doesn't need
7 that much of a training, we will reserve Friday of the
8 last day of the visit and we will take one or two staff
9 members from the overall visit and give a training for,
10 you know five, six hours before they catch a plane.

11 Another vehicle that we use is to -- in order
12 to tell programs, you know, how to better comply and
13 better set up their systems of compliance with the
14 regulations is to the technical assistance reviews.

15 Those are usually four or five days. The
16 program, upon invitation, goes and opens its books and
17 its records to us and tell us what exactly they're
18 doing, and we tell them what exactly is wrong, what
19 exactly needs to be improved, and so forth.

20 We conduct also about three -- we try to
21 conduct three of those a year, three or four of those a
22 year, in conjunction with -- and then the other type of

1 visit is when -- new blood is coming to the programs
2 now.

3 You know, programs are becoming larger. They
4 are recruiting new people. Younger people is coming
5 and replacing the other people at legal services
6 programs. And some of those people have not much
7 experience in dealing with the administration and with
8 the restrictions and so forth of legal services
9 programs.

10 And when one of those new executive directors
11 come in, we usually offer -- or they will call us and
12 tell us, could you come and give me a one-day training?
13 And we do those ways.

14 We would like in the future to do more of
15 those. However, we need to balance those visits with
16 the compliance visits also because ultimately Congress
17 will ask us, you know.

18 But so far, we are very pleased with the
19 visits, and the word is spreading around. And more
20 programs are requesting them.

21 MR. EIDLEMAN: We get a number of letters from
22 programs praising the staff and the work they do for

1 the training. So I think that really garners good
2 publicity for us, and it shows that we are interested
3 in making sure programs operate properly.

4 CHAIRMAN MEITES: Other questions? Lillian?

5 MS. BeVIER: I'm not sure that this is the
6 right time for this question. But I was noticing in
7 the briefing book that we got some discussion of this
8 access protocol. And I wonder if you could tell us how
9 that works with respect to your office and -- yes.
10 Tell us how it works.

11 MR. EIDLEMAN: Well, as you know, there is the
12 protocol that the president put in place. And we
13 notify programs about -- it's already been sent out,
14 and we send them another notice when we set up visits
15 and ask them whether or not they have any concerns
16 about access.

17 MS. BeVIER: Right. Now, that question is one
18 that I -- is interesting. I mean, do you get -- in
19 response to that, I mean, is that sort of a leading
20 question sort of inviting them, or do you think they
21 take it as an invitation to raise issues of privilege
22 that might otherwise -- that are not appropriate or

1 that are over-claimed or something of that nature?

2 MR. EIDLEMAN: It's my impression that the
3 programs are very sensitive about this. They already
4 know about it. Reminding them may stimulate some that
5 have forgotten about it to raise the issue.

6 But we've found in most cases that there is
7 not a problem, and if there is, we're able to work it
8 out. So the system seems to be working pretty well.
9 Danilo, I don't know if you have anything to add to
10 that.

11 MR. CARDONA: There are -- ever since the
12 beginning of the mandate to go and -- since 509(h) was
13 placed in the books by Congress, there have been, you
14 know, certain programs that are sensitive to access to
15 records.

16 Fortunately, we have -- it's been six or seven
17 of those programs that we have already dealt with. The
18 overwhelming majority of programs to provide the
19 records without any compunction whatsoever. They open
20 their books. They give us what we need to do.

21 Some of the programs that at the very
22 beginning raised issues on access have legitimate

1 concerns. There is in the CSR certain categories of
2 cases -- I think it's A's, B's, and C's, brief service,
3 advice, and consultation, they're called, if you permit
4 me to get technical.

5 And those cases are -- there's been no
6 privilege notice to a third party. So understandably,
7 depending on the rules of the local jurisdiction,
8 programs are very sensitive to that.

9 But we have been able in the overwhelming
10 majority of those five or six cases to get an
11 arrangement where we were able to review the program
12 without jeopardizing our -- the Legal Services
13 Corporation rights to see those documents.

14 MR. ERLENBORN: Mr. Chairman, I'll have to
15 admit that this is sometimes called the Erlenborn
16 protocol. So guess what? I thought it was pretty
17 good. It may be better if some of the suggestions
18 could come from the board or others that were suggested
19 to us.

20 But let me say the basis of that protocol was
21 to see what the situation is before we sent the team
22 out to go to the program and find out when they get

1 there they're not going to be able to get the
2 information they need to conduct the investigation.

3 So the protocol has two principal purposes:
4 First of all, to let the program know what steps will
5 be involved so that they're not caught unawares.
6 Secondly, that if they do have a program such as what
7 is the proper way to access, in light of the rights of
8 lawyers and their clients, to have their own interest
9 protected.

10 And that has been raised several times. It
11 has caused a lot of trouble. And the protocol was
12 designed to say, okay, if this is going to happen,
13 let's find out what in your jurisdiction fits the
14 things that are involved here and the question of the
15 lawyer-client privileges.

16 It changes from one jurisdiction to another.
17 If you could give me a universal definition, I'd love
18 to see it. But there is no such thing. The GAO, by
19 the way, no longer is carrying on their investigation.
20 They did make a comment that it isn't clear in this
21 access question.

22 And I agree it isn't clear. The only way you

1 can make it clear is to find that universal definition
2 that everyone would accept. And that has never been
3 clear.

4 CHAIRMAN MEITES: Vic, do you want to address
5 this?

6 MR. FORTUNO: Yes. Just one minor point. I
7 know there was a question about whether asking grantees
8 in advance of a visit whether there was a basis for
9 resisting any request that is on the grounds of
10 privilege.

11 The reason for that -- and it wasn't intended
12 to be a leading question. I'm responsible for having
13 that language in there. I suggested it only because in
14 those few cases where there are access issues, in some
15 of those few cases there have been concerns expressed
16 by OCE, I believe, that the objection wasn't raised
17 until after they were on site.

18 And after you've made all those preparations
19 and have five, six, seven people there planning on
20 being there for a week, to suddenly then have a program
21 director say, or litigation director say, I do want to
22 provide you what you've asked for but under our canons

1 of professional responsibility I'm unable to give you
2 access to 1, 2, and 3.

3 And so we thought that it would be helpful to
4 ask them in advance, if there's going to be an
5 objection, let us know in advance so that we don't have
6 people on site. And it was just meant to be a way of
7 ensuring that if there were any of those issues lurking
8 in the background, that they would come to the fore and
9 could be resolved before we had people on the ground.
10 It was just meant to be helpful, and not to encourage
11 people to raise those kinds of objections.

12 CHAIRMAN MEITES: I have two questions. You
13 sent me and I sent the members of this committee a copy
14 of a cert petition that has recently been filed by one
15 of the legal services offices in New York, or maybe two
16 of them. Does that involve the access protocol, the
17 cert petition?

18 MR. FORTUNO: Not the access protocol, but
19 access issues.

20 CHAIRMAN MEITES: Because I don't recall
21 reading in the cert petition the access protocol.

22 MR. FORTUNO: No.

1 CHAIRMAN MEITES: But the underlying -- the
2 same kind of issues that are involved in the access
3 protocol are also raised that cert petition. Is that
4 correct?

5 MR. FORTUNO: Yes. And those cases actually
6 predate the access protocol, the promulgation of the
7 access protocol.

8 CHAIRMAN MEITES: I see. Okay. Thank you.

9 Mike? Any other questions from the board?

10 MR. ERLNBORN: You will be hearing more about
11 that, I should say, in executive session tomorrow.

12 CHAIRMAN MEITES: Understood.

13 MR. ERLNBORN: I'm sorry.

14 CHAIRMAN MEITES: Mr. Chairman?

15 MR. STRICKLAND: Danilo, a while ago when you
16 were talking about substantial compliance with respect
17 to grantees in terms of restrictions or not handling
18 matters that are subject to the restrictions, can you
19 flesh that out a little bit more? In other words, is
20 it almost total compliance? When you use the word
21 "substantial," there's a little bit of maneuvering room
22 there. I was just wondering --

1 MR. CARDONA: That is correct. It's an
2 equivocating word, I think, in my own estimation,
3 Mr. Chairman. However, I can't vouch for the entire
4 field. But the programs that we have seen and the
5 audit reports that we have seen from the inspector
6 general say to me that there is no program out there,
7 for example, that is doing class actions or doing fee
8 generating cases, for that particular matter, or, you
9 know, soliciting clients, although we have complaints
10 about that.

11 MR. STRICKLAND: But based on what you've
12 seen -- and I realize you haven't examined every
13 program. But it's really beyond -- or you could fine-
14 tune your use of the word "substantial" perhaps to
15 include total compliance. Is that right? Have you
16 seen universal compliance, or is that too strong?

17 MR. CARDONA: That's too strong for my own
18 case.

19 MR. FORTUNO: Mr. Cardona knows better than to
20 speak in absolute terms.

21 MR. STRICKLAND: And I should know better than
22 to try to paint him into that corner. But I gave it a

1 shot, anyway.

2 CHAIRMAN MEITES: I think that dialogue is
3 useful, that it's hard to get a handle on a universe as
4 large as this, particularly given the number of cases
5 and the number of different programs, so that it's
6 probably asking more than we can ask to ask for a
7 hundred percent.

8 But you all are giving us the impression that
9 your reviews suggest to you there are no major
10 problems, systematic problems with evasion that you've
11 seen.

12 MR. CARDONA: With the restrictions, correct.
13 And also, in 1996 I had the unmitigated displeasure --
14 let's put it that way -- of seeing programs divest
15 themselves of all class actions, alien litigation, and
16 prisoner litigation.

17 I was the one responsible to the then-
18 president, Alexander Forger, and Congress to certify
19 that there were no class actions, prisoner litigation,
20 and illegal alien representation out there in the
21 field. And that was done on December 31, 1996.

22 Since then, we have been going to programs and

1 we have not found that type of cases in the field.

2 MR. STRICKLAND: Okay. Thank you.

3 CHAIRMAN MEITES: Thank you very much.

4 Please.

5 MR. HALL: Just one small question. On the
6 fund balances, on page 68, you have a list of
7 organizations. And I think I understand the concept of
8 a waiver for the fund balances.

9 MR. CARDONA: Correct.

10 MR. HALL: There's one program, Indiana Legal
11 Services, that have \$430,000.

12 MR. EIDLEMAN: Actually, that's a mistake.
13 That's a deficit.

14 MR. HALL: That's a deficit?

15 MR. CARDONA: Which is better.

16 MR. HALL: Okay. That's helpful.

17 MS. BeVIER: Does that answer your question?

18 MR. CARDONA: Which we have already granted
19 permission to use current LSC funds. And I have asked
20 the program to give me an explanation on how they came
21 about in the incurrence of that deficit, and they have
22 explained it to my satisfaction. And they promised

1 that they will never get into it again.

2 CHAIRMAN MEITES: All right. Please.

3 MR. DIETER: Well, there's another -- I
4 noticed one that -- Central Minnesota, on 69.

5 MR. CARDONA: Yes.

6 MR. DIETER: 137,000.

7 MR. CARDONA: That is a large fund balance,
8 too. But Program Letter 2002-7, I believe, had an
9 advance understanding between the Corporation and all
10 the field that they could accumulate a fund balance of
11 not more than 25 percent if they were going to lose
12 funds because of the loss of population in their areas.
13 And that is the one of Central Minnesota. It falls
14 within that advance understanding of the Corporation.

15 MR. DIETER: I had another -- two more
16 questions, I guess.

17 CHAIRMAN MEITES: Speak up a little bit,
18 Robert.

19 MR. DIETER: I have here page 71, but I don't
20 see it. There is a private attorney involvement and
21 note about \$92,000 to the North Penn Legal Services.
22 And I was wondering, you know, how that accumulates

1 and -- for the private attorney involvement portion of
2 the grant.

3 MR. CARDONA: Well, I do not at this point --
4 I will forward you and to the committee a full written
5 answer. But PI deficits, it means that the program
6 could not spend the full 12-1/2 percent in PI
7 involvement.

8 MR. DIETER: But this was from fiscal year
9 2002.

10 MR. CARDONA: Correct. Because those are the
11 audited financial statements that we are reviewing now.
12 They come at the end of the year. And I think this
13 program may have a calendar year for 2003.

14 MR. EIDLEMAN: Pennsylvania has a calendar
15 year.

16 MR. CARDONA: Pennsylvania has a calendar
17 year.

18 MR. EIDLEMAN: Not fiscal year.

19 MR. CARDONA: So those audit reports will not
20 come in to us until April of 2003, and then we start
21 reviewing them. But I will tell you the reasons why I
22 couldn't expend that money. Totally the 12-1/2

1 percent.

2 CHAIRMAN MEITES: If you would address a
3 letter to me with the explanation, I'll make sure Rob
4 gets a copy of it.

5 MR. CARDONA: Sure. That's no problem.

6 MR. DIETER: I had one other point. On the
7 intake forms and the retainer forms that, you know, are
8 noted on the chart, how much, you know, variation is
9 there between programs, and are you looking at these so
10 that they provide basic information that might, you
11 know, facilitate the outcome performance analysis and
12 that sort of thing?

13 I mean, is there -- I can understand why you
14 might have some variation in terms of certain data
15 you're collecting from people on an intake form.

16 But --

17 MR. CARDONA: We do not get that many intake
18 forms for review from programs. What we do get a lot
19 is retainer agreements.

20 MR. DIETER: Okay.

21 MR. CARDONA: And basically, our review of --
22 when we review a form, we give them advice on how it

1 would be better depending. We get in touch with them
2 and talk to them about their intake forms. And
3 generally speaking, we approve them. They're pretty
4 much okay.

5 With the retainer agreements, what we're
6 looking for in there is mainly that they're not
7 requesting putting the clause in there that they will
8 request attorney's fees because that's prohibited.
9 Some of them do, and we ask them if they could review
10 the form and eliminate the offending clause.

11 MR. DIETER: But is there that much variety
12 between the retainer agreements?

13 MR. CARDONA: Not that many, no. Some of them
14 are more thorough. Some of them are more succinct.
15 But the Regulation 1608 is very clear about what is
16 required. And basically, it is the substance of the
17 agreement: What is it that the client came in for and
18 what are we committing ourselves to do? That's
19 basically what the regulation requires in our retainer
20 agreement.

21 Some programs write two, three pages of it,
22 very specialized. But there's nothing wrong with it.

1 MR. DIETER: Right. I was just wondering if
2 there wasn't -- you know, is it more efficient to have
3 a standard retainer agreement and then ask a program to
4 have a waiver?

5 MR. CARDONA: It could very well be that it
6 may be more efficient on the Corporation at a certain
7 point -- and Victor can help me here. Back in the
8 1990s, early 1990s, it was moving towards a standard
9 retainer agreement.

10 I wasn't involved in there in anything. I
11 didn't have any managerial positions then. But I was
12 going in and out, reviewing programs. And it was a lot
13 of talk about that.

14 Recently, there hasn't been any. We haven't
15 proposed any. We have let the programs propose
16 whatever retainer agreement they think it is necessary
17 and fits their circumstances. And we just follow them
18 in accordance with 1611.8 in the restrictions. We go
19 ahead with it.

20 MR. FORTUNO: I think that the idea of a
21 standardized agreement, retainer agreement, is
22 certainly something worth discussing and quite possibly

1 something worth doing. I think the issue right now,
2 however, is with respect to 1611, client eligibility.
3 I think you may hear in just a few minutes that one of
4 the sub-issues is whether to require a retainer
5 agreement.

6 I know that when the revisions to the
7 currently open -- when revisions were considered to
8 1611, revisions which have not yet been acted on but
9 remain open, those revisions, one of the discussions
10 was about whether to require retainer agreements or
11 not.

12 I believe that there was some concern in the
13 field about the Corporation actually requiring those.
14 I think staff recommended that we require retainer
15 agreements, and I think that the board decided that on
16 balance, while they're a good thing, there was no basis
17 for actually imposing a requirement.

18 And so the draft that was last acted on by the
19 board actually takes the requirement out. That was a
20 policy determination by the board and not yet acted on,
21 and it's something that will be before you shortly.
22 But the question of whether or not to require a

1 retainer agreement will have to be addressed first.
2 And then if the decision is to in fact require a
3 retainer agreement, then you can turn to should it be
4 standardized.

5 CHAIRMAN MEITES: If there are no other
6 questions from the board, then thank you very much,
7 gentlemen. Oh, I'm sorry.

8 MR. GARTEN: I just have one.

9 CHAIRMAN MEITES: Herb?

10 MR. GARTEN: I think there are variations in
11 retainer agreements state by state. So this may be a
12 reason for a variation from state to state.

13 MR. FORTUNO: Well, I think that the current
14 approach is to set forth basic requirements that must
15 be included, and then the agreement can be adjusted to
16 conform to state law so that at least the essential
17 elements are in there, as opposed to just having a
18 standard that will cover every jurisdiction. Because I
19 think that was the concern when it was first discussed,
20 was that there are variations jurisdiction to
21 jurisdiction.

22 CHAIRMAN MEITES: Good. If there are no other

1 questions, thank you very much, and we'll continue with
2 the agenda.

3 All right. The next agenda item is an
4 overview of rulemakings. I've asked the staff to
5 report not just to our committee but to the board as a
6 whole on where our predecessors left us, what we are
7 left by our predecessors, as far as open rulemaking,
8 potential new rulemakings, the staff's thoughts on the
9 priorities for rulemaking, and a timeline for both open
10 and proposed rulemaking.

11 Let's start with what the staff has identified
12 as the three open rulemakings. Those are proposed
13 regulations with regard to 1604, which is outside
14 practice of law; 1611, which is financial eligibility;
15 and 1626, alien eligibility.

16 I'll ask the staff to first give at least some
17 history of how it came to be these -- that there are
18 open rulemakings in these three areas, and then to go
19 through and give us a status of each of these three
20 rulemakings, and then tell us what the issues are that
21 are either still open or are -- they believe consensus
22 has not been achieved.

1 So with that, I'll turn it over to the staff.

2 MR. FORTUNO: If I may, Mr. Chairman, the
3 point person at LSC on rulemaking, that is, our
4 rulemaking specialist, is Mattie Condray. And since
5 she was the one principally involved in the rulemakings
6 that will be discussed this afternoon, I thought it
7 would be helpful to have her here with us. And rather
8 than hear it from me, I thought to hear it directly
9 from the -- strike that -- from the source's mouth.

10 CHAIRMAN MEITES: Good.

11 MR. FORTUNO: So Mattie is here to join us and
12 happy to address that. I'm here to address them as
13 well. But if I may, I'll turn it over to Mattie and
14 let her take it from here.

15 CHAIRMAN MEITES: Fine. Thank you.

16 MS. CONDRAY: Thank you, Vic. I'll start with
17 a very brief summary on where things stand. There's
18 more detailed information that was sent to the
19 committee in the briefing books over the summer.
20 Obviously, if you have any questions, interrupt me.
21 And I'll be happy to answer additional questions also
22 as we go along. I hope everyone can hear me. As Maria

1 Luisa can attest to, volume is not usually an issue for
2 me.

3 So I'll start with 1604, outside practice of
4 law. The current version of this regulation dates to
5 1976. The Corporation has not revisited -- well, has
6 not changed this rulemaking, this rule, since 1976. It
7 implements statutory restrictions in the LSC Act on the
8 outside practice of law by full-time LSC program
9 attorneys.

10 There were major revisions proposed in 1995,
11 but no action was taken on this rulemaking. And I'm
12 going to end up saying the same thing about 1611.
13 There was some action in 1995 on a number of
14 rulemakings which because of the flurry of rulemaking
15 activity required by the imposition of the
16 congressional restrictions in '96, a number of the
17 prior existing rulemakings just -- there was no final
18 action on them. They were either withdrawn or there
19 was no action taken at all.

20 So in the board picking this issue back up
21 kind of after the issuance of the rulemaking review,
22 regulations review task force, which I'll also talk a

1 little bit about, this was one of the items that was on
2 that high priority list identified as, you know,
3 suitable for action because there had already been an
4 interest in this rulemaking. We had a product that was
5 out there that we had gotten some comment-on. So the
6 board directed the staff to republish the 1995
7 rulemaking as it was.

8 We published a notice of proposed rulemaking
9 in September of 2002. We received comments on that
10 rulemaking, and a draft final rule was presented to the
11 committee in January of 2003. At the same time that
12 the draft rule was presented to the committee, we
13 received a letter from Chairman Sensenbrenner of the
14 House Judiciary Committee requesting that the
15 Corporation withhold action on open rulemakings,
16 partially in deference to the soon-to-be-awaited
17 appointment of a new board, but also expressing concern
18 about one particular provision.

19 In the 1995 -- the original 1995 NPRM, there
20 had been a provision that would have allowed for an
21 attorney doing certain permissible outside practice of
22 law work to be compensated provided that the

1 compensation was turned -- the attorney's fees were
2 turned over to the program.

3 In 1995, this would have been completely
4 legal. However, with the imposition of the attorney's
5 fees restriction in 1996, that particular provision was
6 no longer consistent with the regulation, with the
7 other regulations and the statutory requirements.

8 Because we'd been directed to simply republish
9 the NPRM, what we did was in the preamble to that
10 republished notice, we referenced this, saying this was
11 originally published this way. We have significant
12 concerns that this is no longer legal. But in the
13 interest of generating comment on this, we are keeping
14 it in the proposal with the knowledge that this will
15 get fixed up when we go to the final rule stage.

16 I think the chairman of the committee in his
17 letter obviously had not seen the draft of the final
18 rule that was presented to the committee in which
19 this issue was fixed. So I would say that with respect
20 to 1604, there really are no major controversial issues
21 outstanding. I think I can -- that's about all I need
22 to say unless anybody has any questions about 1604.

1 CHAIRMAN MEITES: I have a kind of basic
2 question. This rule has been published. Comments have
3 been received. It is now up to this committee, should
4 it choose, to determine that -- to recommend to the
5 full board that this rule be approved or no more time
6 be spent on it.

7 Can we recommend that it be approved with
8 changes, or does it have to go through the public
9 notice process again?

10 MS. CONDRAY: Generally, no. You could direct
11 us to do changes. The Corporation is not subject to
12 the Administrative Procedures Act, which governs
13 typical agency rulemaking. We are governed by some
14 provisions in the LSC Act about notice and comment,
15 very, very basic provisions, and we have a rulemaking
16 protocol, a revised version of which was adopted by the
17 board in November of 2002.

18 I would think that borrowing principles of
19 general administrative law, if the changes were things
20 that were within the scope of the original rulemaking,
21 that would be fine to move ahead with them. If the
22 committee wanted to recommend significant changes that

1 were outside the scope of the original rulemaking for
2 some reason, that might be something that would best be
3 done. Even if we could just move ahead and adopt a
4 final rule, that might best be done by soliciting
5 additional comment.

6 CHAIRMAN MEITES: Okay. Now, let me move on
7 to the same question at the board. Let's assume that
8 this committee recommends the board approve the rule in
9 its present form. If the board, at the time it
10 considers that recommendations, decides to make a
11 change, can the board adopt the regulation with that
12 change, or must it give notice and so on?

13 MS. CONDRAY: I would say it would be the
14 exact same answer, that it would be -- the board has
15 the responsibility for doing the rulemaking. The board
16 can adopt changes. If it was a significant enough
17 change about -- over and above what had already been
18 noticed and discussed, even if the board could do it,
19 it would probably be prudent for the board to request
20 additional comment if there's, you know, a major issue
21 that we hadn't come up with, you know.

22 And that would be very fact-specific, looking

1 back on what was proposed and what was the range of
2 comments, whether it was in the original scope or not.
3 But generally it is the board's discretion.

4 CHAIRMAN MEITES: Mike?

5 MR. MCKAY: You just answered it. You said it
6 was prudent. And I was just trying to figure out,
7 based on the research you gave us -- which, by the way,
8 the binder you gave us in July was very helpful -- but
9 it probably is prudent. But I was just trying to
10 listen to your answer as to whether or not it was
11 legally required. But you say it's discretionary.

12 MS. CONDRAY: Yes. I mean, that's the best
13 answer I can give you outside of a fact-specific, you
14 know --

15 MR. MCKAY: Sure. But you're not pointing
16 to --

17 MS. CONDRAY: -- example.

18 MR. MCKAY: Excuse me. You're not pointing to
19 a statute or regulation that would require us to ask
20 for public comment. And by the way, I agree with you.
21 I think it would be prudent. But I'm just trying to
22 figure out what flexibility, which I think our chairman

1 was asking about in the first place -- what flexibility
2 we have in relation to the work done by the previous
3 board.

4 MS. CONDRAY: Correct. The Corporation
5 actually has a considerable amount of flexibility with
6 respect to rulemaking because we are not in fact
7 governed by the Administrative Procedures Act. This
8 is, in my humble little opinion, both a blessing and a
9 curse.

10 It gives us a great deal of discretion, which
11 can be a wonderful thing. But it also means that we
12 don't have kind of some of the safeguards built in of
13 where the -- with the Act and the law surrounding the
14 Act would tell you, this is how you should proceed, and
15 if you proceed this way you are going to be protected.

16 You know, if we got to the point where we were
17 in court arguing about the sufficiency of the
18 rulemaking and therefore whether it is in fact, you
19 know, truly in accordance with the law.

20 MR. FORTUNO: Mattie pointed out we're not
21 subject to the APA. But there is a body of law that
22 predates the APA and it sets out standards which we'd

1 be held to. And, in fact, there has been litigation
2 over the years involving rulemaking by LSC, so there is
3 some guidance.

4 And while strictly speaking there is nothing
5 that says that if the change made by the board is
6 outside the scope of the published notice and request
7 for comments, that we would have to republish for
8 comment, by publishing for comment, giving it 30 days
9 are strengthening our position in the event that there
10 should be a challenge.

11 So again, it's advisable but there's nothing
12 strictly that requires it or that says we need to do
13 it. But I think that's pretty much all we could say on
14 that.

15 MR. MCKAY: All right. Thank you.

16 CHAIRMAN MEITES: Herb?

17 MR. GARTEN: Is this a good summary, that
18 although there's no safe harbor rules, this board can
19 rely on the opinion of counsel with respect to these
20 changes?

21 MR. FORTUNO: I'm not sure if the -- I'm not
22 sure if I understand the question.

1 MR. GARTEN: Well, you tell us there are no
2 safe harbor rules that tell us in advance that what
3 we're doing can pass muster. But in the past, has the
4 board relied on opinions of house counsel with respect
5 to whether we can do certain things in connection with
6 rulemaking?

7 MS. CONDRAY: Yes.

8 MR. FORTUNO: Yes. And our opinion has been
9 with respect to undertaking something that isn't within
10 the scope of what was published for comment.
11 Consistently, our view has been that the better
12 approach is to -- while it's not required -- we would
13 never say that it's required -- that the better
14 approach is to republish that piece of it for comment
15 even if it's only a 30-day comment period.

16 It causes a slight delay, but unless there's
17 some compelling circumstance requiring that you move
18 forward without that additional piece of information,
19 that our recommendation has been to go ahead and
20 republish for comment, at least that one piece, not all
21 of their proposed revisions.

22 CHAIRMAN MEITES: Maria?

1 MS. MERCADO: Yes. I think in general -- and
2 I think that Victor can attest to this -- in general we
3 have taken the position that although there are a lot
4 of statutes and procedures which do not govern Legal
5 Services Corporation because we're not a federal agency
6 or federal entity, that we go ahead and as much as we
7 can try and live by those guidelines.

8 Because we figure we err on the side of
9 creating greater due process in whatever procedures we
10 set out to do, whether it's grantmaking, whether it's,
11 you know, doing rulemaking, that we prefer to err on
12 that side. And so even in inspector general auditing
13 standards, we still audit by the Federal Auditing
14 Standards although we're not required to under the
15 statute.

16 So we do a lot of things that bring us into
17 compliance as an open government, which is why we're
18 open sunshine and government act. And so if we sort of
19 keep in mind that we're probably less likely to have
20 litigation in the future if you are open and aboveboard
21 in doing all the process in procedure in public view,
22 and that it's not a problem.

1 CHAIRMAN MEITES: Yes. That's helpful. And I
2 kind of deflected us, but I thought it was useful for
3 the board to get some idea whether we could just gavel
4 this whole thing through and take the rest of the year
5 off. It looks like the answer is no.

6 Okay. Let's go on to 1611.

7 MS. CONDRAY: Okay. 1611 is the Corporation's
8 regulations on financial eligibility standards for
9 clients of LSC-funded legal services. The current
10 version of 1611 dates to 1983. This was another of the
11 regulations that there was a proposed major revision in
12 1995 that received no follow-up action due to the
13 implementation of restrictions.

14 The current negotiated rulemaking was begun in
15 June of 2001. There was a negotiated rulemaking
16 working group established with an outside facilitator.
17 The working group met three times. It included
18 representatives of LSC from the various offices, the
19 inspector general's office, as well as a variety of
20 folks from the field, individual programs, in addition
21 to CLASP and NLADA as organizations, and the American
22 Bar Association's Standing Committee on Legal Aid and

1 Indigent Defendants.

2 And through the work of the working group, a
3 notice of proposed rulemaking was developed and
4 presented to the committee. It was published in
5 November of 2002. The notice of proposed rulemaking
6 that was presented to the committee, the draft notice,
7 was changed in part by the committee. So what was
8 published for comment was not exactly what the working
9 group had originally brought to the committee. There
10 were a couple of issues outstanding, and I'll get to
11 those in a minute.

12 After the publication in November of 2002, we
13 received a comment in writing on the notice of proposed
14 rulemaking. A draft final rule was developed and
15 presented to the committee in January of 2003. So it's
16 in the same procedural stage as 1604. A draft final
17 rule has been drafted and presented to the committee
18 and is awaiting action, whether that action is a
19 recommendation to adopt as final, a recommendation to
20 adopt as final with changes, or a recommendation to
21 send certain issues back out for comment, or table it
22 altogether. You know, there's a panoply of options.

1 The major substantive issues that are going on
2 with this rule -- and again, this rule was also subject
3 to -- was mentioned in the Sensenbrenner letter. And
4 the two major issues that were -- I guess that
5 generated some controversy in the development of the
6 final rule were also mentioned in his letter.

7 One is the issue of retainer agreements, which
8 just got discussed a little earlier. The original
9 staff recommendation was to maintain the retainer
10 agreement requirement that's in the current rule,
11 although with some changes.

12 And I'll note to Rob one of those changes was
13 in fact to have the organization forego reviewing --
14 doing prior approval of retainer agreements because
15 nobody thought it really -- it wasn't really helping
16 that we weren't seeing a lot of retainer agreements
17 that weren't in accordance with the requirements of the
18 rule. And it was an administrative burden that we all
19 thought we could skip.

20 But a number of folks from the field, however,
21 were of the opinion that it wasn't important -- I don't
22 want to say that -- that it wasn't required by statute

1 for the Corporation to have a retainer agreement
2 requirement, that while retainer agreements are very,
3 you know, widely used and a good idea, that the
4 Corporation did not have to require administratively
5 the gathering and the retention of retainer agreements.

6 The committee and the board at the time agreed
7 with this requirement -- I mean, agreed with this
8 position and directed staff to take the retainer
9 agreement requirement out of 1611 entirely.

10 So the notice that was published for comment
11 had the -- proposed the removal of the retainer
12 agreement requirement, and the draft final notice that
13 went back to the committee in January similarly did not
14 contain a retainer agreement requirement. I believe
15 the Sensenbrenner letter expressed some concern about
16 that particular action, taking the retainer agreement
17 requirement out.

18 The other major substantive issue had to do
19 with group representation. This was an interesting
20 issue because we had a three-way disagreement. The
21 Corporation did not want to include some changes to the
22 group representation requirements that the field was

1 interested in.

2 The board again, agreeing with the field on
3 this issue, directed us to put those in, specifically
4 permitting the representation of organizations who,
5 while not made up of persons who are financially
6 eligible, are working on behalf of persons who are
7 financially eligible, so a nonprofit organization that
8 may not have any financially eligible persons on its
9 board but who provide services and work in advocacy for
10 the eligible client base. So that proposal was then
11 added in there.

12 So that was an area of disagreement, plus
13 there was an area of disagreement between Corporation
14 management and the Office of the Inspector General
15 regarding the documentation and verification of group
16 clients, the Office of the Inspector General believing
17 that what was proposed was not sufficient to permit
18 adequate compliance and enforcement, and the
19 Corporation management believing what was proposed was
20 in accordance with the statute and sufficient. That's
21 a very, very quick gravamen of the complaint without
22 taking up the entire remainder of the three hours on

1 it.

2 So unless anybody has any questions about
3 1611, I would --

4 MS. BeVIER: I just have one question, Mattie,
5 and that is just in terms of -- I'm trying to get a
6 handle on what these disagreements are about. And what
7 I don't have a sense of is what the substantive
8 arguments are from the field that retainer agreements
9 should not be required. Why are they -- why do they
10 dislike this requirement?

11 MS. CONDRAY: Well, I don't wish to
12 necessarily speak for the field. There are
13 representatives here who can do that. But my
14 understanding of the positions and what is reflected,
15 in fact, in the draft NPRM because it was the position
16 of the board was that 1611 is a financial eligibility
17 regulation.

18 Whether or not there are retainer agreements
19 doesn't really speak to the issue of financial
20 eligibility, and that the Corporation requiring
21 retainer agreements was an unnecessary administrative
22 burden. You know, and if we have a requirement, then

1 somebody is going to go out and enforce it.

2 And the programs know when they need to cover
3 themselves by having retainer agreements, that their
4 professional responsibility requirements, to the extent
5 that their professional responsibility requirements
6 require retainer agreements in certain situations, that
7 that should be sufficient, and that the Corporation
8 does not need to add another layer to that and possibly
9 require retainer agreements in situations that might
10 not otherwise require them or that would lead to
11 administrative compliance and enforcement issues
12 related to the execution of retainer agreements.

13 If I have not sufficiently expressed that, I'm
14 sure Linda will do so.

15 CHAIRMAN MEITES: Well, we've kind of planned
16 not to go into the proposed --

17 MS. BeVIER: Oh, I'm sorry. I apologize.

18 CHAIRMAN MEITES: No, no, no. Lillian's
19 question is exactly -- as a practitioner, you know, I
20 expect retainer agreements. So there must be more here
21 than meets the eye, and we'll save it for another day,
22 if that's okay. It's a -- because it's

1 counter-intuitive not to expect retainer agreements.
2 I'm sure there are reasons on all sides. But I think
3 what we should note here is that unlike 1604, where
4 apparently the questions have been solved, including
5 the congressman's questions, if I understood your
6 remarks --

7 MS. CONDRAV: I think that's correct.

8 CHAIRMAN MEITES: -- 1611 there still are very
9 much open questions that have not been resolved between
10 the various stakeholders involved in this process.

11 MS. CONDRAV: I believe that would be a fair
12 characterization.

13 CHAIRMAN MEITES: Okay. So the third
14 regulation, then, if we can move on to it, is 1626.
15 Why don't you give us the same kind of report on 1626.

16 MS. CONDRAV: Sure. 1626 is -- the current
17 title is restrictions on legal assistance to aliens.
18 It's basically the citizenship and alien eligibility,
19 you know, counterpart to 1611. It's again an
20 eligibility test. Are you a citizen? Are you one of
21 the categories of eligible aliens?

22 The current version of this rule dates to

1 1997, so obviously it was amended a lot more recently
2 than the other rules. But notwithstanding that, it was
3 felt that there were still areas, especially as we've
4 been working the last few years with the restrictions
5 in place, where the rule could be clarified and tweaked
6 and massaged.

7 So again, a negotiated rulemaking working
8 group was initiated in January of 2001. The working
9 group met three times and achieved consensus on a
10 variety of proposed changes to the rule. A couple of
11 examples would be implementing some additional
12 statutory authority regarding the trafficking --
13 Victims of Trafficking Act -- I know there's a longer
14 title than that and it's not coming to me -- and what
15 to do if there's cases of lost and stolen
16 documentation, kind of very ministerial sorts of
17 issues.

18 The group, however, failed to achieve
19 consensus on several important issues. So the working
20 group was not yet at a point to even finalize a draft
21 of a notice of proposed rulemaking. So the previous
22 committee has not yet seen -- never saw a draft notice

1 of proposed rulemaking.

2 The committee instead was presented with a
3 briefing memo in January of 2003 which outlined the
4 areas of disagreement, where staff was essentially
5 requesting direction from the committee on working
6 towards resolving the issues of disagreement.

7 Very, very briefly, the main issues of
8 disagreement had to do with what is required to verify
9 eligibility; the scope of the exceptions to the
10 verification requirements,; what eligibility -- citizen
11 and eligibility standards apply, if any, to groups of
12 clients and group clients; and finally, the eligibility
13 of H-2B workers who are non-farm, unskilled worker
14 aliens. There's specific statutory authority for the
15 representation of what are considered H-2A aliens.

16 It's a different farmworker class. It was
17 mentioned -- it was brought up in the committee that
18 through agreements entered into as a result of NAFTA,
19 that their statutory authority to require that -- the
20 eligibility of H-2B workers, a position with which the
21 Corporation disagreed.

22 So those are the specific rulemaking issues

1 with that. I guess the working group is still -- and
2 the staff, I would say, are still awaiting guidance on
3 how to proceed.

4 CHAIRMAN MEITES: Let me ask you this. This
5 negotiated rulemaking working group, it sounds to me it
6 didn't finish the work, or stated another way, that if
7 it had worked longer, it may have gotten closer to
8 consensus at least on some of these issues you raised.
9 Is that your sense?

10 MS. CONDRAY: Possibly. Possibly. You know,
11 it was a confluence of limited funds for keeping the
12 working group meeting and keeping the outside
13 facilitator on; also, running up against the
14 Sensenbrenner letter.

15 Although the Sensenbrenner letter did not
16 specifically address 1626 because there had been
17 nothing published on it, it was still on a piece of the
18 committee not necessarily moving forward with very
19 specific guidance.

20 The committee -- at the January meeting, the
21 committee had agreed to review the briefing memo that
22 was provided to them and provide some comments back to

1 staff. Some of that happened -- you know, it kind of
2 just got caught in timing, I think, a lot of it.

3 CHAIRMAN MEITES: But is it your sense that an
4 option for our committee is to ask you and this working
5 group to continue working? It still -- the working
6 group still exists?

7 MS. CONDRAV: The working group still exists.
8 Yes. The committee could do that. We could -- staff,
9 of course, could go ahead and develop a draft notice of
10 proposed rulemaking that would -- under the rules of
11 the committee would end up having the staff's
12 recommendation in -- well, to the extent that there
13 would still be areas of non-consensus, what the working
14 group ground rules were is that the notice of proposed
15 rulemaking that would be presented to the committee
16 would end up having what staff proposes as the text,
17 but we would have a significant discussion in the
18 preamble of the fact that those areas do not in fact
19 referral the consensus of the committee and would
20 contain a discussion of what those people who chose not
21 to come to consensus, what they would have preferred.

22 CHAIRMAN MEITES: But you said that in fact

1 the last time this committee considered it, rather than
2 spending more time at the working group level, you
3 would come to this committee and ask for some guidance.

4 MS. CONDRAV: Correct.

5 CHAIRMAN MEITES: That's another course we
6 could take, is to actually stop talking at this level
7 of generality and actually weigh substance and do some
8 hard work. So we could do that as well.

9 MS. CONDRAV: Yes, you could.

10 CHAIRMAN MEITES: Okay. Let me open it to
11 questions about this third rule. All right. I think
12 it helps to give an overview of the three that either
13 have been published or are getting close.

14 I also -- the next items on the agenda are
15 potential new rulemakings and then priority -- at least
16 the staff's view on the priority among either new
17 rulemakings or the open rulemakings. Let me ask you to
18 combine (b) and (c) together.

19 MS. CONDRAV: Absolutely.

20 CHAIRMAN MEITES: Go ahead.

21 MS. CONDRAV: Also, if I may, there's one
22 other issue with respect to 1626 I would like to raise.

1 There's an appendix to the current regulation. The
2 appendix to the current regulation of 1626 is basically
3 just a listing of which documents may -- a program may
4 use to verify eligibility.

5 That list is woefully out of date. And it is
6 doing neither the Corporation nor the field any good to
7 have this out-of-date list. As part of the working
8 group effort, a revised, up-to-date, and correct list
9 has been developed.

10 Because we had the sense that it was just
11 going to go along with the entire revision of the rule,
12 it's been kind of just -- the revised appendix has just
13 been kind of sitting in limbo. But given the fact that
14 the rulemaking is taking as long as it has and that
15 it's certainly not going to be resolved today, the
16 folks from the field have asked us, and Victor and I
17 agree, that it would be a good idea to go ahead and
18 publish just the revised index.

19 It would have no bearing on any of the
20 substance of the rules. All it would do was give
21 actually up-to-date, correct guidance to the folks in
22 the field about how to comply with the current rule as

1 it currently stands.

2 Typically, with appendices like this, they are
3 just published directly through the Corporation without
4 the specific approval of the committee or the board.

5 1611 has an appendix that is republished every year on
6 what the financial guidelines, poverty guidelines, are.

7 But given that this is a new committee and
8 there's issues around this, we didn't want to just
9 forge ahead with that without at least raising it and
10 letting anybody who had questions about it do that.
11 But I would say that we would recommend moving forward
12 with that particular small piece even while the rest of
13 the rulemaking is in whatever status it's in.

14 CHAIRMAN MEITES: Understood. We'll bracket
15 that appendix, then, as a different issue.

16 But putting the appendix aside, if you'd go on
17 to the next -- agenda (b), (c), and (d), potential new
18 rulemakings, your sense of priority among the open
19 rulemakings and some new ones, and an idea of a
20 timeline that you would suggest to the committee on the
21 board for proceeding.

22 MS. CONDRAV: There was a regulations review

1 task force, which was a staff task force effort, which
2 got work going in October of 2002 to conduct a review
3 of appropriations regulations from top to bottom to
4 assist the committee with the development of a
5 regulatory agenda.

6 The task force included staff from offices
7 throughout the Corporation and the Office of the
8 Inspector General. The task force developed a report
9 which was then published for comment, plus there were
10 individual meetings held, in-person meetings held, with
11 some field representatives to discuss the issues in
12 there.

13 On the basis of the comments we received from
14 the field, we made some revisions. In fact, the staff
15 made some revisions to its own report. And a final
16 report of the regulations review task force was
17 presented to and accepted by the committee and the
18 board in January of 2002.

19 The final report identified six high-priority
20 items for action. Work on one of those items, 1602,
21 the Corporation's Freedom of Information Act
22 regulations, has been completed.

1 I will say that 1611 and 1626 were not
2 identified on the high-priority list because they were
3 already in progress. So obviously, those are high-
4 priority items, but we were already working on them.

5 Work on one of the other high-priority items
6 is in progress, and that's 1604, as we discussed
7 earlier.

8 The remaining items on the high-priority list
9 were regulations 1606, 1618, and 1623. These are
10 regulations on suspension of funding, termination of
11 funding, and enforcement of the Corporation's laws,
12 regulations, grant assurances, and standards.

13 The basic -- I guess the shorthand that you'll
14 hear used for this is a lesser sanctions rule. The
15 Corporation has a rather blunt tool at its disposal,
16 which is the suspension or termination of funding
17 altogether. As you can imagine, that's a big club, and
18 so everybody wants to wield it very carefully.

19 Over the years, there have been times where
20 the Corporation has wanted some more precision tools to
21 be able to impose lesser sanctions. But there has been
22 a reluctance to forge ahead with the inherent authority

1 that the Corporation has to do that without some sort
2 of standards about what sort of lesser sanctions would
3 apply in what due process. So --

4 MR. FORTUNO: If I may, just on that, a point
5 about which you should be aware is that when we're
6 talking about termination of funding, the regulation
7 that governs that defines a termination as a reduction
8 in whole or in part in a grant during the term of a
9 grant -- during the grant term.

10 So many people might think that, well, the
11 termination is -- you're reducing -- you're eliminating
12 the grant altogether. You're going to provide no more
13 funding. And, of course, there are very significant
14 due process procedures that kick into play.

15 However, the reg defines termination in such a
16 way that any reduction in funding is considered a
17 termination so it kicks in the full panoply of
18 protections.

19 So I think that's why there is discussion
20 about the need for the ability to impose some lesser
21 sanctions, so that if what's going to be done is not as
22 drastic as a complete elimination of funding but maybe

1 a reduction of funding, that maybe the process that's
2 accorded that is somehow ratcheted down to correspond
3 to the severity of the action being proposed.

4 CHAIRMAN MEITES: Before you go on, Mattie,
5 the lesser sanction issue involves 1606, 1618, and
6 1623?

7 MS. CONDRAY: Yes.

8 CHAIRMAN MEITES: All three of those
9 regulations?

10 MS. CONDRAY: Yes.

11 CHAIRMAN MEITES: I now count five that you've
12 discussed. You said there was a top six. There's
13 another high-priority item, or did I count it wrong?

14 MS. CONDRAY: Well, the task force considered
15 that as one issue.

16 CHAIRMAN MEITES: Oh, okay.

17 MS. CONDRAY: So although three specific
18 regulations were implicated, that was considered one
19 issue.

20 CHAIRMAN MEITES: So you've given us three
21 issues so far of the six?

22 MS. CONDRAY: Correct.

1 CHAIRMAN MEITES: Go ahead, please.

2 MS. CONDRAY: And I will note, although I'm
3 sure you'll hear this in public comment, this was
4 one -- although this was the Corporation's highest
5 priority issue, that was not a universally agreed-upon
6 position.

7 The other high-priority issues were: client
8 grievance procedures at Part 1621; Part 1624, which is
9 the Corporation's implementation of section 504 of the
10 Rehabilitation Act prohibiting discrimination on the
11 basis of handicap; and 1607, the Corporation's
12 regulations on governing bodies.

13 I think the Corporation, in coming up with the
14 high-priority list that was -- and the specific
15 prioritization order that was in the regulations review
16 task force, the task force was trying to balance off
17 kind of the big ones and some littler ones that were
18 all high priority, but not kind of front-loading all
19 the big ones right at once, although you'll notice that
20 1604 was actually originally at the bottom of the
21 high-priority list, but the committee and the board had
22 chosen to move that up.

1 There was also some discussion at the last
2 meeting where this came up that 1607 should be given a
3 certain amount of priority after the diversity
4 conference that the Corporation held because that was
5 identified -- the diversity of governing bodies was
6 identified at the diversity conference as an issue. So
7 since, you know, that had made the high-priority list,
8 that was talked about.

9 The 1624 was originally kind of put in the
10 middle of the priority list, not because the
11 Corporation thought it wasn't a high-priority item but
12 that was a fairly -- it's a fairly big item to figure
13 out how to implement -- how to revise that, given that
14 there's the Americans with Disabilities Act out there.
15 1624 was written before that, and it just exists in a
16 vacuum. And we were trying to kind of balance off the
17 kind of big -- the big and the small.

18 And then, of course, the first one I
19 mentioned, which -- the task force was of the opinion
20 that that was the single biggest regulatory issue that
21 we found of importance. But we acknowledge that it's
22 going to be a big undertaking. And given that the

1 Corporation was already engaged in two major negotiated
2 rulemakings, that was not the time to undertake another
3 huge piece of work.

4 CHAIRMAN MEITES: You're referring to the
5 lesser sanction rule?

6 MS. CONDRAY: Yes.

7 CHAIRMAN MEITES: All right. That has given
8 us a lot of choices. We could steer towards the rocks
9 of lesser sanctions, or we could stay in the safe
10 harbor of the Rehabilitation Act. That's terrific.

11 But let's move on to where the staff is on how
12 we should allocate our time and the board's resources
13 in the coming months and years.

14 MS. CONDRAY: Okay. I will also note that
15 there were other -- nine additional items, and those
16 are in the task force report, which were identified as
17 items which the staff thought merited some -- another
18 look and some rulemaking thought, which were at the
19 time considered lower priority. So you can put even
20 more on your plate.

21 CHAIRMAN MEITES: All right.

22 MS. CONDRAY: And in the spirit of full

1 disclosure, I should at least address the idea that
2 there are issues that aren't in our current regulations
3 that perhaps merit rulemaking. In the discussions that
4 the committee and the board had about 1611 and 1626, an
5 issue had come up within the working group of whether
6 to put an access to records provision in 1611 and 1626.

7 CHAIRMAN MEITES: Right now that's the --
8 right now it's just a protocol.

9 MS. CONDRAY: Right. There's the statutory
10 right to access, and that's going to exist whether or
11 not anything in the regulation says anything about it.
12 But it was an issue of whether we should flesh out in
13 the regulation the statutory access provisions.

14 Because of a significant amount of
15 disagreement between the parties of the working groups
16 and between the two different working groups, it was
17 thought better to actually not proceed with an access
18 provision in each individual rulemaking, that the issue
19 of access to records was bigger than just eligibility
20 records.

21 And although the board did not -- did neither
22 commit or not commit to doing a rulemaking on access to

1 records, that issue was raised. So that's also out
2 there as a possibility if the board is interested in
3 pursuing having our access to records provisions in a
4 regulation. That was something that was developed
5 outside the scope of the task force report.

6 MR. FORTUNO: Having heard everything you
7 have, if there's anyone who'd like to transfer off this
8 committee and onto another, this is probably the time.

9 CHAIRMAN MEITES: Actually, I thought it was
10 pretty interesting, which is the last thing you want to
11 hear from a chairman.

12 Herb, please.

13 MR. GARTEN: I have a problem distinguishing
14 between -- you talk about the Corporation task force
15 and the working group in different regions of your
16 priority list. Are you talking about both groups?

17 MS. CONDRAY: No. The working groups were
18 specific working groups for those specific negotiated
19 rulemakings dealing with 1611 and 1626. The task
20 force, the regs review task force, was an internal
21 staff effort that developed this high-priority list.
22 The staff took public comment and incorporated comments

1 from the field to guide its thinking.

2 MR. GARTEN: But they haven't gone over this
3 with the working group. That's separate and apart.

4 MS. CONDRAY: That would be outside the scope
5 of the working groups.

6 CHAIRMAN MEITES: But if I understood the task
7 force, and maybe -- I mean, the staff task force,
8 because it set about to review existing regulations, it
9 didn't have the charge of looking as to what new
10 regulations we may need. Is that correct? I looked at
11 the report. It discusses existing regulations,
12 regulation by regulation, rather than saying, these are
13 the twelve problems.

14 MS. CONDRAY: Right.

15 CHAIRMAN MEITES: That's how this access to
16 records would have fallen in the cracks in that type of
17 undertaking.

18 MS. CONDRAY: Right. Right. The closest you
19 get to that is the idea of lesser sanctions, which is
20 outside of those current regulations that do discuss
21 sanctions. Correct.

22 CHAIRMAN MEITES: All right. So that -- it's

1 about time for a break. But before we take a break --
2 and the next thing is public comment; it's a logical
3 place -- if you could, give me the staff's -- any
4 suggestion the staff has about how, first, this
5 committee and then the board should go about its work
6 with regard to open rulemakings and new rulemakings in
7 terms of priorities.

8 MR. FORTUNO: If I may offer just a very brief
9 introduction. Mattie will go ahead and address the
10 task force report. But just to put it in context, when
11 the prior board was sworn in back in late -- was it
12 '93, it was decided that there would be a significant
13 regulatory reform effort undertaken. And they wanted
14 to review the regs and determine which needed to be
15 changed and how.

16 So work was started, and that's why you heard,
17 for example, about work being done early on on 1604 and
18 then being set aside and being taken up more recently.
19 What happened was in 1995 and '96 when we had the
20 assortment of new requirements and restrictions
21 imposed, the board had to turn its attention to
22 promulgation of implementing regs -- implementing those

1 new requirements and restrictions.

2 So the work that was done in '93-'94 was
3 essentially put on hold so that focus could be on the
4 new restrictions. Then in the late '90s, when that was
5 done, the board wanted some direction from staff, or at
6 least some input from staff, I should say, as to what
7 rules might be deserving of additional attention and
8 possibly be taken up as new rulemakings.

9 And so it was in connection with that request
10 that the staff task force was put together to study the
11 existing regs and to make recommendations. And that
12 culminated in a report that was issued in 2002, and
13 that's what Mattie will be addressing now. But I just
14 thought that the context might be helpful.

15 CHAIRMAN MEITES: Fine. Thank you. And
16 Mattie, would you go ahead.

17 MS. CONDRAY: I don't know that I have a very
18 specific timeline in mind. At this point, I'm now
19 venturing into my own personal opinion.

20 CHAIRMAN MEITES: Rather than months or years,
21 I think more helpful is a sequence of events,
22 regardless of how long it takes. What do you suggest

1 we do first, second, third, and fourth?

2 MS. CONDRAY: I would suggest that the
3 committee might want to finish the open rulemakings
4 first. There's been a lot of work put into them.
5 Particularly 1611 and 1604 are so close to being done.

6 You know, obviously the world has continued
7 spinning on its axis without the revisions being
8 completed. But I think we would be doing a service to
9 both the Corporation and the field to finish those off.
10 The revisions to both of those rules, I think, would
11 make significant improvements in them.

12 We certainly get -- in the Office of Legal
13 Affairs, we're asked to provide interpretations. We
14 get requests for interpretations of 1604 and 1611 on a
15 fairly regular basis, and hopefully this would, you
16 know -- all right. It would generate requests for new
17 opinions. But that's something else.

18 CHAIRMAN MEITES: What about 1626?

19 MS. CONDRAY: 1626, it would be nice to
20 continue work on that. Whether the -- you know, I'm
21 not sure what the committee's preference would be,
22 whether the committee would like to go through that

1 briefing memo and discuss it and provide guidance, or
2 if the committee would really rather have us just get
3 something out and have a product for them to look at as
4 a draft proposed rule.

5 CHAIRMAN MEITES: Understood.

6 MS. CONDRAY: You know, apples and oranges.

7 CHAIRMAN MEITES: And that's the three -- two
8 opens and one almost open, or three open and two
9 published, one not. And is it your recommendation that
10 we undertake that before we go to the six high-priority
11 items?

12 MS. CONDRAY: Yes, although I will say that if
13 the committee, say, is -- at the next meeting chooses
14 to act on 1604 and 1611, since that would pretty much
15 be it, the committee could then also choose to initiate
16 a rulemaking on one or more of these other and kind of
17 get the ball rolling in a continuous fashion.

18 In terms of a priority from the priorities
19 list, we're a little bit out of order. But taking
20 what's left -- since 1602, which was originally number
21 three on priority list, that's done. 1604, that was
22 number six on the priority list. That's almost done,

1 if we took that off.

2 You know, I guess I have no reason to back off
3 the original task force recommendation that the order
4 would be -- the lesser sanctions, 1606, 1623, then
5 1621, then 1624, which would be a big hairy one,
6 something a lot simpler, and then a more major
7 rulemaking, although I would understand if the
8 committee did not want to get its toe wet by taking on
9 a humongous project right at the beginning. And
10 that -- oh, sorry, and then 1607.

11 The committee might want to start with 1607 or
12 1621 even though they were a little further down on the
13 priority list. 1607 is governing boards, and 1621
14 client grievance procedures, just because those would
15 be susceptible to notice and comment rulemaking and
16 would probably be able to completed in a shorter amount
17 of time and generate less controversy.

18 MR. FORTUNO: In all fairness to Mattie, I
19 think that she's --

20 MS. CONDRAY: I'm extemporizing.

21 MR. FORTUNO: -- been asked to walk out on a
22 bit of a limb.

1 MS. CONDRAV: Right.

2 MR. FORTUNO: I don't think that management
3 has had an opportunity to formulate a recommendation to
4 make. So I think that what Mattie's doing and I think
5 what she was asked to do was to give her own personal
6 best judgment on this.

7 But I think that management may want to focus
8 on it and may, in fact, come back with the same
9 recommendations in terms of order and timing. But I
10 just wanted to make clear that there was a distinction,
11 is all.

12 MS. CONDRAV: Thank you.

13 CHAIRMAN MEITES: That's fair. But at least I
14 gather from what you said that some are easier than
15 others. And I think you've helped us to classify two
16 of them as easier and two of them as harder.

17 MS. CONDRAV: Right.

18 CHAIRMAN MEITES: Maria?

19 MS. MERCADO: No. I was just going to say --
20 and I'm not sure whether in the briefing materials that
21 the committee got, since I didn't get one, I assumed
22 that she had already done prioritizing and sort of a

1 calendaring of how long it would take to get from the
2 process of initiating. We did one.

3 MS. CONDRAY: That was a calendar about how
4 long it would probably take a negotiated rulemaking.

5 MS. MERCADO: Right. To do, so that we have a
6 sense of how long the timetable is. So I'm just saying
7 if that's already somewhere in your computer, you know,
8 then you can just --

9 CHAIRMAN MEITES: Yes. That's a very good
10 point. For our next meeting, it may be helpful if
11 you'd give us some idea of how much shorter than eleven
12 years this can take.

13 MS. BeVIER: Theoretically.

14 CHAIRMAN MEITES: Theoretically. All right.
15 Any other board comments at this point? If not, I
16 suggest we take a break and we'll open with any public
17 comments with regard to what's been -- we've heard so
18 far. Let's take a, what, 15-minute break. We'll
19 reconvene at 4:20. Thank you.

20 (A brief recess was taken.)

21 CHAIRMAN MEITES: Let's resume, if we could.

22 This is the agenda 5, which is essentially

1 public comment, everything that we've said so far.
2 And Linda Perle has asked if she can be the first
3 person to speak in the public comment period, and I
4 have agreed to that.

5 And so Ms. Perle, if you'd begin:

6 MS. PERLE: Thank you. I think that most of
7 you know me or I've met most of you, spoken to you at
8 least briefly. But I just want to -- if you'd give me
9 30 seconds, I just want to give people a sense of who I
10 am and how I come to be here in front of you.

11 I am an attorney with the Center for Law and
12 Social Policy, which under a contract with the National
13 Legal Aid and Defender Association represents the
14 members of the -- civil members of the National Legal
15 Aid and Defender Association, many of whom are LSC
16 recipients.

17 So I spend a lot of my time, most of my time,
18 working on issues that relate to the Corporation and
19 its grantees, which means that you'll see me appearing
20 before this committee in the future as you deal with
21 these regulations.

22 But one thing that some of you may not know is

1 that in 1975, I came to work at the Legal Services
2 Corporation. And I worked there from 1985 (sic) to
3 1983. I was one of the first staff members of the
4 Corporation. I was there before the first president of
5 the Corporation.

6 And during the time that I was there, I did a
7 lot of work on some of the regulations that you're
8 being asked to consider now. And so I have a lot of
9 familiarity. I was actually the staff person that
10 wrote one of the regulations that you're being asked to
11 reconsider, although it was such a long time ago that I
12 can't honestly tell you I remember much about it. But
13 I wrote the 1624 regulation, which I think was -- I
14 don't even remember the date. It was probably in 1979
15 that that was adopted.

16 Anyway, just so that you know, I've been
17 around for a long time and I have a lot of familiarity
18 with these issues.

19 Mattie gave you, I think, a very fair overview
20 of the status of the pending regulations. I was on
21 both of the working groups that you've discussed, both
22 for 1611 and 1626. Those were very large undertakings

1 by a lot of really committed people, both members of
2 the LSC staff, inspector general staff, and the field
3 representatives.

4 A lot of hard work went into those rules, a
5 lot of really thoughtful discussion. And the consensus
6 that was reached particularly around the issues in
7 1611, there was a lot of give and take. I think nobody
8 got everything that they wanted. That was -- but
9 everybody felt satisfied that the issues had been
10 fairly discussed.

11 1611 is a really complicated rule. It's very
12 difficult even today. It's been in existence for 20
13 years. I will tell you that not a day goes by -- and
14 I'm not exaggerating -- that I don't get a call from
15 somebody asking me how to interpret such-and-such, or
16 what does this mean, or where can I find this provision
17 of this rule. It's a very difficult rule to navigate.

18 And I think that the new version of the rule
19 in 1611 is really helpful. I know maybe people say,
20 well, we've been dealing with this rule for 20 years.
21 Why do we have to change it now? And the answer is
22 because it's been problematic for 20 years.

1 And this new rule really does, I think, help
2 resolve some of the issues and makes it much simpler
3 and a much more forthright way to approach these
4 eligibility issues. And I think that there's
5 substantial agreement in the field that this rule needs
6 to be fixed, and that the approach that's taken in the
7 new proposed rule is really the way to go. So I would
8 urge you to go ahead with that rule, that pending rule,
9 on 1611.

10 I think with regard to 1604, that rule was
11 significantly discussed when it was originally taken up
12 in 1995. I think it really is an improvement. I think
13 it's basically done. I don't see really that there's
14 much reason not to go ahead with that one as well. In
15 my view that's not quite as high a priority, but that's
16 my personal view. But I think there's no reason not to
17 do that.

18 In terms of 1626, like 1611 it's kind of a
19 complicated rule. It's sort of a little difficult to
20 navigate. The areas where consensus was reached in the
21 working group, I think if those areas were adopted, I
22 think that the rule would be much improved and much

1 easier to use.

2 By the way, Mattie mentioned the appendix. I
3 think there's like -- there's no reason why the staff
4 shouldn't be able to go ahead and update that appendix.
5 That updating was done, again, by a group of people who
6 really have a lot of experience with immigration law,
7 and I think it would be extremely helpful for the field
8 to have that tool available. And it doesn't require
9 board approval because it's just -- as Mattie described
10 it, just an appendix that sort of lays out what are the
11 current forms. And the current appendix is very
12 updated.

13 With regard to the rest of the rule, again, I
14 think it's a very -- it's a vast improvement over the
15 current rule. I think there are some areas where there
16 is not consensus yet. I think that with some
17 additional work, we could get closer -- the working
18 group, if we could be convened again even by telephone,
19 we could get a little -- we could get closer.

20 And as Mattie said, if you don't feel
21 comfortable presenting your views on issues without
22 having something concrete, the staff could present a

1 draft with a long discussion of the areas where there's
2 no consensus. And I think that would be very helpful
3 and I think you should go ahead with that rule as well.

4 So I agree with Mattie's personal view. And I
5 think the field agrees that those three rules are rules
6 that we should go ahead with and there isn't really any
7 reason not to go ahead with them.

8 With regard to the other rules that the
9 Corporation -- or that Mattie's suggesting that the
10 Corporation would want to go ahead with, those that
11 were in the task force report, on your desk I gave you
12 a copy of a set of comments that we -- that were
13 submitted on behalf of the civil group of the National
14 Legal Aid and Defenders Association.

15 I need to give you some explanation. These
16 were submitted on October 26, 2001. They were based on
17 an earlier version of the task force report. So they
18 may be a little confusing.

19 You have, I think, the final version, which
20 was -- which did take some of these comments into
21 account. Nevertheless, I think that if you can ignore
22 the points that were already changed, some of the

1 substantive discussions in here are still valid with
2 regard to these -- the ones that the Corporation was
3 suggesting that they'd like to go ahead with.

4 And Mattie talked about this lesser sanctions
5 rule, which involves two things. One is to combine
6 three current rules into one super-rule, which I don't
7 think is necessary because I think it will just cause
8 confusion. We've lived with these three rules for a
9 long time and everybody knows where to find them and
10 there doesn't seem to be any reason, as far as I'm
11 concerned, to put them all together.

12 Nevertheless, with regard to the lesser
13 sanctions issue, and I think the view of others in the
14 field, especially since the advent of competitive
15 bidding, there is much less need for this lesser
16 sanctions rule.

17 I mean, the Corporation now has the
18 opportunity once every three years, if it's a three-
19 year grant, or more frequently, if they're unhappy with
20 one of its grantees, simply not to award the grant to
21 them. And they have used that ability on some
22 occasions by not re-funding a program for the full

1 three-year term, and they've said, we'll give you only
2 a year and you have to make these changes or these
3 improvements. And they have used that.

4 There is also a questioned cost regulation
5 which permits the Corporation to question costs for
6 whatever the program has done. And although they've
7 not used that recently, they have that tool available
8 and it was used in the past.

9 They have a suspension rule, which they've
10 also used to encourage programs to comply with various
11 things that the Corporation has been unhappy with.
12 They've used things like month-to-month funding. They
13 have a variety of tools at their disposal that they've
14 used in the past. And we don't really think there's a
15 need for something -- for a real lesser sanctions rule.

16 CHAIRMAN MEITES: What about the other three,
17 grievances, Rehabilitation Act, and governing boards?

18 MS. PERLE: Okay. The client grievance
19 procedure is a -- it's a small rule. I mean, it's an
20 important process. But the changes --

21 CHAIRMAN MEITES: All right. Fair notice. I
22 was a member of the grievance committee when I was on

1 the board's Legal Assistance Foundation. So you happen
2 to have -- the one rule I know something about is this
3 one.

4 MS. PERLE: Okay. The changes that -- this is
5 another rule which in 1995 was a proposal for changes
6 to the rule. Those changes were made in response to a
7 variety of things that were going on in the Corporation
8 at the time.

9 I think that the rule that was developed --
10 the proposal is a good proposal. It clarifies some
11 things. It makes some changes in the rule that would
12 be beneficial. You have this existing rule. I think
13 that the Corporation could go ahead and do what it did
14 with 1604, which is to publish the proposal, republish
15 the proposal, and see what it gets on that. I don't
16 see any reason not to go ahead with that. I think
17 that's a pretty simple one.

18 CHAIRMAN MEITES: Rehabilitation Act and
19 governing boards.

20 MS. PERLE: Yes. This is one that I have
21 qualms about. I agree that the landscape has changed
22 significantly since I wrote that rule however many

1 years ago, with the Americans with Disabilities Act and
2 other things.

3 What I'm concerned about is that I think it's
4 very important that the Corporation not just go blindly
5 into changing something that, A, it doesn't have a lot
6 of expertise in, and B, that's very complicated and
7 there are a lot of stakeholders that are involved in
8 this.

9 And I think that if the Corporation wishes to
10 do that, what it needs to do is really engage in a very
11 significant dialogue with both its own recipients and
12 the civil rights community and make sure that it fully
13 understands what the implications are for it adopting a
14 rule in this area, where there are others that have
15 responsibility for enforcing the ADA and other civil
16 rights rules.

17 So that's my view. I mean, I'm not saying
18 that -- I understand that it's out of date and that,
19 you know, maybe there needs to be some change. But
20 it's something that the Corporation can't do by itself.
21 And I think it's going to involve a very significant
22 process.

1 CHAIRMAN MEITES: Governing body regulations.

2 MS. PERLE: The governing body regulations. I
3 think the problem that they're trying -- that the
4 Corporation is thinking about trying to address in here
5 is not a regulatory issue. They're concerned about
6 perceived lack of diversity on program boards.

7 I think that that's a function not of the rule
8 nor diversity provisions in the rule, and I think that
9 if they were enforced, it would go some way towards
10 solving the program. But I'd also think that the
11 problem is in the underlying statute, which limits the
12 flexibility of the programs to name board members.

13 So that I just -- I think that this is -- the
14 solution to this is not through change in regulation,
15 but it's through educating bar associations and the
16 programs itself. I know the Corporation's doing a good
17 job in raising this issue with some of the efforts that
18 its diversity task force has made.

19 So I think that it's a continuing educational
20 process, and I think, you know, there -- I don't know
21 that there's any way to change the legislation to give
22 the programs more flexibility to name people to meet

1 these diversity standards. And I'm not suggesting that
2 we should be able to do that.

3 CHAIRMAN MEITES: Now, what other -- of the
4 new open area, where I was surprised to hear we did not
5 have a regulation was access to records. Is that an
6 area that you think would be fertile for the staff and
7 the board to explore?

8 MS. PERLE: I think the protocol deals with it
9 in a very productive way. I think that the field is
10 more comfortable with these issues than they were a few
11 years ago. I think as you've heard from the staff,
12 that they're -- you know, that they're used to it.
13 They deal with it. It gives them the opportunity to
14 flesh out these issues before they come to visit.

15 I think that there are fewer instances where
16 access to records are a problem today than there were a
17 few years ago. I honestly don't think we need a
18 regulation on this. I think that if you had a
19 regulation that opened up -- you know, there are so
20 many different rules from state to state. The rules of
21 professional responsibility vary so much from state to
22 state.

1 I think that the Corporation tried to sort of
2 develop some general rules that were -- applied to
3 everybody, I think, that have grave difficulty. So I
4 really don't think we need action in a regulatory sense
5 on this.

6 I think the protocol has been -- has worked.
7 It's been effective. OCE has learned to deal with it.
8 We've learned to advise our clients about the issues.
9 You know, I often get calls from programs that say, oh,
10 my goodness, OCE is coming to visit me and I have these
11 access to records problems.

12 And I say, okay, tell me what your problem is.
13 And we talk about it and talk through it before. And I
14 said, you know, you really don't have a problem because
15 this is -- you've told me what your rules say, and this
16 is what that means in this context.

17 And you can give the Corporation this thing
18 that they've asked for. And in terms of this other
19 thing, well, you can do it through an intermediary,
20 which is something that's provided for in the protocol.

21 And I think there are many, many fewer
22 instances where this is an issue, and it's becoming

1 fewer and fewer. There are a few, and those are
2 situations -- I think, as Danilo said, those are
3 situations where, in fact, there's some real
4 peculiarity in the rules of professional responsibility
5 in a particular state.

6 And I know we've had one or two of those
7 situations in the last couple of years, and it's been
8 worked out. And I think that it's true that the
9 Corporation has had the opportunity to get the
10 information that it needs in order to do its job to
11 ensure compliance.

12 And programs are generally very cooperative,
13 and they understand that the Corporation has a role to
14 fulfill. And the times when it's come up for the most
15 part recently I think are real -- are situations where
16 the programs feel they're between a rock and a hard
17 place because they have this peculiarity in their rules
18 of professional responsibility.

19 They want to make sure that they're not going
20 to get in trouble with the bar and that they protect
21 the confidentiality of their clients to the degree that
22 the state has required them. But they're few and far

1 between.

2 CHAIRMAN MEITES: I'm sorry. I interrupted
3 you.

4 MS. PERLE: No. I don't remember what --

5 CHAIRMAN MEITES: Any questions?

6 MS. PERLE: And in terms of the other rules, I
7 mean, I think that there are some that can be improved.
8 These comments, I think, address some of the issues.
9 But I don't -- I think that really what you need to do
10 is finish the ones that are on your plate. And I think
11 that the 1621 is one that you could do quite easily.
12 And I wouldn't do the 1627. I just wouldn't do that.

13 CHAIRMAN MEITES: Good. Thank you very much.

14 Any other public comments?

15 (No response.)

16 CHAIRMAN MEITES: All right This is odd, but
17 I now believe we deliberate in public. So let's
18 deliberate in public.

19 I have a series of suggestions, and let me
20 just lay them out and then we can discuss them. Let me
21 start kind of with the tail of the dog.

22 The draft appendix sounds to me as something

1 that we can endorse right now and endorse for
2 publication. Does that make sense?

3 MR. MCKAY: Yes.

4 MS. BEVIER: Yes.

5 CHAIRMAN MEITES: Why don't we -- we'll
6 recommend that.

7 As for the outstanding rules, the three rules,
8 the financial -- I'm sorry, the outside practice of law
9 seems to be in pretty good shape. There is a question
10 that a congressman had, but it seems to have been
11 resolved.

12 And what I propose to that is that because I
13 have not read it as thoroughly as I'd like, perhaps we
14 could table it for this meeting with the idea that at
15 our next meeting we would look -- we would read it
16 seriously and be prepared to recommend it for approval.

17 Does that make sense?

18 MR. MCKAY: Yes.

19 CHAIRMAN MEITES: I'm not so sanguine about
20 the other two. The financial eligibility seems like
21 it's really up in the air. And I've not read it
22 closely, but I think we've heard, at least with these

1 two issues, there are serious questions that have been
2 raised.

3 Maybe what we should do with that is just
4 discuss it further at the next meeting. And I think we
5 should be prepared at that point to give some guidance
6 forward or backwards on it because I don't think it
7 does any good to keep this open indefinitely.

8 I don't know the answer to the issues, the
9 group issue or the retainer. Right now I don't have
10 any views on them. But I can see them both as being
11 serious.

12 MR. MCKAY: I would find it -- first, I agree
13 with your initial suggestion. I think we should go
14 ahead with 1604. And we should be able to move through
15 that fairly quickly. And I do agree with you that we
16 do have these open issues.

17 I would find it helpful if, you know, in
18 addition to reading the materials ahead of time so
19 the -- and I have read it but I would like to do it
20 again -- is to hear from both sides on these issues.
21 It would be more helpful for me to gauge the -- you
22 know, the pros and the cons if we hear them.

1 And it might be best that we do that, that we
2 have a discussion, hear the arguments, pose some
3 questions, and not necessarily come to a decision at
4 our next meeting, but certainly have a better
5 understanding what those issues are so we can think
6 about it.

7 CHAIRMAN MEITES: Okay. Why don't we do this.
8 Why don't we somehow frame an agenda item -- Vic can
9 help us with it -- to encourage whoever wants to speak
10 on at least the two difficult issues under 1611. Does
11 that make sense?

12 MS. BeVIER: It makes a lot of sense. But I
13 have another sort of suggestion or question. It seems
14 to me that the 1626 with alien eligibility presents
15 some of these group representation issues. And I think
16 that to the extent that's true, we ought to be talking
17 about that as well.

18 I mean, I hate to crowd the agenda, put too
19 much on it. But it seems that they are very intimately
20 related.

21 CHAIRMAN MEITES: Well, why don't we expand
22 our forum for discussion to both 1611 and 1626.

1 MR. MCKAY: Happy to do that because there is
2 an overlap. But it seems to me, based on what we hear
3 from staff and from Linda and from others, is that it
4 might be prudent to ask that working group to go back
5 in this intervening period of time and see if we can
6 get closer on some of those issues that are still open.

7 CHAIRMAN MEITES: Well, the working group is
8 still in effect on the 1626, the aliens. As I
9 understood it, because we actually published a draft
10 under the financial eligibility, we're past the working
11 group stage.

12 MR. MCKAY: That's -- I was talking about
13 1626.

14 CHAIRMAN MEITES: 1626. Yes.

15 MR. MCKAY: I agree on 1611. I understand
16 where we are. But if we're going to talk about 1626, I
17 thought it would be important that we simultaneously
18 ask that working group to go back and focus on those
19 remaining issues and see if we can get closer to
20 closure on it.

21 CHAIRMAN MEITES: I got you. So what we would
22 do is let's work -- on 1626, we would -- we receive a

1 request for our view, or our predecessors' views, on
2 1626 rather than giving any views now, which we
3 shouldn't. We'll ask the working group between now and
4 November to reconvene however they can do it, and in
5 November present to us where they're actually at, where
6 there's consensus.

7 MS. BeVIER: You know what I would find
8 extremely helpful, and that is examples. It's all very
9 abstract right now to me, and it's sort of rules kind
10 of in a vacuum.

11 I would like examples of how a proposed rule
12 or an aspect of a rule that is in contention or, you
13 know, is part of a disputed issue would make a
14 difference, so the kinds of situations typically to
15 which these rules apply. And that would help me get a
16 sense of what the stakes are and of what the arguments
17 are pro and con.

18 CHAIRMAN MEITES: That would be for both
19 issues, both the group and retainer?

20 MS. BeVIER: Oh, absolutely. both group and
21 retainer, and alien eligibility as well.

22 MS. CONDRAY: May I ask a clarifying question?

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CHAIRMAN MEITES: Sure.

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MS. CONDRAY: For 1611, since you have a draft and with respect to all of the other issues there was consensus, you'd like to focus just on those two particular issues?

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MS. BeVIER: Yes. I think --

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MS. CONDRAY: Although obviously, as you read through the draft, if other issues come up. With 1626, would you then like us to present you with the best draft NPRM that we can?

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CHAIRMAN MEITES: I'm not sure we're ready for that.

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MS. CONDRAY: I mean, do you want -- because right now the board has -- you don't even have -- all you have in front of you are the areas of non-consensus. You don't have anything on all of the areas of consensus.

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CHAIRMAN MEITES: We understand. But I think the sense here is we'll start with the tough issues, kind of assume that the easier issues will fall into place. And since, as Lillian and Mike both point out,

1 some of the tough issues are common to both 1611 and
2 1626, it makes sense to have the hypotheticals, to have
3 the discussion, about both of them, even though there
4 obviously are some changes.

5 So I guess where we'd end up is we've talked
6 about 1604. 1611, that we would like to hear the
7 various sides on both group and retainer agreements.
8 And to the extent there are the same issues embedded in
9 1626, we'd like to hear that as well next time. Fair
10 enough?

11 MS. CONDRAY: Yes. Do you want to hear just
12 on the common issues, which would really have to do
13 with representation on 1626, and not the other issues?

14 CHAIRMAN MEITES: Yes. Just limit it to that,
15 I think, at this time.

16 MS. BeVIER: At this time, that probably makes
17 sense.

18 MS. CONDRAY: Yes. Thank you.

19 CHAIRMAN MEITES: All right. That should keep
20 us busy for our entire stay in New York.

21 All right. That, I think, settles the
22 outstanding issues on the regulations. Good. Thank

1 you, Mattie.

2 The last item on the agenda is consider and
3 act on a new grant assurance for 2004 regarding
4 attorneys' fees in property recovery actions. Someone
5 from the staff is going to present on this. John, do
6 you want --

7 MR. ERLNBORN: I think Victor, if you
8 wouldn't mind. If you would describe the proposal that
9 is before the committee.

10 CHAIRMAN MEITES: Victor?

11 MR. FORTUNO: Yes. I think the grant
12 assurances were brought to the -- the proposed grant
13 assurances were brought to this board not long ago.
14 And the board managed to devote a little time to it,
15 understandably, but didn't have all of the background
16 because it wasn't involved in development of these over
17 time. But the grant assurances were outlined and the
18 board was sufficiently comfortable with authorizing
19 staff to proceed with them.

20 Since that time, management of the Corporation
21 has come together to pare back the M&A budget because
22 of the shortage of funds. And one of the things that

1 was discussed was the use of M&A funds to litigate
2 cases where what's at issue is property, real estate,
3 to be specific, real property, purchased by a grantee
4 with LSC grant funds.

5 One of the suggestions that was made was that
6 since what happens is from the M&A line funds are used
7 to litigate cases to recover the -- either to have
8 property transferred to the new grantee or to recover
9 from a sale, forced or otherwise, that then gets
10 plugged back into basic field.

11 Since none of that money goes back to M&A to
12 replenish the fund that goes to litigate those cases,
13 the thought was here that maybe there should be a
14 provision requiring the -- if the grantee forces the
15 Corporation to resort to litigation to enforce a
16 provision -- an agreement between the grantee, or
17 former grantee, and the Corporation, that upon ceasing
18 to be an LSC grantee, the Corporation will dispose of
19 the property as directed to by the Corporation.

20 But if the former grantee forces the
21 Corporation to resort to litigation to enforce that
22 interest, there should be a requirement that if the

1 Corporation prevails, that the grantee would reimburse
2 the Corporation out of non-LSC funds for those
3 expenses.

4 And that's what then was reduced to writing
5 and circulated for the consideration of the board. I
6 think Mr. Hillborn wanted to make a presentation today,
7 but his voice is such that he's unable to do that. And
8 so I hope I've done justice to what he wanted to cover.

9 But that in a nutshell is it, is exploring a
10 means by which the Corporation can replenish the fund
11 that it uses to litigate cases involving property
12 purchased by former grantees with LSC grant funds.

13 CHAIRMAN MEITES: I asked you before, and you
14 gave me a timetable, that the actual grant assurance
15 contracts don't go out till December.

16 MR. FORTUNO: That's right.

17 CHAIRMAN MEITES: And we have just received
18 today -- we, the committee -- materials on this. And
19 obviously, we have not had a chance to study them, nor
20 has the public had a chance to review them for any
21 comments.

22 What I would feel much more comfortable doing

1 is deferring this to our November meeting. Make it a
2 formal agenda item with the usual materials.

3 MR. FORTUNO: I think what I've been reminded
4 is that it's actually kind of a two-stage process.
5 Grant assurances have been signed as part of the grant
6 applications. They have not yet, however, been signed
7 as part of the acceptance of the grant.

8 So while they've already been signed as an
9 indication of what the applicant will be asked to sign
10 if the applicant is successful, they will, I guess,
11 be -- if the committee acts in November and if, for
12 example, the committee elects to include this as a new
13 grant assurance, that could then be included in the
14 assurances as they are signed off on by grantees who
15 are offered grants in December.

16 CHAIRMAN MEITES: My sense, Lillian and Mike,
17 is that we defer this till November to include the
18 materials in the material packet. We give a chance for
19 the public to have any response, and we take it up
20 then. If that makes sense, why don't we just truncate
21 the discussion now and just table this to November.

22 MR. GARTEN: May I --

1 CHAIRMAN MEITES: Yes, Herb. Please.

2 MR. GARTEN: May I make a suggestion? You may
3 have a situation in some states where this would not be
4 an enforceable provision. It reminds me of the interim
5 clauses that you see, and people in wills, where
6 someone is going against the will. The document says
7 that to deprive them getting an inheritance under any
8 circumstances, which is illegal in some states,
9 especially in Maryland. So I think you ought to do
10 some research on that point.

11 MR. FORTUNO: We will.

12 CHAIRMAN MEITES: Fair enough. All right.
13 Let's then just table that item and go back to the
14 agenda. We're now on 11. If there's any other public
15 comment on any other matter, now is the time to make
16 it.

17 (No response.)

18 CHAIRMAN MEITES: Hearing none, I'll open the
19 meeting for -- to consider and act on any other
20 business.

21 (No response.)

22 CHAIRMAN MEITES: If there is none, then I

1 will accept a motion to adjourn.

2 M O T I O N

3 MS. BeVIER: So moved.

4 MR. McKAY: Second.

5 CHAIRMAN MEITES: And the motion carries.

6 Thank you very much, ladies and gentlemen.

7 (Whereupon, at 5:00 p.m., the meeting was
8 concluded.)

9 * * * * *