

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

MEETING OF THE BOARD OF DIRECTORS
OPERATIONS AND REGULATIONS COMMITTEE

Sunday, June 25, 2000

2:35 p.m.

Radisson Plaza Hotel Minneapolis
35 South 7th Street
Minneapolis, MN 55402

BOARD MEMBERS PRESENT:

Douglas S. Eakeley, Chairman
Hulett H. Askew
LaVeeda Morgan Battle
John T. Broderick, Jr.
Douglas S. Eakelay
John Erlenborn
Edna Fairbanks-Williams
F. William McCalpin
Maria Luisa Mercado
Thomas F. Smegal, Jr.

ALSO ATTENDING:

John McKay, President
Victor Fortunato, Vice President for Legal Affairs

C O N T E N T S

	PAGE
Approval of agenda	3
Staff report on the status of revisions to 45 C.F.R. Part 1628 (Recipient Fund Balance), 45 C.F.R. (Timekeeping Requirements) and the proposed Property Acquisition, Management and Disposition Manual of LSC Grantees	4
Consider and act on proposed rulemaking protocol for recommendation to the full board	
Consider and act on other business	6
Public Comment	68

MOTIONS: 3, 70

1 P R O C E E D I N G S

2 MR. ASKEW: Let's go ahead and start.

3 Our chairman is on the telephone, but he has asked
4 me to sort of procedurally handle this since he can't see
5 anything from where he's sitting, but I will call the meeting
6 to order.7 The first item on the agenda is the approval of the
8 agenda.9 The committee members, as I understand
10 it, are myself, Chairman Broderick and Edna
11 Fairbanks-Williams -- Edna is on her way down -- and Doug is
12 a member.

13 And that's Don Saunders getting on Windows.

14 So the first item is the approval of the agenda for
15 today's meeting, which is in the agenda book on page 21.

16 Do I hear a motion to approve the agenda?

17 M O T I O N

18 MR. SMEGAL: So moved.

19 MR. ASKEW: And a second? I'll second it.

20 All those in favor say aye.

21 (Vote.)

1 MR. ASKEW: The second item is a staff report on
2 the status of revisions to two regulations. So I'm going to
3 ask Victor to report to us on that.

4 MR. FORTUNO: The committee when it last met
5 recommended to the board and the board adopted the revisions
6 to Part 1628, which is LSC's rule on recipient fund balances,
7 and to 1635, which is LSC's rule on timekeeping by
8 recipients.

9 The rules have been adopted by the board. Staff
10 was to prepare a preamble to accompany the rules when
11 published in the Federal Register. The preamble to 1628 has
12 been discussed in the past. The way we worked it was once
13 the preamble was done, it was discussed with the committee
14 chair.

15 The chair of the committee asked if I could discuss
16 1628 with Mr. McCalpin. I did. And it was also shared with
17 CLASP. I got comments from Linda Perle and Alan Houseman
18 both. And we're nearing the point of sending that out for
19 publication as final.

20 Timekeeping is also nearing the point of issuance
21 for publication as final.

1 So it's just to update. Those two are now just
2 about ready to go to Federal Register.

3 In addition, the last time the ops and regs
4 committee met, it reviewed a draft property acquisition,
5 management disposition manual. The new person we've got at
6 LSC, the new regs person, a woman with a considerable amount
7 of rulemaking experience in the federal sector who
8 unfortunately was unable to be with us here today because she
9 had long ago signed up to take part in an AIDS ride, has
10 reviewed that, pointed out that there were some minor
11 internal inconsistencies, so while the committee the last
12 time around approved the draft for publication for comment,
13 as opposed to the two rules which would be published as
14 final, that document will be coming back to the committee at
15 its next meeting just to identify what she had spotted as
16 minor internal inconsistencies to seek resolution by the
17 committee and then proceed to publication for comment. And
18 that would be as to the property acquisition, management and
19 disposition manual.

20 And that's it for the update.

21 MR. ASKEW: Okay. Any questions for Victor?

1 LaVeeda?

2 MS. MORGAN BATTLE: I don't have any questions. I
3 think it's progressing.

4 MR. ASKEW: Okay. So there's no action required on
5 any of those three items today.

6 MR. FORTUNO: No. Purely a status report.

7 MR. ASKEW: Okay. The next item is consider and
8 act on a proposed rulemaking protocol for recommendation to
9 the full board.

10 Victor, are you going to present that to us?

11 MR. FORTUNO: Yes. I'd be happy to.

12 MR. ASKEW: Okay. Let me ask this --
13 Chairman Broderick?

14 MR. BRODERICK: Bucky, I must say I'm having
15 difficulty hearing. I don't know whether people can hear me.

16 MR. ASKEW: We can.

17 MR. BRODERICK: I can strain and hear, but it's
18 difficult. Victor is going to come and make the
19 presentation?

20 MR. ASKEW: Yes.

21 MR. BRODERICK: What I'd like to do, if I could, is

1 just to make a few comments before Victor does that.

2 MR. ASKEW: Okay. Now is the appropriate time to
3 do that.

4 MR. BRODERICK: All right.

5 I just wanted to make an observation before we do
6 that. Is the chairman of our board there?

7 MR. EAKELAY: I'm here, John.

8 MR. BRODERICK: I think it's appropriate that the
9 chairman of our board has just returned from China, while I
10 wish I were on a slow boat to China. But having said that,
11 let me just make a couple of comments and observations before
12 we hear from Victor.

13 The memo which I know members of the ops and regs
14 group have and which by now has been circulated more broadly
15 is an effort to take a look at how we have done rulemaking
16 with the expectation that this will open the process even
17 more than we have done in the past and it will give us some
18 written guidelines as to how that process should unfold.

19 Although the memo is a draft and we are anxious to
20 get comments obviously from ops and regs and board members
21 and others, I am not sure it's clear on its face that the

1 emphasis is on negotiated rulemaking as opposed to
2 traditional rulemaking and looking at the memo that wouldn't
3 be immediately clear, I don't think.

4 It would be my expectation that in the vast
5 majority of circumstances we would be looking to undertake
6 rulemaking in a negotiated format and talking to those
7 outside the four walls of the corporation in a collaborative
8 way to make sure that we're doing a good job, both
9 substantively and procedurally. And the impetus behind this,
10 I think, as much as anything has been the emphasis over the
11 last seven years of the Clinton administration to pursue
12 negotiated rulemaking under the 1990 act.

13 And so we are a little late getting to the table in
14 a formal sense, but it's clearly the direction the
15 administration has taken.

16 It is my personal expectation that when we get a
17 final draft here when implemented it will open us, I think,
18 in a very constructive way to the field and to those who
19 advocate for the field, but it's clear that the authority,
20 the final authority for this process, will, as I think it
21 should be and as I think all would agree, be vested in the

1 corporation itself. But it is, to summarize, an effort to
2 formalize our process in writing and to emphasize the
3 willingness and the initiative to have negotiated rulemaking
4 be the rule, to be the norm, as opposed to the exception.

5 So having said that, I would ask any other members
6 of the committee if they would like to make some introductory
7 comments and, if not, to ask Victor with whom I have met
8 recently to come forward and to go through this in some
9 detail.

10 And so that everyone knows, I do not expect that at
11 the close of business today we'll have struck an agreement on
12 language. There may be some significant disagreements and
13 I'm open to hearing those, as I think the committee is.

14 Obviously, this also has to be reviewed by the full
15 board and I can't tell how many board members are there.
16 Given my eyesight, even if I were in the room I couldn't
17 tell. But in any event, I'm not sure how many board members
18 are there, but this will be discussed at the board and I'm
19 hopeful that between now and the next board meeting something
20 formal and final is in fact enacted, but I'm very anxious and
21 open to hear suggestions and thoughts.

1 MR. EAKELAY: John, this is Doug. We're all here
2 except for Nancy and Ernestine.

3 MR. BRODERICK: Okay.

4 MR. EAKELAY: So I think you've got a majority of
5 the board. Can you hear me? I tried to turn your phone up a
6 little bit, although with my jet lag, I'm not sure whether
7 I --

8 MR. BRODERICK: Well, I can hear you, Doug. I can
9 hear you all right.

10 MR. EAKELAY: All right. I just wanted to comment
11 on your comment, that negotiated rulemaking should be the
12 norm, not the exception. The way this memo is presented,
13 it's presented as an adjunct, but I just wanted to express my
14 view that I, and I anticipate the rest of the board, agree
15 with you in the perception that this is an appropriate way to
16 go and I think John McKay shares that view.

17 MS. MERCADO: Mr. Chairman, I don't think all the
18 committee members yet have a copy of this. I just got mine a
19 few minutes ago and Tom doesn't have one yet.

20 MR. EAKELAY: Nikki is coming up with copies.

21 MS. MERCADO: But I think you're right.

1 Just during my quick review of the document, you know, four
2 pages dealt with something else, about half a page on
3 negotiated rulemaking, so looking at it without looking at it
4 intently, because I haven't looked at it intently, I would
5 think that it doesn't note that that is the emphasis that
6 we're directing. So I'm glad that you made those comments,
7 Justice Broderick, on the fact that negotiated rulemaking
8 would hopefully be the norm.

9 MR. ASKEW: Let me suggest this. Since several of
10 us only saw this a few days ago and others have only just now
11 gotten it, I think it would be helpful if Victor walked us
12 through it so we know exactly what the proposal is and then
13 we'll come back and have a little discussion of it once
14 you've been able to do that for us.

15 MR. FORTUNO: I guess at the outset I should say
16 this was a group effort. It was done for Justice Broderick's
17 review and feedback so that there would be something that
18 could then be shared with the committee and the board and
19 then the public.

20 What's happened here is we've attempted to spell
21 out with some degree of particularity the procedures to be

1 followed so that there is a clear map to follow for purposes
2 of rulemaking.

3 The discussion about reg neg and traditional
4 rulemaking was fairly extensive in house. The conclusion has
5 been -- the consensus was to be absolutely sure to have a reg
6 neg module which in effect would be the default position so
7 that in most, if not all, circumstances the reg neg model
8 would be the one followed in the rulemaking process.

9 And what was intended was to have a document which
10 could be reviewed by anyone and no one could take issue with
11 in terms of being too closed, not sufficient open. It's open
12 and it should be open to everybody and that was the intent.
13 And to reiterate, I think that the design was for the --
14 although there's not extensive discussion, the design was for
15 the reg neg model to be the default position so that unless
16 there is a reason for not going through the negotiated
17 rulemaking approach to then -- unless there is a position for
18 not going that way, that the default position would be to go
19 reg neg.

20 We do have, as I said, I think, before we were on
21 the record, or at the outset of this meeting, that we do have

1 someone with the corporation now, Mattie Condray, who has a
2 great many years of rulemaking experience, and I think what
3 she attempted to do with respect to her input on this was to
4 have it follow the current federal practice as closely as
5 possible, tailoring it, of course, to the needs of
6 the corporation, but trying to have a process in place that's
7 fair, that's open, and that no one can be critical of for not
8 being sufficiently inclusive. This is intended to be all
9 inclusive.

10 Questions?

11 MS. MORGAN BATTLE: Yes, I've got some questions.

12 MR. FORTUNO: Sure.

13 MS. MORGAN BATTLE: What I'm hearing and what I've
14 read are not actually the same as I see it because in reading
15 through this rulemaking protocol, it sets out an opportunity
16 with equal consideration given to notice and comment
17 rulemaking or negotiated rulemaking and there's no discussion
18 in this document about negotiated rulemaking being the
19 default position in all instances unless there is a specific
20 reason given for notice and comment. That's the first
21 observation that I have.

1 Secondly, there's several things in this document
2 that are a grave departure from the decisionmaking framework
3 that we've had in the past. For example, the determination
4 as to whether it should be notice and comment rulemaking or
5 negotiated rulemaking is vested in the president, rather than
6 the committee. And in the past, the committee has made a
7 determination as to how it chose to handle a particular issue
8 that came before it.

9 So I just want to make note of that. And I don't
10 understand why there's been a change in that procedure.

11 We can handle the first one and then I'll go on
12 through some of the other questions that I have.

13 MR. FORTUNO: I think that again this was a group
14 effort and I think also it was intended to track the federal
15 sector as closely as possible. And I think that in the
16 federal sector the initiation of rulemaking is from within
17 and I think that that's what was contemplated here.

18 And while it's been adjusted to address the
19 particular needs of legal services, I think that it generally
20 follows the federal sector protocol, if you will.

21 MS. MORGAN BATTLE: Well, I guess the other concern

1 that I had, as you go through this, it appears the notice and
2 comment rulemaking vests the policy determinations to be made
3 by management rather the committee and in the past the way
4 that notice and comment was done, the policy determinations
5 by their nature were made by the board and not by management.

6 Management would make a presentation to the board
7 of what policy options were available and then the policy
8 decisions were made by the board, so this would be a
9 departure from that model that we have utilized over the
10 past, I guess, five or six or seven years that this board has
11 been in operation. Is that correct?

12 MR. FORTUNO: I think that ultimately policymaking
13 role is, has been and I think will always be with the board.
14 It's for the board to make the ultimate decision.

15 I think that there is an initial decision on the
16 part of management which is to make a recommendation to the
17 board as to a management position. I don't know that this
18 would be different from how it's been before. I think
19 management has always been in the position of making a
20 recommendation. But I think that it is the province of the
21 board with the help of the committee to make those ultimate

1 policy determinations in enacting the regulation.

2 The regulation is enacted not by management, but by
3 the board, and management comes to the board with a
4 recommendation and is in a position to identify the issues
5 for the board and to respond to any others that are
6 identified by members of the interested public, but the
7 decision itself, the policymaking decision, is clearly the
8 board's.

9 MR. ERLLENBORN: On that note, I think the question
10 that was raised by LaVeeda has not really been answered. If
11 you read this, it says that management notifies the chairman
12 of the board, management notifies the board that you are
13 undertaking the drafting of the proposed regulation.

14 In other words, the decision that there should be a
15 regulation, the drafting of the proposed regulation and so
16 forth all seems to be totally within the control of
17 management until you have something to bring before the board
18 and then they can review decisions already made.

19 MS. MORGAN BATTLE: That's the concern that I have.

20 MR. ERLLENBORN: And that's the way this seems to be
21 written. Am I wrong? Is there any point before you start

1 drafting and then bring it to the board that the board itself
2 decides that there is a need for a regulation and sort of a
3 general outline of that regulation?

4 MR. FORTUNO: I don't think that that -- maybe the
5 document doesn't artfully capture that. I don't think that
6 the intent was to -- it certainly wasn't to usurp the role of
7 the board or to deprive the board of the opportunity to
8 initiate a process.

9 I think it was intended to recognize that the folks
10 who work on these issues day in and day out are in a position
11 to identify for the board, as the board staff, issues in need
12 of the board's attention and then there is a process for
13 funneling that, the process, of course, working its way
14 through the president of the organization.

15 So that rather than coming to the board from
16 different elements of the institution, those elements funnel
17 the information to the chief executive, who then funnels it
18 to the board after making some informed decisions as to
19 what's in need of additional work, whether it's ready to go
20 to the board. But I don't think that the document was
21 intended to foreclose initiation of rulemaking by the board

1 when the board deems it appropriate, but simply to make
2 effective use of your staff.

3 MS. MORGAN BATTLE: Can I follow up with my first
4 question?

5 MR. FORTUNO: Sure.

6 MS. MORGAN BATTLE: Because I think if I go back
7 to -- I think it's the paragraph at the bottom of the first
8 page, the beginning of the second page, in which you address
9 the issue of which way you will go in terms of how the reg
10 will be undertaken.

11 It specifically states the president in
12 consultation with the committee will then determine whether
13 to proceed with the rulemaking using notice and comment or
14 negotiated rulemaking.

15 So if that's in the president rather than the
16 committee, the determination as to the route that this
17 particular interest should go, it seems to me that in the
18 past that decision has been made by the committee and not by
19 the president.

20 I can understand your point about the information
21 being funneled through other offices within the corporation

1 to the president and then being presented to the committee by
2 the president, but at least the way this is written, it
3 appears that it is the president just simply consulting with
4 the committee but not the committee making the decision as to
5 which way the regulatory process ought to go.

6 And at least in my view that's a great departure
7 from the past practice, which has been the committee making a
8 determination as to how it views a particular issue ought to
9 be addressed by regulation.

10 MR. McKAY: I've had some discussion with the
11 committee chairman on this topic and first I'm not sure that
12 it's right to say it's a departure from prior practice
13 because what this new protocol suggests is that there are two
14 paths that rulemaking can take; in fact, they are different
15 paths than we've utilized in the past.

16 And so we're certainly open to -- John Broderick
17 can speak for himself, but I think that the concept was that
18 should we go down the wrong path on the new two options that
19 we have, the committee would certainly let us know that we
20 had made a mistake.

21 I think as we've made it in our preliminary

1 discussions on this we consider the threshold for negotiated
2 rulemaking to be very low and therefore if it is a matter
3 that will have significant interest in the field that we
4 would be recommending negotiated rulemaking for that
5 particular reg. And if we were to come forward with the
6 notice and comment rulemaking, we would certainly hear
7 otherwise from the committee.

8 But that's why the protocol says in consultation
9 with the committee. We certainly are not going to be in the
10 position of going down the wrong path. From the beginning,
11 we will have consulted with the committee. However, it won't
12 be necessary to conduct a full committee meeting to determine
13 which path we will go down.

14 MR. ASKEW: Yes, Bill?

15 MR. McCALPIN: I have not read this document. It
16 was put here this morning. In deference to the people who
17 were before us, I didn't spend the time with it and I was
18 otherwise engaged over the noon hour. But I guess I come in
19 at a very basic level.

20 Will somebody please explain to me the difference
21 between the two approaches, negotiated rulemaking and notice

1 and comment?

2 I assume notice and comment is what we have done
3 without exception for the last six years. What's the
4 difference?

5 MR. FORTUNO: I think that we have had at LSC for
6 the past six years a kind of a hybrid, not the traditional
7 notice and comment rulemaking, but neither is it the standard
8 government reg neg model.

9 MR. McCALPIN: Reg neg being what?

10 MR. FORTUNO: Negotiated rulemaking.

11 MR. McCALPIN: Okay.

12 MR. FORTUNO: I guess it's easier to say reg neg
13 than neg reg.

14 In any event, what has happened here is we've got
15 the input of someone who has been in the federal sector for a
16 long time and has functioned under both the traditional
17 rulemaking process and the more recent negotiated rulemaking
18 process coming in and looking at the model that we were
19 operating under and saying, you know, this is really neither
20 one of the two and making her expertise available to us in
21 crafting this document.

1 But I think that the traditional notice and comment
2 rulemaking, which in fact is all that -- in terms of mandate,
3 is all that's mandated by the LSC act. We're not subject to
4 the Administrative Procedures Act, but the LSC act does
5 require publication for comment. So that's a traditional
6 notice and comment process.

7 And what we've tried to do is improve upon that and
8 add a negotiated rulemaking module which would in many ways
9 resemble what we've been doing in recent times. This just
10 formalizes it and gives us kind of a written guidebook or
11 handbook for how we proceed.

12 But, again, like anything else not written in stone
13 anywhere, and if some version of this is adopted by the board
14 after recommendation from the committee, it can, of course,
15 be modified by the board at any point in time that it deems
16 it to not be working as well as is desired.

17 MR. McCALPIN: You haven't told me what is
18 negotiated rulemaking.

19 MR. FORTUNO: The negotiated rulemaking would
20 involve others outside the corporation in the early stages of
21 the drafting with the aid of a mediator.

1 A mediator is something we've not used -- or a
2 facilitator -- not something we've used in the past. In the
3 federal sector that is the norm for negotiated rulemaking, as
4 I understand it, so that folks with an interest and expertise
5 in the substantive area of the rule would be brought together
6 and with the aid of a facilitator work up some draft language
7 in a way that's different from traditional rulemaking where
8 it's the staff of the institution that drafts the language
9 and then issues it for comment.

10 So that the folks outside the organization with an
11 interest in and expertise in the substantive area are brought
12 into the process earlier in the process than under
13 traditional rulemaking.

14 MR. McCALPIN: That's exactly what we did six years
15 ago.

16 MR. EAKELAY: Not quite, Bill.

17 MR. McCALPIN: Oh, yes, it is.

18 MR. EAKELAY: I don't think it was as opened up to
19 other potential participants as it might be.

20 MR. McCALPIN: We had a roomful of people.

21 MR. EAKELAY: Well, this basically then --

1 MR. McCALPIN: No mediator, but a roomful of people
2 talking to us from the field about the interests and
3 expertise in the area, telling us their views.

4 MR. BRODERICK: Bill McCalpin?

5 MR. McCALPIN: Yes.

6 MR. BRODERICK: This is John Broderick. I'm having
7 trouble hearing, but I just wanted to jump in for a second
8 and if I'm duplicating what Victor said, I apologize, but the
9 process would call for the use of a facilitator, either
10 somebody trained to be a neutral facilitator within the
11 corporation, or somebody that we bring in from outside.

12 The advantage to this process, if it works, is that
13 you have people with substantive knowledge in specific areas.

14 They may not be the most senior people in the field but they
15 are the most knowledgeable. They need to have some latitude
16 and some authority, obviously, from their superiors.

17 But it would be done, depending upon the gravity of
18 the regulation and the complexity of it, in a series of
19 multi-day meetings, which seems on the front end to extend
20 this process, you know, beyond traditional rulemaking, but
21 the philosophy behind it, which makes sense, which is what

1 the administration has been pushing, is get the people who
2 are going to be governed and those who are issuing the
3 regulations on the same page, understand substantively and
4 more clearly what they're doing and how they're impacting one
5 another, and then after you've come to some consensus, as I
6 understand it, you still have to go through the formal notice
7 and rulemaking process that we've traditionally used, I
8 think.

9 But the notion is that the comment period can
10 probably be shortened, the comments coming back will be
11 minimal, if any, because presumably you've hashed that all
12 out, and people feel a lot better about the product when it's
13 produced.

14 But in shorthand fashion, that's what I see
15 happening and I think if it works we would be receiving and
16 welcoming comments from the field, as I think we should, so
17 that we get it right. But I think this would formalize what
18 I understand may have existed but was somewhat informal.

19 MR. McCALPIN: Are we going to subsidize bringing
20 these people together?

21 MR. ASKEW: I would think so. We would have to.

1 MS. FAIRBANKS-WILLIAMS: And who would choose these
2 people?

3 MR. EAKELAY: It says the president in consultation
4 with the committee.

5 MR. ASKEW: The committee chair.

6 MR. FORTUNO: The LSC act, Section 1008, requires
7 notice and comment. What this process does is it provides a
8 structure with an adjunct to that, with an add-on to the
9 required statutorily required notice and comment.

10 What it does is it has the adjunct or this model or
11 module of negotiated rulemaking and one of the things that it
12 seeks to do as well is open it up in an effort to insulate
13 the institution from criticism that we are too closed, that
14 by not having formal, written procedures we create a system
15 for ourselves where we don't really invite or allow broad
16 based participation.

17 The question, for example, being will a Ken Bohem
18 say, you know, I don't get a call from the GC's office or
19 anybody else at the corporation telling me that they're
20 considering one issue or another and allowing me to comment
21 on the off chance that I've got something significant to

1 contribute.

2 What this does is it creates the written entirety
3 of the board process which everybody including the likes of
4 Ken Bohem can read and say this is the process, I can follow
5 it, and, you know, Ken may have some significant
6 contributions, I don't mean -- frankly, I know Ken, I like
7 Ken, I don't mean to make a target of him, but I mean to
8 suggest that he and anyone else would not feel excluded, but
9 would feel just as much a part of being able to contribute
10 what thoughts they have.

11 It wouldn't necessarily bind us in any way, this
12 doesn't create a system that binds the corporation to
13 anything anyone on the outside has to say or contribute.

14 What it does do is it opens it up to comment by
15 anyone who has something to offer and it sets out a system
16 that can be followed by anyone who has an interest in this,
17 whether it's someone whose views we share or don't share.

18 MR. ASKEW: Victor, I think it's of great value to
19 put this in writing and I think it's a worthwhile thing to do
20 to have this in writing so that it's clear to everybody what
21 our process is.

1 None of us have had much of a chance to look at it,
2 to think it through, and I was hoping what we would get today
3 is sort of a walk-through of what exactly what's here, both
4 so we'd understand exactly what's being proposed, but so in
5 our own minds we could compare it to the way it's been done
6 in the past and to figure out what are the changes we're
7 making here.

8 You and John are telling us this isn't a dramatic
9 change, but it reads to me like it is a dramatic change and
10 I'm probably wrong about that, but I can't quite piece it all
11 together because we haven't gone through it.

12 I mean, I have some questions about what some of
13 these things mean and how the process would work and that
14 sort of thing that I can't figure out in my own mind until
15 we've had a chance to really walk through this with some
16 detail.

17 Perhaps we'd be better off if the woman who wrote
18 it were here and could help us with that, because the other
19 side of it as well is what do other agencies do. I mean,
20 this is modeled probably after what goes on in some other
21 agencies or what the administration has recommended. It

1 would probably be helpful for us to know how it really works
2 in the real world as well.

3 But I noticed one thing -- first of all, I sent you
4 an e-mail, I don't know what OLA is and I don't know if
5 that's been corrected in the version that's been circulated
6 around.

7 MR. FORTUNO: Yes, it has. It currently reads --
8 the bottom paragraph of page 1 says "Once the need for
9 rulemaking has been identified, LSC's Office of Legal Affairs
10 (OLA) working with staff in appropriate offices will develop
11 rulemaking options papers."

12 So the current draft does -- and it was in response
13 to your comment that that was --

14 MR. ASKEW: Okay. Let me give you an example of
15 why this from the get go seems like this is going to be a
16 pretty substantial change to me. But from what you're
17 saying, it may be --

18 The first sentence under initiation of rulemaking
19 says "The impetus for rulemaking may come from one of several
20 sources: Congressional directive, a petition from a member
21 of a regulated committee or the general public or internal

1 staff management initiative."

2 It doesn't say LSC board, it doesn't say ops and
3 regs committee. So I'm reading this and saying, wait a
4 minute, this process is now going to begin without the board
5 or committee having any role in it and then I keep reading
6 down, well, when do we get involved in it? And we get
7 involved in it at the end.

8 And I think that's probably an oversight, not to
9 have us in that list, but it sent a signal to me, wait a
10 minute, this is really a dramatic change from the way we've
11 been doing business for a long time, therefore, I need to
12 understand exactly what's being proposed here because it does
13 seem like a radical change. But now you all are saying no,
14 it's really not that big a change from the way you've been
15 doing it.

16 So I think there's going to have to obviously be
17 some drafting work done to correct some of these things, but
18 I don't know that we need to get hung up in the actual
19 drafting of it, as much as making sure that we understand
20 exactly what's being proposed here so that we can react to
21 it, rather than just sort of back and forth with questions,

1 because we're never really getting to the heart.

2 With that being said, I'll go to LaVeeda and then
3 to Maria.

4 MS. MORGAN BATTLE: Okay. Because there's another
5 point. And, again, trying to get at the intent of what it is
6 you're trying to put forward and the language that you've got
7 in this document, on page 4, what I heard you articulating
8 the intent of this particular procedure is a very open
9 procedure, particularly as it relates to negotiated
10 rulemaking. However, in paragraph 2 under negotiated
11 rulemaking, it sets out that the president will appoint the
12 members of the reg neg working group from the regulated
13 community.

14 So my question is in the past what has happened is
15 that we have invited groups, but they have determined who
16 they wanted to have as their representative in this process
17 based on whatever the issue is before us. However, this
18 document says that the president will choose who will
19 represent the person.

20 It says in consultation with the committee chair,
21 however, again to me in consultation with the committee chair

1 making an appointment is different from the committee
2 accepting representatives from a group who has an interest in
3 the rulemaking procedure, which is what we have done in the
4 past.

5 So, again, I've got some concerns about just what
6 this process is going to be and whether or not -- and it may
7 not be, John, what was intended, but it does appear that the
8 actual reg neg working group will be appointed by the chair,
9 handpicked by the chair of the LSC, rather than be
10 representative of whoever from that group should come forward
11 to represent them on whatever issue that particular
12 regulation raises.

13 So that's -- you know, I hear open, but when I read
14 this, it does not sound open to me. So it may not be that
15 that's what you intended, but that's what comes across in
16 this document.

17 MR. FORTUNO: Now, bear in mind that there is
18 always the comment period, so any member of the interested
19 public always has an opportunity to comment.

20 But you're right, in terms of the early
21 collaborative stages, that is, working out some of the issues

1 and proposing some language to the committee, that approach
2 does contemplate, as written here in this draft, that the
3 president in consultation with the committee chair would
4 identify people to participate in this early collaborative
5 effort, but that's not to preclude anybody from commenting
6 further down the process. That's always --

7 MS. MORGAN BATTLE: But I guess what I'm saying is
8 that that's not more open, that's less open, it seems to me.

9 If you've got a committee that's handpicked by the president
10 to do regulations and then you couch that as something that
11 is more open, it doesn't appear to me that that's what you've
12 actually accomplished by setting this particular procedure
13 up.

14 MR. McCALPIN: Would the group accept volunteers?

15 MR. ASKEW: Bill, Maria was next.

16 MR. McCALPIN: Sorry.

17 MR. ASKEW: Maria?

18 MS. MERCADO: Yes. And I apologize because I've
19 been trying to read this as I'm looking at it, but, as I
20 said, just making a quick read of it, I think that you
21 describe the process that we have had up until now has been a

1 hybrid process, I guess a little bit of negotiated
2 rulemaking, a little bit of notice and comment.

3 And perhaps part of the reason is the nature of who
4 we are as legal services is that -- I mean, you're trying to
5 make LSC management and OIG the agency, but yet you've got
6 all these grantees around the country that have all this
7 funding to carry out legal services who are very intimately
8 affected by any rulemaking that we do because of the client
9 community that is being served by those programs. And so I
10 think it's difficult to put it in an either or category
11 because we don't fit in either or category.

12 Now, Victor, that's always been a problem with
13 legal services, is that we're not a federal agency per se, so
14 a lot of federal agency requirements don't necessarily apply
15 to us, although we have voluntarily done a variety of those
16 things. I mean, doing GAGAs, doing, you know, the strategic
17 planning and all those kinds of things that although we're
18 not required to we have done.

19 And so in doing that, it is that hybrid that you're
20 looking at and I'm afraid that we can't necessarily be
21 pigeonholed into one or the other. I think that we're going

1 to have to be creative and do a little bit -- and hopefully
2 the one that is the most open that allows for anyone who is
3 affected by any of the rulemaking to be able to have some
4 input and not necessarily --

5 Definitely we need people who are experts in that
6 particular issue, substantive issue. That is definitely
7 utmost, but whether or not it's something that we pick or
8 something that generally the representatives of those
9 organizations or groups assign or appoint or whatever, like
10 some of the committees that are collaborative with NLADA and
11 ABA and legal services and PAG and just -- IOLTA groups.

12 I mean, you know, you've got a lot of committees in
13 the legal profession that are collaborative and working on
14 some of these issues and I would hope that we wouldn't
15 alienate any of those groups as far as the fact that they
16 have as much an interest in making sure that whatever new
17 laws or regulations we get from Congress are properly brought
18 out, that whatever rules we finally have, that they are
19 something that actually works in the field, ultimately, to
20 serve the client community that we serve because one of the
21 concerns that I had in looking at who decides policy

1 determinations, if you look on page 2, and maybe I'm
2 misunderstanding this, but you're talking about having the
3 directed rule that has been worked with management, staff and
4 inspector general, and then any issues that deal with policy
5 determinations on that rule should be determined by
6 management.

7 And, again, the board is left out of there, or at
8 least that's the way I read it, that we don't have an input
9 as to a particular policy direction on a rule.

10 And I don't know whether it was intended to be that
11 way or I am just totally misreading it because, again, that
12 departs from what we have worked with in the past.

13 Granted, because our staff has expertise, you know,
14 the initial drafting of what we might be interested in comes
15 from you and we expect to work with that, but any issue that
16 dealt with a policy determination, though, came back to the
17 committee or to the chair of the committee to work with that
18 policy consideration, that particular regulation. And I
19 wondered whether that was a departure from that.

20 MR. EAKELAY: Turn over to the next page, the next
21 paragraph at the top of the page, because I don't think that

1 was -- where it says "The committee will then deliberate on
2 the policy."

3 I think it's just the president makes the initial
4 determination on policy issues, but it lies in the drafting
5 stays, but that's for the purpose of forwarding it to the
6 committee for debate, consideration and decision.

7 MS. MORGAN BATTLE: However, I'll just follow that
8 through, Doug, if you look at the very last paragraph which
9 explains how notice and comment rulemaking will be done, not
10 the last paragraph, maybe the fourth paragraph down, it
11 says --

12 MR. EAKELAY: Which page?

13 MS. MORGAN BATTLE: This is on page 3, paragraph
14 four.

15 MR. EAKELAY: Okay.

16 MS. MORGAN BATTLE: "Upon the close of the comment
17 period," and this means that you've gotten the comments in,
18 and it says "working with management, the final policy
19 determinations will be made by management."

20 MR. EAKELAY: But --

21 MS. MORGAN BATTLE: Now, it seems to me that after

1 comment that's precisely when the committee and the board
2 have to be engaged and having heard from the field all of the
3 various policy issues that fall out from a proposed rule and
4 that final decision is not one made by management, but by the
5 board historically.

6 MR. ASKEW: Let me see if I've got this right.

7 MR. FORTUNO: What happened there was simply a cut
8 and paste. She simply took what she had used for the
9 negotiated rulemaking since most of it followed the same path
10 and then cut and pasted -- and I agree with you, I don't
11 think that that last sentence there --

12 MS. MORGAN BATTLE: It says final rule, so --

13 MR. FORTUNO: I don't think that belongs there.

14 MS. MORGAN BATTLE: Yes. But that's what it says.

15 MR. ASKEW: Up above, it says "Will draft a final
16 rule." Maybe that's meant to be the draft final rule,
17 which --

18 MS. MORGAN BATTLE: However, it says --

19 MR. ASKEW: And then it comes to the committee.

20 The next paragraph after that says it then comes to the
21 consideration of the final rule by the committee, will follow

1 a similar process.

2 Hopefully, what it means is once comments come in
3 if there are decisions that have to be made, management makes
4 those decisions, puts them in a draft, the draft comes back
5 to the committee and the board for final review and
6 determination.

7 MS. MORGAN BATTLE: However, the way it has
8 happened in the past, if there have been significant policy
9 issues, those come in a report to the committee. The
10 committee then says, well, we think it ought to go this way,
11 and that's when the drafting comes in.

12 MR. MCKAY: It's just a mistake, LaVeeda. I mean,
13 we're saying -- I think Victor just pointed out that those
14 last two sentences are in error, they're not meant to say
15 that policy determinations will be made by the staff.
16 Nothing in here in its final form will say that we're sorry
17 it's an error, but it's an error.

18 MS. MORGAN BATTLE: Okay.

19 MS. MERCADO: But then the next paragraph goes back
20 to having the final rule that is now closed to the public and
21 not open to public participation.

1 MR. FORTUNO: I think what was intended there was
2 to have a process that -- it's an orderly process that
3 involves public participation if the reg neg module is
4 utilized in the very, very early stages and even if not does
5 have public comment throughout the process, but then reaches
6 a point at which it comes to the committee for the committee
7 to make the final cut and a recommendation to the board.
8 It's essentially just a cutoff, as opposed to leaving it open
9 ended.

10 Again, I think everybody involved in the process,
11 and this, as I said, was kind of a collective effort, agrees
12 that we're all best served in the decisionmaking process in
13 having as much information as early on in the process as
14 possible, but also agreed that it was significant to have
15 some structure so that you knew where you were going every
16 step of the way and while it attempts to impose some
17 structure may seem to do that at the cost of something else.

18

19 I don't think that what was intended as a cost was
20 the acquisition of information from those with knowledge and
21 interest in, expertise in a given substantive area. And

1 certainly I don't think anybody in his or her wildest dreams
2 would ever have suggested that it was meant to replace the
3 ultimate decisionmaking by the board.

4 Clearly, that's the board's province exclusively,
5 but simply to provide a structure that allowed for the board
6 to maximize reliance on its staff, to get as much work
7 done --

8 I mean, I don't know that everybody would be able
9 to devote the kind of attention that the prior committee
10 chair was able to devote. That was yeoman's work for which
11 he should be commended, an enormous amount of work.

12 And I think what this does is it simply imposes a
13 structure which is determined by the board -- and can be
14 modified by the board at any point in time, of course --
15 which seeks to harness the energy that you have in house and
16 to set up a system that will -- where you look to your staff
17 to do the staff work for you, but the decisionmaking is
18 clearly the board's province and not intended to be anything
19 but.

20 MS. MERCADO: So that last paragraph would go under
21 the neg reg, not under the notice and comment section? Is

1 that what you're saying?

2 MR. FORTUNO: We're talking about the last
3 paragraph on what? Page 3?

4 MS. MERCADO: Page 3. Because you mentioned that
5 it was dealing with neg reg and so I wondered if that went
6 with neg reg rather than here.

7 MR. FORTUNO: No, I think this one is traditional
8 rulemaking.

9 MS. MERCADO: Okay.

10 MR. ASKEW: John Erlenborn would like to comment.

11 MR. ERLENBORN: Well, looking at the several
12 paragraphs relative to negotiated rulemaking beginning on
13 page 4, actually going down to the third paragraph or the
14 last paragraph on the page, it says "The working group will
15 then meet as necessary to develop a consensus position to
16 draft the NPRM. The OLA representative in the working group,
17 working with a small subgroup of the working group, will take
18 on the task of drafting regulatory language that reflects the
19 consensus. The working group will review the language to
20 make sure it does reflect the consensus reached, although the
21 LSC," and this is the one kind of saving, but I'm not certain

1 it's sufficient, "the LSC retains the ultimate responsibility
2 for crafting the regulatory language and the consensus
3 proposal of the group once developed must go through the
4 formal rulemaking process."

5 It would almost seem to me if you read this
6 literally that if the working group fails to reach a
7 consensus you then stymie the rulemaking process. This does
8 not in any way take into account the possibility that the
9 working group appointed by the president both outside and
10 inside the LSC, if they cannot reach --

11 MR. FORTUNO: I think the last sentence in that
12 last paragraph addresses that point. It reads "If, however,
13 no consensus can be reached and LSC -- "

14 MR. ERLBORN: All right. I missed that.
15 I should never have stopped reading.

16 MS. MORGAN BATTLE: Going back, just to follow up,
17 if I may, on the point that Maria raised, I just have a
18 question in the rulemaking procedure, that final paragraph.

19 Why are we restricting public participation? We're
20 saying the public can come in after the notice and comment,
21 the public can sit in the room, but when we get ready to make

1 our decision, we will not hear from them.

2 Is that what you're saying, that will happen in the
3 committee meeting?

4 MR. FORTUNO: I think that the basis for this is --
5 what we've done is we've had someone with a great many years
6 of rulemaking experience come in and take a look at what
7 we've developed over time and say this doesn't look like
8 anything I'm familiar with and in the federal sector where
9 you see all the rulemaking, there is ample opportunity for
10 comment, but then there comes a time when you say, okay,
11 we've got all the comment, now let's proceed with business.

12 And I think that's what she had in mind, was simply
13 not to foreclose -- an ample comment period, but not to
14 unnecessarily prolong it, either.

15 MS. MORGAN BATTLE: Well, I guess the concern I
16 have is that so often the committee members may have
17 questions, just in order to make sure that they understand
18 the finer points of how to specifically get all the policy
19 considerations.

20 What this does is to preempt the ability of the
21 committee to ask those questions of members of the public

1 that may be present.

2 And I can understand your point by not wanting to
3 have any additional benefit given to any particular commentor
4 who might be in the room over and above other people who have
5 submitted comments to be able to participate in the process,
6 but on the flip side of it, for the committee attempting to
7 reach a sound decision on policy considerations, it seems to
8 me if there are finer issues that must be addressed that can
9 be addressed by people in the room, to prohibit that by
10 virtue of the way that you've designed this would be to the
11 detriment of the committee itself.

12 MR. FORTUNO: Well, I think that while probably
13 not artfully crafted, certainly the committee is always free
14 to inquire as it deems appropriate. What it does not do is
15 create in the system another automatic comment period or
16 comment opportunity. It does not and should not be seen as
17 foreclosing questions that the committee would care to ask
18 and certainly if the committee has questions, getting full
19 and responsive answers to those.

20 But what it does seek to do is to say this is not
21 an automatic additional comment period, we're not going to

1 have three or four comment periods, we're going to have a
2 specified number, this is not an automatic comment period,
3 however, if there are questions I think everyone agrees that
4 the questions should be asked, should be answered, and that
5 it would be in the best interests of the decisionmaking to
6 get as well informed a decision as possible.

7 MR. EAKELAY: So you can provide some amendatory
8 language to that effect?

9 MR. FORTUNO: Sure.

10 MR. McKAY: If I could just -- I just hesitate to
11 correct our general counsel, but my understanding of this,
12 and we're in a new area here, so we are going to be hopefully
13 trying something on that seems to be promising and I know
14 that the committee chairman feels that way, I certainly do, I
15 think this is a better approach, more promising approach for
16 the corporation and a more open approach.

17 I think there is a point in rulemaking where the
18 final policymaker, which is the board, should with its staff
19 be reaching the final rule, and so at that point if you have,
20 for example, gone through a negotiated rulemaking process,
21 you've had a consensus based effort to raise all of the

1 issues.

2 They should have been raised more fully at that
3 point, there will be written comments on top of that, and at
4 this point I think if there were a finer point that the board
5 needed to get information on, they should be able to turn to
6 the staff at that point and say what were the arguments made
7 during the negotiated rulemaking process, what are the issues
8 regarding this finer point now that will help illuminate for
9 the board the policy issue, so that you don't have a point at
10 the end of the drafting process in which any favored person
11 as might be perceived from the outside would come in and
12 direct the final points of the rule.

13 And so I think it is meant, in fact, to at that
14 point exclude other outside comment, the outside comment
15 having been received hopefully in great abundance prior to
16 that time.

17 MR. EAKELAY: Actually, I was reading that
18 without -- assuming, as was clarified earlier, that these
19 will apply in the main to negotiated rulemaking and therefore
20 there will be that --

21 MS. MORGAN BATTLE: This is reg neg.

1 MR. EAKELAY: What we're really talking about for
2 important policy considerations enacted into regulations,
3 that the reg neg procedure will be adopted and therefore what
4 we're talking about is getting through a negotiated consensus
5 draft of a final rule, then going to the notice and comment
6 and then providing for a cutoff of the public's right to
7 participate at the committee level, which is just that, a
8 cutoff of a process that already will have incorporated a lot
9 of input from a lot of people.

10 MR. ASKEW: Maria?

11 MS. MERCADO: I think that the issue of point of
12 cutoff to public comment occurs, it really does depend on
13 whether we're doing the notice and comment rulemaking or the
14 negotiated rulemaking. I know that we've said that the
15 emphasis, Justice Broderick said, would be on negotiated
16 rulemaking.

17 I would like to see a document written that in fact
18 reflects that, the discussions that you say -- what you meant
19 to say but isn't said in this document, that negotiated
20 rulemaking is going to be the norm rather than the exception.
21 Because then it's not as difficult to say that you have to

1 cut off people if the format of rulemaking that we're doing
2 is notice and comment and you only have the one period of
3 comment, I know from our past six years experience of ops and
4 regs, you know, as the honorary member of ops and regs, that
5 many times the comments that we received from the public
6 created a different interpretation and a different issue that
7 we had not looked at in the rulemaking and the fact that you
8 allow the public again to have -- even though it means
9 publishing it again once more, rather than just one time
10 only, it allowed for a totally different comment to come back
11 on the particular issue that we looked at. And so I wouldn't
12 want that process to be taken away.

13 If we have the negotiated rulemaking process, then
14 you are allowing for the dialogue and for that expertise of
15 different people that probably would have anticipated the
16 different issues that were brought up, and so I'm not as
17 concerned in that format whether or not there is a public
18 notice again of the final rule, but if we're doing notice and
19 comment, then I would want another notice for public comment
20 on the final rule.

21 MS. MORGAN BATTLE: The other point, just to follow

1 the whole issue of input which is it really -- so that the
2 committee can make wise decisions is that it seems from the
3 negotiated rulemaking, the way that this is designed, that
4 this working group is meeting and it's outside of the purview
5 of the committee. Meeting, discussing the issues and then
6 coming up with language that will then be presented by the
7 staff to the committee, so actually, if there is a cutoff so
8 that the committee never gets a chance to even hear what any
9 of that discussion was and there's only a presentation by the
10 staff, I'm just not sure that that's not a major departure
11 from at least the collaborative approach that we've had in
12 the past and it's adding steps that are worthy in that you
13 are able to collaborate in advance, but I don't know that the
14 committee gets the full benefit of hearing what all those
15 various positions might be in that process.

16 I know that this is going to need some more work,
17 but I think it is important to hear at least what concerns we
18 have from the standpoint of board members and knowing what
19 the issues are out there as you consider any particular issue
20 that has to be implemented in a regulation in a way that
21 assists the committee in making the best decision that it

1 can.

2 MR. EAKELAY: May I --

3 MR. ASKEW: Yes.

4 MR. EAKELAY: LaVeeda, I'm not sure how you
5 would -- the working -- if, as and when there is a negotiated
6 rulemaking and a consensus is reached and a draft is then
7 prepared again by a subgroup of that working committee, it
8 then comes to the committee in advance of the committee
9 meeting for consideration by the committee.

10 And I would assume at that point certainly the
11 process, the deliberative process that produced the
12 consensus, would be described to the committee and the policy
13 implications that were debated would also be articulated.

14 Short of having a member or all members of the
15 committee participate in the working group, I am not sure how
16 you would get a better or necessary sense of the process that
17 produced the consensus.

18 MS. MORGAN BATTLE: We've done that in the past
19 this way. We simply had people present who were able to
20 articulate that at the committee meeting. In other words,
21 the way that this is written, all of this deliberation would

1 take place outside of the scope of the committee and sitting
2 at that table would only be members of the staff and the
3 people who are participating in the working group, at
4 least -- and maybe if I'm wrong about that you need to help
5 me to understand how you intend for it to go forward, but the
6 people that have participated in the working group would not
7 be part of the presentation before the committee, but the
8 staff's presentation would come before the committee.

9 And therefore you would lose out on at least what
10 we have had as part of what helped us in our deliberations as
11 a committee, which is the full view of all of those views as
12 we made our policy decisions.

13 MR. MCKAY: Well, the working group is not the
14 staff. The working group is the effort to identify people
15 with expertise in the area and impact in the area, so the
16 working group is a term of art refers to that group that, as
17 written now, the president in consultation with the committee
18 will select. And so the working group is not the staff, it's
19 this collaborative, negotiated process.

20 I don't know, unless the committee were to decide
21 that it didn't want to do this, why committee members

1 couldn't be a part of the working group. They may want to
2 reserve for themselves, and frankly I would think it would be
3 a smarter approach and maybe a better approach, to not be
4 directly involved in the negotiated process because you're
5 then going to vote on the final regulations.

6 But there would also be no reason why members of
7 the working group couldn't participate in the presentation of
8 the proposed rule to the committee. I would think that would
9 be a very productive way to present it and make their
10 negotiated process and consensus building open to the
11 committee and I would certainly encourage that.

12 MR. ASKEW: Yes, John?

13 MR. ERLNBORN: I think that what LaVeeda has
14 raised here should be taken a little more seriously.

15 If you go the negotiated route and say you do have
16 a working group that reaches a consensus, that doesn't mean
17 that every affected group has had representation on that
18 working group. It doesn't mean that all of the issues that
19 could have been raised have been resolved.

20 Now, it is true in the past that when we've
21 published the first publication of a proposed rule we then

1 allowed the public to come in and comment. What I'm reading
2 here or what I seem to hear is that you allow the staff and
3 now it's said, well, you could even have members of the
4 working group, well, that may exclude people that have not
5 yet had a voice other than to have written comments.

6 As we've done it in the past, we have had affected
7 groups who were represented in that first hearing, sometimes
8 we've made some fairly drastic changes that even have gone
9 back to republishing before agreeing on a final rule.

10 I don't think we have any certainty that the
11 working group appointed by the president is going to give us
12 a group that will be able to resolve all questions for all
13 interested parties. That's the point that I want to make.

14 Let me supplement that by saying, first of all, I
15 probably should have said, that I like the negotiated
16 regulation process. I've watched this in the executive
17 branch. My experience has been primarily with the Department
18 of Labor.

19 And I know very well, having watched their
20 rulemaking before they used negotiations that there were
21 people that were making decisions and regulations that did

1 not know the industry that was being regulated, did not know
2 the issues that were going to be faced by that issue.

3 And so negotiated rulemaking makes very good sense.

4 You bring in people who have everyday, day-by-day real
5 experience and they can tell the people in the Department of
6 Labor or whatever the department might be, look, here's what
7 you intended to do, this is going to be the adverse
8 consequence, or did you think about this or that.

9 And so negotiated rulemaking does make sense, but I
10 don't think you should limit the process to those who file
11 written statements in the notice period and those who have
12 participated in a working group appointed by the president.
13 That still may have left some people out from where they
14 could do a service by commenting after we've had the first
15 publication.

16 MR. EAKELAY: Mr. Chair Pro Tem?

17 MR. ASKEW: Yes?

18 MR. EAKELAY: I agree with you, John, but I
19 think -- well, let me ask you how you would change this
20 process because I think what's contemplated is more than
21 simply an opportunity for written comment.

1 At the first committee meeting when the consensus
2 draft is presented by the working group, the draft rule will
3 have been published, written comments will have been
4 solicited, but there is an opportunity at that hearing for
5 anyone who was inadvertently omitted to participate.

6 MR. ERLÉNORN: That's all I was asking for.

7 MR. EAKELAY: I think that's in here.

8 MR. ERLÉNORN: I didn't see here -- we were
9 talking about letting the working group appear and then we
10 could also --

11 MR. EAKELAY: There's a cutoff of public
12 participation after that hearing and public comment and final
13 drafting is done after the rule is presented, but if you take
14 a look at the second paragraph on page 3, again, we've gone
15 through the negotiated rulemaking, the task force has drafted
16 a rule and it's being presented to the committee after notice
17 and opportunity for comment and then it says "At the
18 committee meeting, an opportunity for public comment will be
19 held."

20 So I think that addresses your point, but it may
21 not do it adequately. I mean, I think that this is very

1 helpful to John Broderick and staff because I think that
2 we're getting a lot of good suggestions for how to improve
3 this document in the process.

4 MR. ERLNBORN: I just thought that what I heard
5 was, first of all, OLA would present it and then the issue
6 was raised what about people on the working group and then it
7 was we'd have them. It seemed to me to be excluding.

8 MR. EAKELAY: No, but there's clearly
9 contemplated --

10 MS. MORGAN BATTLE: It's not stated.

11 MR. EAKELAY: -- public hearing and --

12 MS. MORGAN BATTLE: Right.

13 MR. EAKELAY: -- which hopefully will capture
14 others who want to be heard and were not participants in the
15 working group.

16 MS. MORGAN BATTLE: It may be --

17 MR. BRODERICK: Doug, if I can say, my read of this
18 is exactly as you've described it. There would be an
19 opportunity for public comment beyond those in the working
20 group itself.

21 MS. MORGAN BATTLE: Right. And I guess whatever

1 document is ultimately generated about how the negotiated
2 regulation process will work should include these concerns
3 because at present they don't and so they do leave questions.

4 MR. ASKEW: Maria?

5 MS. MERCADO: I just want to make sure that I
6 understood Justice Broderick.

7 You were saying the process would be followed
8 because once you do the negotiated rulemaking you go back to
9 the notice and comment?

10 MR. ASKEW: Right. You begin the NPRM draft rule
11 process, which then kicks in all the other things.

12 MS. MERCADO: Well, I guess I was having a problem with
13 the last paragraph in this paper where it talks -- and I'm
14 not sure whether they're contradictory because it says "At
15 this point, the notice and comment process described above
16 will be followed. If, however, no consensus can be reached
17 and LSC must forge ahead on its own, the notice and comment
18 process described above will be followed."

19 What is the distinction?

20 MR. ASKEW: There isn't a distinction. I think the
21 wording just needs to be fixed there. In either case, the

1 notice and comment is going to be followed. In either case.

2 MS. MERCADO: Yes, because I had --

3 MR. ASKEW: The difference would be --

4 MS. MERCADO: The only reason you wouldn't follow
5 notice and comment was only if the working group did not
6 reach consensus, is how I understood it.

7 MR. ASKEW: That's not --

8 MS. MERCADO: Okay.

9 MR. ASKEW: And that may be why this paper is
10 organized the way it is, where you have to put notice and
11 comment first because if negotiated rulemaking doesn't work,
12 you have to go back to notice and comment, so that --

13 But let me make this statement and let's see if we
14 can draw this to a close. Rulemaking, it seems to me,
15 involves more than just process, it involves substance. We
16 in legal services frequently get too hung up on process and
17 forget the substance.

18 I have a bias towards public comment, input,
19 collaboration, in terms of developing the substance of what
20 we do and that it's to our advantage to have that input and
21 collaboration. We produce a better rule, which is what we're

1 after.

2 It's not so much process oriented issues as much as
3 what's the quality of the rule we produce, how effective is
4 it, does it accomplish our goals, is it regulating the
5 community the way we're supposed to be regulating it. We
6 need that input in order to do that.

7 That reflects back, I think, to what Congressman
8 Erlenborn said, the industry having that input helps you make
9 sure you're doing what you're trying to do. So my bias is
10 towards as much input, collaboration, community or public
11 comment as is possible.

12 It seems to me, and Chairman Broderick hopefully
13 can hear that, we've come up with at least five points that I
14 think you need to go back and work on.

15 First, add the board and committees to who can
16 initiate the section of the regulation.

17 Look at whether you can reorder this protocol to
18 have notice and comment first as opposed to second on the
19 list and also if there's a way to put a statement in there --
20 excuse me. That you have negotiated rulemaking first, reg
21 neg first, so that it will be clear that is the preferred way

1 of doing this and if there is a way to put language in there
2 that says that it's the default position, we will always do
3 it unless. And there may be some discussion about what are
4 the unlessees, what are the times we would not do negotiated
5 rulemaking.

6 Thirdly, it's clear and it needs to be stated in
7 here the board has the final authority on rulemaking. I'm
8 not sure that is clear or at least there's some ambiguity in
9 here about that.

10 And, fourth, look for other opportunities to
11 emphasize to make sure that the public comment opportunities
12 here are emphasized so that everybody else won't be confused
13 like we are about what are the opportunities. People are
14 going to focus on the fact that at that final session no
15 public comment is taken and believe that they've been
16 excluded from the entire process when that's not the case,
17 but it appears that way from first reading.

18 Now, did I miss --

19 MS. MORGAN BATTLE: Well, I was going to just add
20 about the point that you made about the decision and the
21 final authority being the board's, that the decision and

1 final authority as to which way you go ought to be by the
2 committee. The committee ought to decide which way it thinks
3 a particular issue ought to be addressed.

4 MR. ASKEW: Well, policy decisions of the Legal
5 Services Corporation are ultimately the responsibility of the
6 board.

7 MS. MORGAN BATTLE: Right.

8 MR. ASKEW: That's the key thing. The way I'm
9 reading this, it may need to be clarified, is when they get
10 to a certain point where some decisions have to be made in
11 order to move it to the committee, management or the
12 president makes that decision in order to get it to the
13 committee, but it's clear that the committee and then
14 ultimately the board makes the final determination.

15 If that's not clear, that needs to be clarified
16 here, rather than it appears that the president is making
17 policy decisions without consultation with the board, which I
18 don't think is what's intended here.

19 Let me ask Chairman Broderick, could you hear that
20 last discussion, John?

21 MR. BRODERICK: I heard -- I had trouble hearing a

1 lot of the folks, but I heard your summary of revisions that
2 people are suggesting and I think all of them would be
3 helpful.

4 And my sense is that no one has had really the time
5 they would like, perhaps, to review this. There's a board
6 meeting tomorrow. I assume this has been on the record, so
7 there's a transcript of what people have said.

8 And I would hope that the ops and regs committee in
9 coordination with management, certainly speaking for myself,
10 upon review of the transcript and any comments generated
11 tomorrow could put together a revised proposal incorporating
12 the sorts of things Bucky has suggested, maybe some others
13 upon reflection, and circulate it to the board in the near
14 term.

15 I don't know that there's anything that's
16 immediately on the horizon that's going to be subject to
17 these new rules, you know, in the next 30 or 60 says. It
18 seems to me we have time to make these changes.

19 But I also hope that there's a strong consensus in
20 the room that this is the direction we ought to be going and
21 we can put a finer point on the process, but I agree with the

1 comment that while process is important, we need not forget
2 here that we're after substance. But it seems to me we have
3 time to do this and the comments have been very helpful.

4 MR. ASKEW: Okay. Anything else?

5 So our next meeting is in September?

6 Is that right? So hopefully we would have something
7 out before the September meeting to review and then a further
8 discussion of this at the September meeting.

9 MR. BRODERICK: I would hope that people would have
10 the revisions which would incorporate suggested comments to
11 the extent we can do that at least 30 days in advance of the
12 next board meeting and hopefully we can then implement this.

13 MR. McKAY: Mr. Chairman, we can do this very
14 quickly. I'm sure we can put these comments together in the
15 next ten days or so, get them to you for initial review.

16 MR. BRODERICK: All right.

17 John?

18 MR. ASKEW: Yes?

19 MR. BRODERICK: I would like to get a copy,
20 obviously, of the transcript today. I've had difficulty
21 hearing some of the comments.

1 MR. MCKAY: We'll make arrangements for you to have
2 a full transcript, John.

3 MR. BRODERICK: All right.

4 MR. MCKAY: And if I may just add, Mr. Chair Pro
5 Tem, I agree with your summary of the issues and I think
6 those can all be incorporated into the document and I think
7 we'll have the benefit of some more feedback from Chairman
8 Broderick and it was his intention, I know, to bring this
9 forward at this meeting and I sure appreciate the comments
10 and I think he does, too, as well.

11 MR. ASKEW: Thank you, Victor.

12 The next item is consider and act on any other
13 business.

14 Is there any other business to be brought before
15 the committee?

16 (No response.)

17 MR. ASKEW: Any public comment on what we have
18 done?

19 Linda?

20 MS. PERLE: I don't have a lot to say, the
21 committee has obviously addressed all the issues fully and I

1 agree with a lot of the discussion.

2 I would like to ask that members of the public can
3 get copies of the latest versions of the memo. I don't think
4 anybody outside of the board have them. I know the board
5 only got them last night, but we certainly haven't seen this
6 version of the memo.

7 MR. ASKEW: The next draft of the protocols?

8 MS. PERLE: Well, we haven't seen this one, this
9 version.

10 MR. ASKEW: Okay.

11 MS. PERLE: And I just -- I was asked to make a
12 comment that's probably redundant now, but asked by the staff
13 of the ABA committee to express their concern that there
14 needs to be some assurance that both the ABA and field
15 representatives are involved early in the process of
16 developing regulations. That's obviously something we agree
17 with, but I'm just making that point on their behalf. I
18 promised I would.

19 MR. EAKELAY: Thank you. I should note for the
20 record that SCLAID chair Doreen Dotson was the de facto chair
21 of our delegation to Beijing after Justice Kennedy had to

1 leave early and she was still negotiating when I left.

2 MR. ASKEW: Any other public comment?

3 (No response.)

4 MR. ASKEW: Is there a motion we adjourn?

5 M O T I O N

6 MS. FAIRBANKS-WILLIAMS: So moved.

7 MR. ASKEW: Edna is the only one -- so moved.

8 MR. EAKELAY: Second.

9 MR. ASKEW: The committee stands adjourned.

10 (Whereupon, at 3:52 p.m., the committee was
11 adjourned.)

12 * * * * *