LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE

Friday, November 8, 2002

10:15 a.m.

The W Hotel
930 Hilgard Avenue
Los Angeles, California

COMMITTEE MEMBERS PRESENT:

John T. Broderick, Jr., Chair
LaVeeda Morgan Battle
Hulett H. Askew
John Erlenborn

BOARD MEMBERS PRESENT:

Maria Luisa Mercado
Thomas F. Smegal, Jr.

STAFF AND PUBLIC PRESENT:

Victor M. Fortuno, Vice President for Legal Affairs,
General Counsel & Corporate Secretary
Randy Youells, Vice President for Programs
Mauricio Vivero, Vice President for Government
Relations & Public Affairs

STAFF AND PUBLIC PRESENT (con'd):

John Eidleman, Acting Vice President for Compliance and Administration
Leonard Koczur, Acting Inspector General, Office of the Inspector General
Laurie Tarantowicz, Assistant Inspector General and Legal Counsel
David Maddox, Assistant Inspector General for Resource Management
David Richardson, Treasurer and Comptroller
Mattie C. Condray, Senior Assistant General Counsel
Alice Dickerson, Director, Office of Human Resources
Linda Perle, Senior Attorney-Legal Services, Center for Law and Social Policy
Robert Dieter, University of Colorado (Nominee)
Bruce Iwasaki, Executive Director, Legal Aid Foundation of Los Angeles

C O N T E N T S

MOTIONS: 5, 43, 75, 83, 84, 87, 90, 92, 110, 116, 127

P R O C E E D I N G S

CHAIR BRODERICK: Everyone's in place?

MS. MORGAN BATTLE: Yes, we are.

CHAIR BRODERICK: Can you hear me on this phone?

MS. MORGAN BATTLE: We certainly can.

CHAIR BRODERICK: Okay. Can I just ask before I call the meeting to order, I hear LaVeeda and Bucky. Is there any other board member present?

MS. MORGAN BATTLE: No. We're it. The meetings are going on at the same time. There's a wonderful Provisions Committee meeting going on in the room next to us, which has now captivated the rest of the board.

CHAIR BRODERICK: Well, I also wanted to mention before we start, I had spoken to Bucky earlier today, and I had asked him --

MS. MORGAN BATTLE: Glad to have you here in spirit and in voice.

CHAIR BRODERICK: Well, I wish I were with you. And I would be if I were able to fly that distance. But I'm looking forward to this meeting, and I'd like to call it to order and welcome everyone who is in attendance.

The first item on our agenda is approval of the agenda, and I would accept a motion to approve it.

M O T I O N

MS. MORGAN BATTLE: So moved.

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: Agenda is approved. The second item is approval of the minutes of the committee's meeting of August 23, 2002. I've read those minutes. Obviously, I did not attend that meeting, and so I should abstain from voting. But I will leave it to you to make sure that those minutes are in order.

M O T I O N

MS. MORGAN BATTLE: I would so move their adoption without any corrections, unless you've got some, Bucky.

MR. ASKEW: No. I second.

CHAIR BRODERICK: Those are accepted. The third item on our agenda today may or may not take us a little bit of time. But I wonder if Mattie Condray is at the table.

MS. CONDRAY: Indeed I am.

CHAIR BRODERICK: Mattie, how are you?

MS. CONDRAY: I'm good. How are you?

CHAIR BRODERICK: Oh, I am fine. And I want to make certain as we go through this that we do it as thoughtfully as we need to, and as expeditiously as we can. And I know that there are a lot of people who have spent a lot of time in the working group to put this draft together. And from what I've been able to distill, it was widely accepted, with some concerns that were expressed by non-LSC members. And I know Linda Perle has some concerns, and maybe others do. And they will have an opportunity during this meeting to express them.

But what I would like to do, Mattie, is to have you give us very briefly your overview of where we are on 1611, and then perhaps some discussion among the members of the committee as to what areas they may have particular concern about. It may be that those concerns are the same as those shared by the field, or it may not. But we may be able to expedite this, in a way.

But why don't we start, Mattie, with you just giving us an outline of where we are and what issues you see

as still in controversy.

MS. CONDRAY: Okay. I will say in your materials, you have both the draft, the entire Draft Notice of Proposed Rulemaking, as well as kind of a summary memo of the major issues. So I guess I'll work off of that summary memo, and just kind of walk through the regulations. What the working group is proposing to do is really substantially revise the regulation, both substantive regulations, but also some just technical reorganization of the regulations. So I think I'll walk through it just section by section briefly.

First, we're looking to change the title of the regulation from "Eligibility" to "Financial Eligibility," just to highlight that this is a -- these regulations address financial eligibility questions only. They don't address questions related to citizenship eligibility, which is covered by 1626, or really address issues of service determination. There was a concern on the part of the working group to separate whether someone is eligible for service from a decision about whether they fit in the priorities, et cetera, et cetera, and whether the program is going to be able to provide them service.

1611.1 is the Purpose. Again, we were trying to revise the purpose to reflect those points I just made. There are a number of definitional changes that I won't go through separately, unless anybody has a question about them, because I think they may come up as I talk about other sections of the rule.

The heart of the rule is going to be the new section 1611.3, 4, and 5. .3 will be Financial Eligibility Policies. That's based on requirements currently found in Sections 1611.5(a), 1611.3(a) through (c), and 1611.6. I think that gives you an idea of how we are trying to reorganize and consolidate the regulation.

It would address in one section recipient's responsibilities for adopting and implementing financial eligibility policies. A lot of it is based on in the current reg, the most significant new element is a proposal to permit recipients to adopt financial eligibility policies which permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families.

And then there's another change about "Recipient

shall not consider jointly-held assets in determining financial eligibility for clients who are victims of domestic violence."

The latter change comes as a result of a statutory change. And so we were just simply implementing the statutory change.

The first one, the reference to other benefits. One of the issues that got discussed extensively in the working group was that a lot of the client base are people who are already receiving government benefits for low-income individuals and families. And the standards for those benefits are, in many cases, as stringent or more stringent than our eligibility policies. And so being able to reference those would be a great administrative help to our grantees.

And it was pointed out that with respect to asset ceilings, we already have an informal procedure which allows grantees to have their board or the program make an official recognition of the asset standards of other programs, and say, "If you meet that asset standard, you're meeting our asset standard." So that seemed to make sense for us to be

able to allow that for income as well, provided that that's the sole source of income for people. So we're hopeful that that change alone will help our grantees administratively significantly.

MS. MORGAN BATTLE: I've got one that I don't know exactly -- are you going over -- is that 1611.4 or 3?

MS. CONDRAY: I'm still on 3. I haven't gotten to 4 yet.

And 1611.3 is basically talking about our grantees have to have policies that are consistent with the rest of the regulation.

1611.4 is Financial Eligibility. That's the section where we have the basic requirement that recipients can only provide legal assistance supported with LSC funds to those individuals who have been determined to be financially eligible.

Again, we go into the -- repeating that, the provision I just talked about, that a recipient may find an applicant to be financially eligible if the applicant's sole source of income is a government program for low-income individuals or families, and if their assets are underneath

the applicable asset ceiling. And we're also writing into the regulation the previous practice, which allowed reference to asset ceiling tests from other benefits.

All of the provisions that are in this section are based on existing provisions, and we hope that they will be clearer to read and understand in the field if they're in one section, rather than scattered over three different sections, as these provisions are found currently.

There are two significant substantive changes in this section over what exists in the original regulation, which is a requirement that in making financial eligibility determinations, a recipient shall make reasonable inquiry regarding sources of the applicant's income prospects and assets, and shall record income and asset information in the manner specified for determining eligibility in proposed Section 1611.7.

MS. MORGAN BATTLE: Now, is that supposed to be 1611.7 or 1611.6? When I look at 1611.7, it --

MS. CONDRAY: It should be 1611.6.

MS. MORGAN BATTLE: Yeah. I noted that --

MS. CONDRAY: You know, these things change so

much, I missed one. I'm sorry about that. Manner of Determining Eligibility is 1611.6. This change is meant to -- well, our current regulation has a fairly lengthy process by which the program is supposed to ask for a whole bunch of pieces of information. And depending on the answers they get, you almost follow this flow chart. Then if you're going to make one decision, you have to ask a whole bunch of other questions.

And it was clear to us in the working group that the current formulation is difficult, at best, and that what our grantees by and large were doing was more or less a truncated form of what was required technically under the regulation.

But since we had no particular information to think that people were serving ineligible people or, in fact, not inquiring sufficiently into their eligibility status, we had no reason to think that that wasn't happening. It made sense to simplify the regulation somewhat to make a process that was easier to follow, yet we're all still comfortable, provides the basis for an eligibility determination that we think is defensible. So that's the first major change.

And then the second major change is consistent with the section on eligibility policies. The regulation would permit recipients to determine an applicant to be financially eligible because the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of that program are at or below 125 percent, which is our statutory level.

CHAIR BRODERICK: Mattie?

MS. CONDRAY: Yes.

CHAIR BRODERICK: Can I ask you, through this point in the proposed rule, is there any substantial or significant disagreement among members of the working group, to your knowledge, up to this moment?

MS. CONDRAY: Up to this point, no.

CHAIR BRODERICK: Thank you. I didn't mean to interrupt you.

MS. CONDRAY: No, that's all right. Section 1611.5, Authorized Exceptions to the Annual Income Ceiling. The first change here that we would do is we're proposing to amend the upper income limit. Currently, it's 150 percent of

125 percent, so a total of -- the complete upper income limit under our regulations is 187.5 percent of the federal poverty guidelines. And we're looking to just increase that to 200 percent.

MS. MORGAN BATTLE: Tell me, is there a statutory guideline on that, or did we derive that cap or that ceiling ourselves in the regulatory guideline?

MS. CONDRAY: That part, we were able to do. If we were going to change the 125 percent of the federal poverty guidelines, we would have to go back to the governors and OMB to change that. But the total upper income -- the way this works is you've got your 125 percent. And there are other factors here that affect ability to afford legal assistance. You can look at somebody's income over that. That absolute maximum is something that we had established by regulation, and we have the authority to change that. And we decided to go from 187 percent of the federal poverty limits to 200 percent, partially because it's simpler, but also partially in recognition of the changing demographic of a lot of the program's client base, which is increasingly made up of the working poor.

MS. MORGAN BATTLE: So is that 200 percent of 125 percent? Or is it --

MS. CONDRAY: No, no. It's 200 percent of the federal poverty guidelines of the DHHS number.

CHAIR BRODERICK: Mattie?

MS. CONDRAY: Yes.

CHAIR BRODERICK: The consequence of that change is anticipated to be what?

MS. CONDRAY: It will slightly increase the potential applicant pool, eligible applicant pool.

CHAIR BRODERICK: By making it more accessible to the working poor?

MS. CONDRAY: Correct. It was the feeling of everybody on the working group, though, that slightly increasing the applicant pool would not, in fact, have a deleterious effect on the actual legal services provided to people accepted as clients. So we were comfortable that we weren't going to make a change that would either increase the pool so much that people couldn't actually serve the people that they needed to serve.

CHAIR BRODERICK: I hear you.

MS. CONDRAY: We also addressed an issue relating to governmental benefits for persons with disabilities, which is not currently addressed by the regulation. The regulation currently speaks to just governmental programs for low-income persons. There are persons who have disabilities, and there are many governmental programs out there, some of which are income-specific and some of which aren't.

The one issue in this particular section that was -- kind of where there's some disagreement was the issue of fixed debts and obligations and taxes.

Prior to 1983, current taxes was considered a fixed debt. That could be considered. When the regulation was changed in 1983, the reference to taxes was changed to only count for prior years' unpaid taxes, but not current taxes. And the justification at the time was that those 1611.5 factors were only supposed to be special circumstances, a justification we no longer find compelling, and including current taxes. In fact, if you were paying your current taxes, you do not have that income available to you with which to afford services. And so we thought it was -- LSC thought it was appropriate to address this issue back in

taxes.

I know the field was interested in having us just go from a gross income standard to a net income standard. Essentially, the leading current taxes from what you consider income. The corporation representatives were not comfortable doing that, because the standard has always been gross income, and then you look at deductions to gross income. And the federal poverty guidelines are on gross income, not net income. And we thought trying to mesh those two changes there was too much, but that we could appropriately deal with the issue by considering current taxes a fixed debt or obligation, the same way that mortgage payments. And we are going to also consider rent payments -- that's something that hadn't really previously been addressed -- as a fixed debt or obligation that may be taken into consideration for a low-income person.

So what we're basically proposing to do is return to the prior usage of the term with respect to taxes as prior to 1983 from the original regulation of '76.

MS. MORGAN BATTLE: Help me to understand this. So the formula post 1983 excluded taxes as a fixed debt, and

meant that you used the gross amount.

MS. CONDRAY: Well, the definition of "income" has always been basically a gross income standard.

MS. MORGAN BATTLE: I understand that.

MS. CONDRAY: Prior to 1983, you could look at current taxes, what effect did that have as a fixed debt or obligation, the same way a mortgage payment affects your -- the amount of money you have.

MS. MORGAN BATTLE: Right.

MS. CONDRAY: In '83, current taxes were taken out of that mix. And so it was only if you had an unpaid tax bill from a prior year that you could look at that unpaid tax bill, but the current taxes you were paying, you couldn't look at. And that didn't make sense to us anymore. So we want to go back to prior to 1983, where we're still using the definition of "income" stays as gross.

MS. MORGAN BATTLE: I understand. But how were present taxes treated then post 1983 is what I'm trying to understand.

MS. CONDRAY: They were -- you just didn't -- they weren't treated -- I mean, it was more or less tough, that

you couldn't take into account that that money was being paid in looking at income.

MS. MORGAN BATTLE: So this should also, it seems to me, increase the pool.

MS. CONDRAY: Potentially, yes.

MS. MORGAN BATTLE: Okay. All right.

MS. CONDRAY: But what it will, hopefully, do is for people who are over that 125 percent, you can then, for those people, look at their current taxes to see if, "Well, do they really not have enough money? Can we determine them to be eligible?"

MS. MORGAN BATTLE: Right.

MS. CONDRAY: 1611.6, Manner of Determining Eligibility. We've proposed several revisions to this section. We're proposing to delete the requirement that eligibility forms have to be approved by the corporation, and proposing to add a provision to make it clear that a recipient may provide legal assistance upon referral from another recipient, providing that the referring program provides a copy to the receiving program of the documentation of the financial eligibility of a client.

This is the currently accepted practice, but it's not mentioned in the rule. And since one of the points of the rule is to clarify what standards apply, we thought we'd write that in.

1611.7. This is one of the two areas of biggest disagreement that we had in the regulation.

MS. MORGAN BATTLE: Let me ask another question, going back to fixed debt. Mortgage -- tell me what things are now considered. You've got mortgages now, taxes, and what other things are now fixed debts?

MS. CONDRAY: Rent.

MS. MORGAN BATTLE: Rent? And what else?

MS. CONDRAY: Well, I'll say we've tried to use the phrase and explain it as an obligation that's fixed into time and amount, so that if there are other fixed debts out there -- I suppose if you had a prior legal judgment and you were making payments that you had to make on that, debts that were fixed as to time and amount is the key here. We didn't want to be too specific, because we want programs to be able to have the leeway to develop, look at different payments that came in.

MS. MORGAN BATTLE: What about utilities? Is that included?

MS. CONDRAY: No. Utilities has not traditionally been included, and the corporation did not want to include it. We have in the preamble specifically asked for comments on utilities, though, as well as whether there are other sorts of deductions or payments that we need to look at.

MS. MORGAN BATTLE: Is the thinking because the utilities --

MS. CONDRAY: Because I think utilities -- you know, there's a certain level of utilities which you have to have, but it's not necessarily fixed as to amount. You know, like you have to buy food. You don't have to buy all of your food at Dean and DeLuca. So --

MS. MORGAN BATTLE: Well, what about water, heat, gas? I mean, things like that that are as standard as rent mortgage?

MS. CONDRAY: Well, like I said, those have traditionally never been part of the calculation. They're not generally fixed as to time and amount. You have to pay your rent. You know what the rent payment is.

I think the rationale there is certain things are within your control and certain things aren't. You know, you have to have a certain amount of heat. You have to buy a certain amount of clothes. You have to have a certain amount of food. But there are other payments on top of that that are perhaps not necessary. And we've never considered credit card debt. Although once you're charged it, you have to pay it.

MS. MORGAN BATTLE: But I would put that in a totally different category than I would basic utilities.

MS. CONDRAY: And like I said, we've specifically asked for comment on this issue, because it was something that we did discuss in the committee, and we didn't really come to a resolution of it. So we are specifically asking for comment on whether there are additional items that we can specify as specifically mentioned, utilities among them.

So hopefully, since this is just a proposed rule, we'll be able to generate some additional comment and give some more thought to that list of additional factors.

MS. MORGAN BATTLE: And I guess the reason I raise that question is that the fixed debts are certain specific

things that can be considered to determine eligibility. If it's a non-fixed debt, then even though it may be as recurring, it cannot go into that formula; is that correct?

MS. CONDRAY: Well, there are other items on the list of factors, obviously, other than simply fixed debts. We've got among the other things that are in that list are current income prospects, unreimbursed medical expenses, including medical insurance premiums, fixed debts.

MS. MORGAN BATTLE: Tell me where you're reading from. I'm sorry.

MS. CONDRAY: Oh, I'm sorry. I'm looking, actually, at the proposed text of 1611.5. It's on page 122.

MS. MORGAN BATTLE: Now, what letter?

MS. CONDRAY: 122 and 123 in the book.

MS. MORGAN BATTLE: "Current income." So it's at the bottom.

MS. CONDRAY: It starts at the bottom and continues on the next page. "Expenses necessary for employment, job training or educational activities in preparation for employment such as dependent care, transportation, clothing, and equipment expenses" -- if you, you know, had a uniform

expense or something -- "non-medical expenses associated with age or disability or other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance."

And these are the current factors. There's been a little tinkering of the language of a couple of them to make them clearer. But they are the current factors. (F) has always existed as kind of a catch-all for some other extraordinary circumstance that we hadn't previously anticipated.

And again, we're requesting -- we talked about whether it was just fixed debts or just other items that should be on this list. You could call things like utilities -- you could put utilities on this list without having to have them being fixed debt.

MS. MORGAN BATTLE: Yeah.

MS. CONDRAY: And we talked about those, and for the moment decided that we would republish the current list the way it is, but specifically ask for comment on identifying additional items, and how we would -- how you would look at those.

MS. MORGAN BATTLE: What is the concern -- I know the concern in part is that it is not a fixed amount, that you could have someone bring in one receipt and say, "My utilities are 'X,'" and so therefore, you just kick that into the formula, because that amount does change based on seasons. It changes based on how much you use. There are some factors in that.

But what is your thinking about how, in a constructive way, utilities could be included?

MS. CONDRAY: Well, they could be included. I mean, the regulation has always kind of charted this line between looking at people's -- how much people have available to afford private legal assistance, but at the same time acknowledging that all sorts of everyday expenses aren't necessarily -- you don't just deduct for every single possible everyday expense that somebody has.

You know, the corporation has never had deductions for how much you spend on food. Although, obviously, you have to buy food. Never allowed you to make deductions or look at how much money you're spending on clothing generally, as opposed to clothing you have to buy for employment.

And so these kind of everyday expenses have generally not been in this list of factors. And, you know, you're making a good argument that, you know, utilities are one of those everyday expenses like food and clothing, but I think you can make a good argument that some of those expenses, perhaps, should be in this list. We were unclear about how to go about doing that, though. And which is why we specifically wanted to ask for comment.

Because if you're going to put utilities on the list, do you put utilities over a certain proportion of somebody's income? Assuming that okay, well, you have to pay for some utilities, but you don't have to pay for lots of utilities. You know, you have to have a certain amount of heat and rent and cooking gas, but you don't have to have all sorts of appliances that --

MS. MORGAN BATTLE: Water. Water is fairly basic.

MS. CONDRAY: Water. And for, you know, a lot of people, electricity, they don't have that expense, because it's part of their rent.

It's a fine line. And, I mean, from a philosophical point of view, I think you can make a perfectly

reasonable argument, personally, either way, which is why we wanted to generate additional comment on this issue and readdress it in the final rule.

I think I just started to talk about 1611.7, Retainer Agreements. There has been a requirement in the current regulation that retainer agreements be obtained. Clearly, retainer agreements, it's not really a threshold eligibility question. But this is where it was put in, so we were dealing with the issue. The corporation's position has been even if we didn't keep it in 1611.7 that it should be addressed somewhere. But for lack of a better place, we were dealing with it with 1611.7.

CHAIR BRODERICK: Mattie, can I ask you a question?

MS. CONDRAY: Yes.

CHAIR BRODERICK: Relative to retainer agreements, are they required by statute?

MS. CONDRAY: There is not statute that requires us to require retainer agreements.

CHAIR BRODERICK: Are they required, in the corporation's view, by Rules of Professional Responsibility and Professional Conduct?

MS. CONDRAY: Well, we believe -- the corporation believes that its authority derives from the act which provides our responsibility to assure the highest quality legal assistance, and that we believe retainer agreements are a part of that. Individual rules of professional responsibility differ. In some jurisdictions, they are required to have -- there are some requirements for retainer agreements in certain circumstances. In other jurisdictions, there are not. There are certain jurisdictions that require, if you're providing what they call unbundled or limited legal services, they don't require a retainer agreement, but they do require some sort of written notice to the client regarding the limitations of the -- so the Rules of Professional Responsibility differ from jurisdiction to jurisdiction.

CHAIR BRODERICK: So a retainer agreement that's envisioned in 1611.7, basically, a form which would be modified for each case, or is it something that's created anew in every case?

MS. CONDRAY: Well, the current regulation actually requires LSC to approve people's retainer agreement forms,

and we have done that in the past. What we have proposed is that we would take that particular element out, that the regulation would propose that there are certain items, certain pieces of information that would have to be in the retainer agreement.

But other than that, we would not specify the form or the language of the retainer agreement. Programs would be free to put in additional information if they chose into their retainer agreement above and beyond what we would require. That would be entirely up to them.

CHAIR BRODERICK: I'm sorry to keep asking you questions here, but --

MS. CONDRAY: No.

CHAIR BRODERICK: But the reason for it, from our perspective, from the corporation's perspective, other than complying with the aspirational notion of achieving the highest quality legal services, what practical impact does it have in terms of our oversight?

MS. CONDRAY: Well, the practical impact it has is if you have documentation of what the expectation is between the client and the program. If there is a claim later that

reflects on that -- I don't want to speak for OCE, but the folks from OCE were telling us that they had had -- you know, they would receive a complaint. The program said they would do XYZ, and then they go back and have the retainer agreement that said no, the program only said they would do X and Y. They didn't say they would do Z. And you can't complain to them, because they're not doing Z. Or the program said they would pursue this particular policy. They didn't guarantee -- nobody guarantees an outcome with legal things.

So that it turns out to be a protection for the program in later disagreements and complaints with clients. And it can also be a protection for the client on those rare occasions if the program does not provide the services in the manner it was supposed to, that there is a record of what the program was to provide. Although I suspect that case happens much less.

CHAIR BRODERICK: Mattie, why wouldn't individual programs being done in some sort of best practices rationale, if that were a problem for them and that were, in fact, a solution to the problem, why wouldn't they do that voluntarily?

MS. CONDRAY: I don't know.

CHAIR BRODERICK: Why do we have to require it if it's largely to protect programs?

MS. CONDRAY: Some of them, I'm sure, would do it voluntarily. I think our experience has been that not all of them, in fact, do it. But prior to their being a regulatory requirement for it to happen, it did not necessarily happen.

MS. MORGAN BATTLE: Just a question, if I could follow up on John's concerns, is with the abundance of specific regulatory requirements that we have that have fallen out of either their statute or the restrictions that we've gotten on our appropriations, here we have something that we have imposed. And when we ask what is our vested interest as LSC in either our responsibility to monitor compliance with the statutes or any other law that we've got to follow, it's a provision put in place that might be helpful to the program in its disputes that may arise between clients. And so --

MS. CONDRAY: And then it helps us in monitoring those issues as well. Obviously, if we are asked to investigate a claim against a program, it helps us in our

oversight if we have something to refer to.

MR. FORTUNO: Yeah. if I may here. And this is Vic Fortuno. Just one point. I think that my understanding is as to the compliance and enforcement perspective on this that one of the things that they value in the agreement, not just best practices value to the grantee and some protection to the recipient from a purely compliance standpoint, I think it's a document that embodies the terms of the representation. That is, who's being represented, when the representation commences, the scope of the representation. These are things which periodically, when compliance and enforcement is investigating allegations of one sort or another, finds it helpful to go back to and to review. That is, to make a determination as to who's being represented, what the understanding was at the outset as to the scope, and the timing of the representation.

So it does have -- in addition to the value to the program, and the aspirational best practices and compliance with state ethical requirements, I think there is this independent compliance. If the question was does it have any independent compliance significance, I think that that's the

one that comes to mind is there is documentation as to the specifics of the representation.

CHAIR BRODERICK: Victor?

MR. FORTUNO: Yes.

CHAIR BRODERICK: Let me ask you, in terms of some sort of balancing test here, obviously, it can be required, and it may from time to time prove very helpful, for the corporation in terms of compliance. And I guess my question is for the additional effort that's being required of every program for every client across the country, versus the number of times we say, "Thank goodness we have a retainer agreement to refer to to find the parameters," are we overkilling this issue?

MR. FORTUNO: Yeah. I think it -- well, I don't know that we have a whole lot of empirical data. I think it's fair to say that the latter are few and far between.

MS. CONDRAY: I would also point out that it's not every client, in fact.

CHAIR BRODERICK: That is true, Mattie. I'm sorry. I overstated that.

MS. CONDRAY: The requirement which I point out is

something that was adopted a number of years ago. We're not proposing to add a retainer agreement requirement. We were just -- the argument in the working group was that we didn't want to take out the requirement that the board had already put into the regulation.

It's not, in fact, every client. It's never been every client.

MS. MORGAN BATTLE: It says extended service to a client. So we understand the distinction between extended service and brief consultation and --

MS. CONDRAY: Advice and consultation and brief services, right.

MS. MORGAN BATTLE: Yeah, I understand. I think we do understand that significant difference.

CHAIR BRODERICK: Mattie?

MS. CONDRAY: Yeah.

CHAIR BRODERICK: Is your view the same as Victor's that if this is required in a large number of cases, which it would be, that the utility, the practical effect in utility of this is not going to be realized that often. Because a number of times, the compliance people need to find out in

any detail what the understanding was at the outset of the representation is infrequent. I was just trying to --

MS. CONDRAY: I have no reason to disagree with him on that.

CHAIR BRODERICK: Okay.

MR. ASKEW: John, this is Bucky. I think this issue is similar to some issues we discussed at the last committee meeting, which is why are we regulating in this area. Because regulation -- when we write something like this in the regulation, it not only requires the programs to do what we're requiring them to do, but it then requires us to certify that, you know, there is compliance with the regulation. So it adds an additional burden to the corporation in terms of compliance to make sure the programs are doing what the regulation instructs.

In my view, this got added to the regulations, I understand, in 1983, and it hadn't been part of the regulations before. And in my view, this is an issue of best practices that if a program is operating in a state that has an ethical rule that requires it, obviously, they need to have it. If they've had a history with issues coming up like

this, and perhaps they want to have it, but that it's not an issue that we should be regulating in or requiring programs to do, just like there are a huge number of other best practices that we would probably like to see every program do, but we're not going to write a regulation requiring them to do it. You know, nice carpets on the floors and nice furniture.

Not to be flip about it, but there are a huge number of things that we would like to see every program do that we shouldn't regulate in. And my preference is we take this out simply because it's not something that I've seen as necessary, and yet does provide a burden on programs and adds an extra level of requirement on us. And there was one other point I wanted to make. Anyway, I'll come back to that.

I think it's something that we should seriously consider. Since the board put it in in '83 on its own motion, without being statutorily required to do it, the board can just as easily take it out --

MS. CONDRAY: Absolutely.

MR. ASKEW: -- after a review and decision that it's no longer necessary to do.

MR. EIDLEMAN: This is John Eidleman, Acting Vice President for Compliance. And it is OC's position that this is very important. It's not that time consuming for our office to do the investigation and look at the retainer agreements. I think it's also foundational for good practice. It's been my experience the time that I recently was in the field looking at a program that the files that were well maintained started off with a retainer agreement which set forward for both the client absolutely what they would be served for, and for the program, knowing what they would be giving representation for.

And flowed from that, then you had good documentation in the file. If that piece of essentially document was not there, the retainer agreement, very often, the files were somewhat chaotic and didn't have the essentially information.

Now, you can certainly argue that this is time consuming. But it's my understanding that most programs have gotten this down to routine, that part of finding client eligibility once they've done the financial eligibility screen, they move on, have a client sign the retainer

agreement. So I don't think it's that burdensome.

MS. MORGAN BATTLE: I agree with what I've heard, at least from the other two board members on this. I do understand best practices and an organized methodology for going forward in how you establish your relationship with the client and communicate to the client the expectations of what it is that you plan to deliver in terms of services.

And I think that probably on a going-forward basis, programs will continue to have retainer agreements. The issue is whether we ought to require them to have retainer agreements in the absence of a local standard where it is required by state law or state practices, and where whether that agreement is there or not, the underlying issue of a program implementing good practices of communicating solidly with their clients about the expectation of what that relationship is all about can be handled in a letter or some other things as well. Yes, John.

CHAIR BRODERICK: I just wanted to say, with respect to retainer agreements, I share Bucky's concern, and I think I come out on that issue as both you and Bucky do. I can't imagine that if it's of importance to local programs in

their practical everyday experience, but they're not doing it. And I suspect if they're not doing it, they'll find out that it's just not worth the time and energy, because it's not that useful.

And, you know, I'm sympathetic to the field in the sense that there are enough regulations out there that they need to comply with, and I don't think we need to add to the pile if it's not necessary and if it's not particularly and frequently useful to the compliance people.

And so I would be inclined to eliminate the retainer agreement requirement. Is that something that I've stated accurately for the two of you?

MR. ASKEW: Yes, you have for me. And for LaVeeda.

MS. MORGAN BATTLE: Yes.

CHAIR BRODERICK: With respect -- Mattie?

MS. CONDRAY: Uh-huh.

CHAIR BRODERICK: With respect to the client service notice for a lesser activity, can you help me? Is that something we currently require, or something that would be new?

MS. CONDRAY: No. That would be new. But if

you're going -- well, if you're going to get rid of the retainer agreement, I would assume that whole kit and caboodle just goes.

CHAIR BRODERICK: It would seem to make no sense to have a lesser rule if it would knock out retainer agreements. And the same would be true, it seems to me, for referral notices in the PAI contract?

MS. CONDRAY: Right. Correct.

CHAIR BRODERICK: I don't know where Bucky and LaVeeda are on that issue, but I think I would be inclined to eliminate it entirely.

MS. MORGAN BATTLE: In fact, the concern I had about the client notices, just listening to how much, you know, just brief service goes on in some of the programs, there would have been a significant burden as it relates to that. I actually thought that the standard of just a notice that says what the relationship is ought to be the basic requirement, if anything, so that you have something in the file that shows you what that relationship is without it having to be a signed retainer would have been a minimal standard all the way across the board.

But I agree with you, John. The whole thing could go.

MR. ASKEW: I would recommend that we strike all of 1611.7, and that takes care of the notice issue at the same time.

The other question is, Mattie, there are no references in the regulation later to the retainer agreement that would have to be changed.

MS. CONDRAY: If there are, I would fix them technically.

MS. MORGAN BATTLE: Retainer is out.

MS. CONDRAY: Obviously, then, I'll have to renumber 8, 9, you know.

M O T I O N

MS. MORGAN BATTLE: I would so move that, at least from our standpoint, when we make our recommendation to the board that it not include 1611.7, Retainer Agreements, that that particular requirement be stricken.

MR. ASKEW: I second.

CHAIR BRODERICK: Mattie, if we do that, do we have to amend 1611.8(b), which says a recipient is not required to

execute a retainer agreement, and then it goes on to describe under the circumstances.

MR. ASKEW: If you're looking at Mattie's cover memo, John --

CHAIR BRODERICK: Yes.

MR. ASKEW: -- I think that's where she didn't go back and correct the numbers. I think it's 1611.7(b).

MS. CONDRAY: Yeah, I'm sorry about that.

CHAIR BRODERICK: All right. Okay, I'm with you. So the unanimous view of the committee on let's call it 1611.7 in the proposal would be deleted in its entirety.

MR. ASKEW: Right.

MS. CONDRAY: And if there are any other, obviously, I will rewrite the --

MR. ASKEW: Conforming language.

CHAIR BRODERICK: Actually, Mattie, I can't imagine that there is. But before we formally vote on that, I wonder if there's any public comment that would run contrary to the anticipated vote here, whether anyone wants to be heard in advance for the anticipated vote that would eliminate 1611.7.

MR. ASKEW: No.

MS. PERLE: This is Linda Perle. I don't have any comment. I don't know if there's any other member of the public here that has any comment.

MR. ASKEW: Okay. John, the motion was made and seconded. Do we want to take a vote now?

CHAIR BRODERICK: Yes, I think we should. All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: All those opposed?

(No response.)

CHAIR BRODERICK: Unanimously, 1611.7, based on our recommendation, should be stricken.

MR. FORTUNO: Do I understand that that's the deletion of 1611.7 and the making of any unnecessary conforming revisions?

CHAIR BRODERICK: Yes, exactly. Exactly, Vic. Mattie, 1611.8?

MS. CONDRAY: Yes. Moving on, 1611.8, which I guess will become 1611.7 when I renumber. Change in Financial Eligibility Status.

The current regulation talks about changing

circumstance, if there's a change in circumstance and someone becomes financially ineligible. We also just wanted to add a provision that if there is later discovered information not a change in circumstance, but it comes to light that the person was never financially eligible in the first place. It's a fairly technical change. We have language in the preamble to make clear that we do not -- as with change of circumstance, we're not expecting our programs to be, you know, asking every time, "Do you have a change in circumstance?"

CHAIR BRODERICK: Sure.

MS. CONDRAY: Was there other information. Just trying to make the regulation actually fit what real life is.

The last section of the regulation, but the second-to-last issue we have was the other issue of significant difference of opinion. And that's Representation of Groups. Prior to 1983, groups were permitted to be found eligible for assistance if they were either primarily composed of eligible persons, or had as their primary purpose the furtherance of interest of persons in the community unable to afford legal assistance.

In 1983, the regulation was changed to delete that

last portion so that the only groups that would be eligible would be those groups primarily composed of eligible persons. There was interest in the field to go back to the pre-1983 formula and allow representation of groups other than -- I'll use the food bank example.

The corporation of the food bank, the organizers of the food bank, are clearly probably not eligible individuals, but the food bank is clearly serving an eligible population. It was those sorts of groups that had been taken out of permissible representation in 1983, and there was a disagreement about whether to add them back in. The field was very interested in having those groups added back in. The corporation did not want to do that, and so the proposed reg does not add them back in. The field dissented from that position.

CHAIR BRODERICK: Mattie, is there a statutory prohibition on this issue?

MS. CONDRAY: No.

CHAIR BRODERICK: Or is it merely a matter of internal policy?

MS. CONDRAY: This is a matter of policy.

MR. ASKEW: John, can I make a suggestion here?

CHAIR BRODERICK: Certainly.

MR. ASKEW: Bruce Iwasaki is here from the Legal Aid Function, Los Angeles. He's been waiting patiently and wants to speak on this issue. And the Provisions Committee is going on in the other room, and his staff is maybe talking about him. I'm sure it makes any program director nervous to be out of the room. So I suggest we let Bruce address this issue, and then we'll come back to it as a committee.

CHAIR BRODERICK: I think that's a good idea. Bruce, please come forward, if you're not already there, and speak to us. Welcome.

MR. IWASAKI: Thank you very much. I will be very brief. I have a written presentation that I can pass out to the committee and staff, but I'm not going to read through that.

I'm simply going to say that I urge this committee to adopt the language that the field representatives and the working group propose regarding expanding the ability to represent groups when the group has as its principal activity the delivery of services to persons who would be financially

eligible for LSC-funded assistance, or the group has as its principal activity the furtherance of the interest of persons who would be financially eligible for LSC-funded assistance.

A couple reasons for that. I think the primary one is doing so really helps us fulfill the mission of LSC, and one that we have embraced, which is to promote comprehensive integrated client-centered legal services. We do a lot of work in our program in the community economic development area. We help groups incorporate. We help them get their tax status. We help them learn how to run meetings and be good non-profit employers. It helps our private attorney involvement work.

Two weeks ago, we had a program with about 30 non-profit groups. We had a couple lawyers from Skadden Arps there teaching them how to be good employers and not violate labor laws. So everything clicked in something like that.

We can incorporate these groups, but they're not going to get much lending or much financial assistance when many of those -- most of them are making less than $20,000 a year. We found that the best situation is when the groups are -- their governing bodies are something like our

governing bodies. They have representatives of low-income people, but they have people from all walks of life. And I'm not talking about rich people. I'm talking about people who make more than $11,075 a year, though.

And so people who are -- they could be clergy, they could be lawyers, they could be business people, they could be teachers, they could be any number of folk who care about their community. We find that that sort of setting gives that organization the best chance to create child care centers, or to build affordable housing, or to do a job development program.

And there are other groups like that that we represent not on LSC funds. Coalitions, for instance, to help the homeless often are made up of different entities in the community, church-based entities, Salvation Army, all sorts of other groups that have come together to address a problem. If we can't work with them, then it's hard to build this comprehensive integrated system.

So I just urge the committee to adopt the field recommendation.

CHAIR BRODERICK: Bruce, can I ask you a question?

MR. IWASAKI: Yes, of course.

CHAIR BRODERICK: You know, you do this every day, and I don't. But I'm just concerned a little bit about the policy ramifications in the following context. If we were to allow the representation you propose, and maybe we should, but the group involved only had one or two eligible persons, and the vast majority were not eligible persons, would we be subject to criticism?

And secondly, if the group, however composed, provides services to a number of people who would not otherwise be individually eligible for our services, aren't we doing indirectly what we can't do directly, and would we be criticized by some for doing that, particularly those who have something to do with our funding?

MR. IWASAKI: I think those are two very good questions, and I suppose there are many scenarios that we could come up with. I guess -- go ahead.

MS. MORGAN BATTLE: If I can, Bruce, I might be able to help. John, and you're not here, so you can't see it, but the actual language in the proposal from the field says number one of the requirements would be that at least a

majority of the group's members are financially eligible for LSC-funded legal assistance --

CHAIR BRODERICK: Oh, okay. That's different. Yes.

MS. MORGAN BATTLE: -- or --

MR. IWASAKI: That's an "or," yes.

MS. MORGAN BATTLE: -- or -- let me just read all three -- or for a non-membership group, at least a majority of the individuals who are forming or operating the group are financially eligible for LSC-funded assistance, or the group has as its principal function or activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded assistance.

MS. CONDRAY: It's the third one that we were most concerned about. The first two were in the ambit of what we proposed.

CHAIR BRODERICK: Yes.

MS. MORGAN BATTLE: Okay.

MS. CONDRAY: It is the third one that the corporation was concerned with, and for exactly the reasons that Justice Farber articulated.

MR. IWASAKI: And I think this rule has to be -- or the proposal that the field representatives made and that I'm urging the committee to adopt for recommendation of the full board does not do away with a number of other requirements. And I don't think they should. Obviously, priority setting is one; obviously, restrictions on political activities; and the basic requirement that the organization must be able to show that they can't find counsel anywhere else.

So there are a number of other, I think, safeguards that we have. Because I understand that in any lawsuit, there's always somebody who's not happy with the other side. And so that's our business. We recognize that we can sometimes walk a fine line. And I think the field understands and respects that, and respects the choices that the corporation has to make on that.

I believe those other limitations do protect both the field and the corporation. And all I can say is there are so many eligible clients that we have. We're not concerned about wasting time with groups that really are not trying to assist our client community. And I think the field will take a responsible view on this.

CHAIR BRODERICK: I think, Bruce, if the field did exactly as you said, this would not create any overwhelming problem. It wouldn't be above criticism, but that's not the test.

If the field was not vigilant, even with the restrictions that you impose as suggested, it could be a source of conflict, I think. And I think, you know, the field would have to be very, very sensitive to the concerns of those who would see this as indirection.

MR. IWASAKI: I agree with that, sir. The one thing I think I would say is that the pre-1983 rule, which, to my knowledge, never led to even an allegation of any misconduct or any embarrassment -- and for almost 10 years, the field worked under those rules -- was I think a more liberal rule than what I'm proposing now. That was a primary purpose test, I think, if I'm not mistaken. And this goes -- I'm not saying words are that much easier to apply sometimes, but it's a primary function and activity test, which I think is a bit more objective, a bit more where there is something to look at, rather than asking, "What's your purpose?"

So I think that must have been hashed out with

considerable discussion and I'm sure thoughtful discussion that I was not part of. But I respect and applaud the work of the entire working group in this important discussion.

And with that, unless there are other questions, which I'm happy to --

MR. ASKEW: Let me ask you one thing, Bruce.

MR. IWASAKI: Sure.

MR. ASKEW: I was struck this morning with the presentation of Provisions Committee about all the various groups that you work with across boundaries on all of those issues that seem to be overwhelming on language problems.

Now, one thing that popped into my mind when I was hearing that is whether this restriction might inhibit your ability to work with those groups or to assist those groups in what they're doing to serve the client community, because it might be hard to document what this regulation would require for each and every one of those groups.

MR. IWASAKI: Yes, I definitely think so. That's why so much of this we have to do on our IOLTA money. And I think that's always -- well, that's going to be another issue one day, and in other states, that's less available.

As I said, I think there are a number of factors that are coming into play that make this an excellent opportunity for the corporation to revise this rule. The awareness and embracing by the field of the state justice communities idea, I think, is one. We're working with the courts and other organizations.

The development of more anti-discrimination and civil rights work is certainly one. As we presented in the previous -- well, in the other committee, we work very closely with community organizations, civil rights organizations. Many of those organizations advance the interest of low-income communities, but may not be composed of entirely, or even a majority, of low-income people.

I don't think the corporation would want us to say to those communities when they come to us, "Sorry, we can't help you. But we are really interested in a state justice community with you."

I recognize that there are fine lines to draw here, and I don't think there's a right or wrong on this. But I can say that I believe from the field's point of view we can advance very important interests of the corporation and equal

justice by this modest modification.

MR. ASKEW: Thank you.

CHAIR BRODERICK: Bruce, thank you. I wonder if there's somebody there -- I notice in my materials that the OIG had a concern relative to this proposed change. Not the one that the corporation was making, but the one the field was interested in having. And I'm wondering if there's anyone there from the OIG's office.

MR. ASKEW: Yes. Laurie's here.

CHAIR BRODERICK: I don't know whether Laurie wants to speak to us or not relative to that. I want to give her an opportunity, if she'd like to.

MS. TARANTOWICZ: Thank you. Well, we submitted as part of the proposed rule, which basically, I think, summarizes our concerns relative to group representation. And I think to state it very simply, our concern is that it will result in the representation of ineligible clients, as Justice Broderick had mentioned earlier on. And I'm not sure we have much more to add. I think our discussion in the proposed preamble was, you know, pretty thorough as to what our position is.

CHAIR BRODERICK: Does the OIG have the view -- I don't want to overstate it, but I recognize your concerns. Is your concern that to do this as the field would propose it would be unlawful, or just unwise?

MS. TARANTOWICZ: Well, quite frankly, we haven't really had the opportunity to look at the field's proposal. Our comments went to the proposal in the actual Notice of Proposed Rulemaking, which is somewhat narrower, I suppose, than what I understand the field's proposal to be. But as I said, we really haven't had a -- I don't know if there's a written proposal or not.

MS. CONDRAY: Well, we had talked about the general idea of rebroadening it back to include non-membership groups the primary function type groups. And the OIG was in agreement with us, with the rest of the corporation, with respect to those -- that particular portion of it, of the proposal, where we talk about -- in the preamble, talking about expansion to those sorts of groups, and that LSC was not -- did not believe that that was appropriate. And to that extent, the OIG agreed with us, and was not dissenting from that particular view.

CHAIR BRODERICK: Mattie, what I'm trying to find out is whether the Office of Legal Counsel, because in this context, believes that the field's proposal is unlawful, or is it just your view that it's not recommended?

MS. CONDRAY: Well, I don't want to speak for Laurie. But to the extent she agreed with us, our view was that -- going back to, you know, kind of the pre-1983, where you're allowed to represent groups -- I'll use the shorthand of food bank, since that was one of the examples -- that that's not unlawful. I just thought it was unwise from a policy standpoint.

CHAIR BRODERICK: I understand.

MS. CONDRAY: So I suppose if, in fact, it turned out that people were representing significantly -- were, in fact, not representing eligible individuals, or the group was not, in fact, doing what it was supposed to do, it could turn into -- a particular instance could be unlawful.

But as a general proposition, no, I don't think the statute prohibits -- any of the statutes prohibit the representation of a group like that. The corporation just felt that given a number of policy questions, it was not wise

and it was not a good use of scarce corporation resources to permit such representation.

CHAIR BRODERICK: Well, the conditions Bruce identified, and if we added to that that the group was not otherwise capable of paying for legal representation, and assuming those conditions additionally that I just made were followed and not abused, do you see policy problems regardless of how tightly they follow those conditions?

MS. CONDRAY: Yes. The position that we developed was that yeah, that that -- and for the reasons you articulated earlier, is that, you know, there are some subjective -- even though this language is more objective than the previous pre-1983 language, there's still a certain amount of subjectivity. And, you know, the furtherance of the interest of those persons in the community who would be financially eligible, well, we don't really know without doing an eligibility screen on all of those persons. You know, I'm willing to say that yeah, probably those people are, in fact, you know, going to be eligible.

CHAIR BRODERICK: How would the field know --

MS. CONDRAY: But there's an attenuation here that

opens us up for criticism, I think, is the policy concern.

CHAIR BRODERICK: How would the field be able to calculate whether the substantial majority -- whatever the term of art was -- substantial majority of the individuals involved who were otherwise eligible, how would you do that? How would that be accomplished?

MS. CONDRAY: I don't know.

CHAIR BRODERICK: Is Bruce available?

MR. ASKEW: John, let me suggest this. The pre-1983 rule was less restrictive than what's being proposed here. Prior to 1983, this really was not an issue that I'm aware of or can remember in terms of criticism or concern --

CHAIR BRODERICK: So the proposal, Bucky, that Bruce articulated is more restrictive than what existed pre-1983.

MR. ASKEW: That's right.

CHAIR BRODERICK: Are you and LaVeeda of the view that we should follow the field recommendation on this issue?

MR. ASKEW: Well, I am. But let me say this. There's a threshold statement in this new draft that I think is very important, and it's been mentioned. But before this

representation is undertaken, the program has to make a determination that the group has no practical means of obtaining private counsel in the matter for which representation is sought.

MS. CONDRAY: That was true too, prior to 1983.

MR. ASKEW: But there is a threshold issue here that it's not just any group, but it's a group who cannot obtain representation. But then it has to meet the --

CHAIR BRODERICK: But chances are, Bucky, if that's true, the substantial majority are eligible clients.

MR. ASKEW: That's one of the conditions.

CHAIR BRODERICK: It would seem to me.

MR. ASKEW: And that's number one. That's right. And that would then qualify.

CHAIR BRODERICK: Yes.

MR. ASKEW: But there are "or's." They're not "and's" that go after that.

CHAIR BRODERICK: Right.

MR. ASKEW: If they can document that the substantial majority is financially eligible, then they could say for a non-membership group, at least the majority of the

individuals who are forming or operating a group are financially eligible. Then there's an "or." And those are all okay, I think, with everybody, if that's where it ended.

Then the third "or" is the group has as its principal function or activity to deliver the services to those persons in the community to be financially eligible. That's another one. If they could demonstrate that, then the representation is "Okay, if the group has no practical means of obtaining counsel."

And then there's a final "or" which has as its principal function or activity the furtherance -- anyway, it goes on to list another set of requirements. So my understanding is if any of those "or's" are met in combination with the fact that they have no way of obtaining counsel, then they can represent the group.

CHAIR BRODERICK: LaVeeda, what's your view on this?

MS. MORGAN BATTLE: I'm inclined, if there's no statute or restriction that would restrict us from going forward with this, to agree that if it would allow us to have a more integrated opportunity to serve clients in a

particular community that it makes sense.

I do think this, that the additional requirements set out in the proposed reg of making sure that they cannot get legal services anywhere else and have that documented gives us some level of protection, particularly if their principal function -- and this means that there has to be a judgment made by the recipient about what the principal function of this particular organization is going to be.

But if those two things are met, it seems to me if you operate within those parameters, we should not at all run afoul of the overall mission of the Legal Services Corporation with regard to providing legal services to our grantees.

CHAIR BRODERICK: LaVeeda, thank you. Is Bruce there?

MR. IWASAKI: Yes, sir.

CHAIR BRODERICK: Bruce, the alternatives that Bucky was identifying, do you see those as imposing enormous obligations on the field that, you know, it's like don't wish for it; it may just happen?

MR. IWASAKI: Mr. Broderick, are you referring to

the requirement that the group, as a practical matter, has no means of obtaining private counsel?

CHAIR BRODERICK: Well, that would be one. And I guess that's a threshold issue on all of these alternatives. But they have to have a majority or substantial majority, or have to have a specific purpose and so forth. I just wonder if that's going to be onerous on the field, and how you feel about it.

MR. IWASAKI: Let me see if I understand it. The rule today permits us to represent such groups if a majority of -- and I think it's the way it's enforced is a majority of the board or majority of the membership, if it's a membership organization, are eligible clients, which we understand to mean that we have to do an eligibility screening for either every one of them or some sort of sample of them.

If that is the only way, I believe that's very burdensome. And that's why I believe the field's recommendation that permits -- and that's why it's in the disjunctive -- groups with the principal function or activity language is preferable.

MS. MORGAN BATTLE: You would have to be able to

show that they had sought the representation in other places --

MR. IWASAKI: That's correct.

MS. MORGAN BATTLE: -- and were not able to obtain it.

MR. IWASAKI: For instance, I don't think we could represent -- and I don't know how to say this without offending any number of people -- a coalition of the Presbyterian Church and the Catholic Church and Muslims in America, who probably have their own lawyers, even though they would all say and all have evidence that they help low-income people. We couldn't do this under the field's proposed rule, because they would have practical means of finding counsel elsewhere.

Surely there will be gray areas. I understand that. A non-profit corporation that gets funding from HUD to build low-income housing, a gray area might be, "Well, gee, can't you squeeze something out of there to get a lawyer?" I will tell you, that's really hard to do when you're just starting out.

CHAIR BRODERICK: Bruce, I'm persuaded from the

discussion that the field's recommendation makes some sense. I'm also of the mindset that the field, if this were to pass, needs to be extraordinarily vigilant relative to it. Because I can see it as a source of some collateral attack by those who would miscast it. So as long as everyone understands the risk going in.

MR. IWASAKI: Sir, I understand that. I feel somewhat humbled to represent the field, at least in this body, with that admonition. I think there is a level of maturity that's developed throughout staff and Legal Services, and increasingly close relationships with national bodies and OCE and the Inspector General and legal counsel. I think we can work out some of these things.

MS. MORGAN BATTLE: I think Laurie had her hand up.

CHAIR BRODERICK: Laurie, did you want to speak?

MS. TARANTOWICZ: Yes, thank you. I just wanted to go back to a question that I think Justice Broderick asked earlier, and I don't think that I got a chance to answer. And Justice Broderick, you asked whether or not the OIG believed that any part of this field proposal would be inconsistent with the LSC Act. And I believe our position is

yes, it would be, especially with regard to -- I'm now looking at Section (a)(3) and (4), and I don't see how these groups are financially eligible for legal services under the act.

And as I said, because, you know, I hadn't actually been prepared to discuss this particular proposal, but, you know, the representation of a group that does not have to prove financial eligibility, I'm not sure how that's consistent with the LSC Act. And I just wanted to make that clear, because by not answering, I didn't want to leave the impression that --

CHAIR BRODERICK: So your answer is you have some concerns, but you haven't reached a final conclusion. Or am I miscasting what you said?

MS. TARANTOWICZ: Well, I think the conclusion is that -- I mean, very serious concerns, and if I needed to reach a conclusion today, I would say that it was inconsistent with the requirement that clients of Legal Services grantees be financially eligible.

CHAIR BRODERICK: Every member.

MS. TARANTOWICZ: Well, you know, the specifics of

how you go about determining whether a group is financially eligible is obviously not particularly addressed in the LSC Act. I just believe something that goes, you know, quite this far, where financial eligibility doesn't even seem to be required to be determined, is just not something that makes me comfortable.

MR. ASKEW: Victor, were you going to offer something, or -- let me just say I don't have the act here in front of me, but I don't think the act anticipated how you define group representation, or eligibility of a group. And so the corporation adopted a regulation back at its creation to try and address that issue, because it's clear Legal Services programs were going to and had a need to represent groups. And so the corporation came up with a regulation in the mid-'70s to answer those questions that I don't think anybody said at the time were inconsistent with the act. And we operated for eight years or nine years under those regulations, which are more open, if you want to put it that way, than this particular regulation is.

So I don't think we can say that the act prohibits us from representing a group that's not composed 100 percent

of eligible people. I mean, to say that, you say that we could only represent groups that could document, and after screening could document, that every single member is eligible for legal services. I don't believe it was anybody's intention to restrict it that way. And so we operated for all these years with a rule that's more open than this particular rule.

What we're trying to do is go back to a rule that I think makes sense, from the real world of what programs are doing and the kind of issues they're facing.

And secondly, I think Bruce made a couple of powerful points. One, we are pressing these programs to have these integrated high-quality state-wide delivery systems, and involve everybody in the equal justice community in the delivery of services, which we saw demonstrate to us this morning with groups that are not LSC-funded who are actively participating with the program. So we do need to be cautious that we don't throw up roadblocks to making happen what we are encouraging or requiring programs to do.

Secondly, I don't know of a single Legal Services program that has the time, interest, or energy to represent

non-eligible people or non-eligible groups. They're overwhelmed with eligible clients, as you saw this morning. And every program is faced with that. And there's just no incentive on a program to want to go out and represent the Presbyterian Church, or to represent some group that can clearly find its own counsel. That's not a good use of their resources, it wouldn't fit within their priorities, and they're simply not going to do it. And so I don't think it's an area that cries out for regulation, or cries out for restriction.

Section (b) in here does require the program to document all of these issues, and that can be checked by the Office of Compliance and Enforcement. It can be used whenever there's an issue to make sure the program has documented carefully under which section of this regulation the program has asserted that it has the right to provide representation here.

Victor, can you help in terms of the act any more than I was able to?

MR. FORTUNO: No. That's my understanding as well.

MS. CONDRAY: And just from a policy standpoint, I

don't think the corporation was so much concerned --

MS. MORGAN BATTLE: Mattie, the mike.

MS. CONDRAY: With respect to groups, I don't think the corporation was so much concerned with the no practical means of obtaining private counsel. I think we were pretty comfortable with the idea that if they were going to represent these groups, it would be groups that, you know, didn't have a lot of money and couldn't get counsel elsewhere.

I think the policy concern really came with the idea of who determines what the principal function or activity is, who is determining what's the furtherance of the interest of the persons who would be financially eligible, that that's where the gray area is, and that's where the concern that would open us up to criticism was.

So I just wanted to be clear what I think our principal concern was. You know, I don't think we were thinking that people would be running off and representing groups that had lots of money.

MR. ASKEW: That's the requirement that's placed on the program now to do that, and it's subject to review and

inspection and oversight by the corporation if there is a problem or a complaint.

MS. MORGAN BATTLE: You know, it seems to me we're at a point where this is going to get further comment before we make a final decision.

MS. CONDRAY: That's true. Absolutely.

MS. MORGAN BATTLE: So I think we have fully vetted the concerns in our discussions thus far, and I'd like to see us consider, so that we can get feedback and comment, the proposal, the new proposal. And then certainly, after we've had a chance to get feedback and comment on it, we'll be in a better position to see whether that language is fraught with wonderful opportunities for the legal services community, or some problems that we haven't thought of thus far.

CHAIR BRODERICK: LaVeeda, is that a motion?

M O T I O N

MS. MORGAN BATTLE: That is a motion.

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: All those opposed?

(No response.)

CHAIR BRODERICK: It's unanimous.

MR. ASKEW: So we're going to publish it with this language.

MS. CONDRAY: And I will make whatever conforming amendments I need and changes of the discussion and the preamble.

MS. MORGAN BATTLE: And then we'll get discussion on it, and we can make a decision about it later on.

MS. CONDRAY: Correct.

CHAIR BRODERICK: Mattie, is there anything further on 1611?

MS. CONDRAY: Yeah, there's one additional issue on 1611, and that has to do with access to records under Section 509(h) of the 1996 Appropriations Act. That section refers to -- provides that eligibility records, among a host of other records, "shall be made available to any auditor or monitor of the recipient" -- there are some ellipses -- "except for such records as subject to the attorney/client privilege."

That provision has been retained in each subsequent

appropriation measure since 1996, and continues to be enforced today. The Office of the Inspector General has been interested in having this language expressly incorporated into 1611.

What happened at the working group level was that we had talked about it. It was clear that there was a disagreement over exactly what 509(h) means, and we didn't really want to have a long, lengthy discussion about what 509(h) means in the context of this regulation. But we were close as a working group to adopting language which would have basically very closely tracked the language of the statute. It wouldn't have answered some of those inherent questions, but it would have put the statutory language more or less into the regulation. We were close to getting agreement on that.

And then simultaneously, we raised this issue in the other working group, the 1626 working group. Because to the extent that the statute says "eligibility records," it occurred to us well, if we're going to talk about financial eligibility records, and we're talking about citizenship and alien eligibility records, if we're going to adopt language

in one regulation, we should adopt language in the other regulation.

The 1626 working group, however, was not willing to adopt any language that just simply tracked the statute. That working group was not willing to go to the same place that the 1611 working group was on this issue.

Internally for LSC management, then, we ended up with a situation where we could have either -- where we could end up with language in one regulation and not the other regulation, differing language, or simply having some language in 1611, but no language in 1626. And we determined that that really was not an acceptable option either way.

And then on further reflection, thinking about the fact that 509(h) talks about a lot of records -- it doesn't talk about just eligibility records -- and that hashing out a discussion of what it means or having regulations that deal with this issue that only touch on a certain portion of the records referenced in 509(h) was simply inappropriate, that if the corporation wants to have a regulation relating to access to records, that that would be a fine topic for a regulation, but that would be separate.

MS. MORGAN BATTLE: I think that that makes sense. I think that from just listening to the discussion, I think this is -- if we've got a statutory access to records provision, I do think we need to have a regulation that interprets that statutory provision. And it seems to me putting that in a place so that anyone looking for what the standards are for access to records could find it probably makes sense.

I'd like to hear from the OIG. I know that this is of concern. If you've got it spread out in two or three different places, does that adequately inform people of what the standards are?

MS. TARANTOWICZ: We had felt pretty strongly about at least having -- understanding that we were never going to finish the working group if we were going to try to reach consensus, and also understanding that ultimately, it's the corporation's responsibility to promulgate the rule that it believes is most appropriate, regardless of whether consensus is reached or not.

We strongly believed it was at least important to refer in 1611, as the corporation did in 1635, the

timekeeping reg to the fact that 509(h) exists, that these eligibility records we're talking about in 1611 are the eligibility records that 509(h) refers to. And just a simple statement that tracks very closely the statutory language, although I don't think any of us are very happy with that language one side or another, because it's not the clearest expression in the world. But that simply recognizes that 509(h) deals with eligibility records.

As I said, 1635, the timekeeping reg, has a similar provision. And I guess as a member of the working group, I didn't quite understanding the objection to just at least tracking the statutory language. And I guess that's our position.

MS. MORGAN BATTLE: What about my suggestion that there be a separate place in the regs that addresses 509(h) in all of its -- I mean, with a cross reference to where --

MS. CONDRAY: In all of its glory.

MS. MORGAN BATTLE: Yeah.

MS. TARANTOWICZ: I certainly don't think we'd have an objection to that. But as I mentioned, I don't think that we'd ever be able to reach consensus in that if we did it

through negotiated rulemaking. Although I believe it's probably important enough to warrant at least some form of discussion beforehand.

But in the meantime, just a simple reference, you know, as I said, as is in 1635 seemed to us appropriate.

MR. ASKEW: Mattie, let me ask you, other than the IG's dissent on this issue, was this the consensus of the working group that this be presented in this form, or was there other dissent within the group about this?

MS. CONDRAY: No. The rest of the working group was comfortable with not addressing the access issues in the regulation, and leaving the statutory language to stand on its own.

CHAIR BRODERICK: I don't see -- in 1635, is that what you're saying, that's the timekeeping requirement, the reference to 509(h)?

MS. TARANTOWICZ: Well, I don't think there's a reference specifically to 509(h). I think there's some language -- I'm sorry. I don't have it in front of me. But I think there's some language that states something similar to what is in 509(h). Because timekeeping records are also

listed in 509(h), as are eligibility records and retainer agreements, for that matter.

CHAIR BRODERICK: Bucky? Hello?

MR. ASKEW: Yes.

CHAIR BRODERICK: Yeah, I'm sorry. I wonder on this point whether we want to come to some consensus, the three of us.

MR. ASKEW: Yeah. I think what I would do, John, is publish this with the changes that we have made here today in 1611.7 and 9, and then take comment on this. And the Inspector General, obviously, will give us some comments on their perspective on this. And then when the appropriate time comes, we'll come back and make a decision on the final regulation.

But just as the working group delayed or really stopped their progress forward, I think it might stop our progress forward. And I think what I prefer to do is go ahead and publish this regulation, and then take comment and then come back to it later.

In the meantime, maybe start looking at this issue, should we start work on the regulation on 509(h)?

MS. CONDRAY: They're completely separate regulations.

M O T I O N

CHAIR BRODERICK: Bucky, your motion is to publish 1611 in its modified form, as modified by earlier vote?

MR. ASKEW: Exactly.

MS. MORGAN BATTLE: I'll second that. And Bucky, I'm looking at 1635.4, Administrative Provisions. And in there, there is some statement about the persons who are statutorily entitled to access to such records. And is that the language we're talking about putting here? It may be that it makes sense for us to cross reference all this and put this -- what is it -- 509(h) entitlement to an access somewhere that people can find it and know exactly what they've got to give and what they don't. And I think that that probably would be instructive both to the field as well as to us about how that particular statute is going to be implemented across the board.

CHAIR BRODERICK: LaVeeda?

MS. MORGAN BATTLE: Yes.

CHAIR BRODERICK: I had some difficulty hearing

you. I couldn't tell whether your recommendation was the 509(h) be included in some place within 1611, or we were making the --

MS. MORGAN BATTLE: No. I'm agreeing that we're leaving it out for now. We'll take comment on how we ought to approach it. But I'm saying my suggestion would be that we approach it by doing it someplace separate that it cross references how it works.

CHAIR BRODERICK: Yes. All right. That's what I thought.

MS. MORGAN BATTLE: Yeah.

CHAIR BRODERICK: As earlier amended by our votes, can someone make a motion to approve the draft of 1611 for presentation to the board for publication and comment?

M O T I O N

MS. MORGAN BATTLE: So moved.

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: And I hesitate, because I hope everyone there who wanted to make public comment relative to

this before this vote has had an opportunity. It sounded as if they had.

MS. MORGAN BATTLE: I think that's everybody, John.

MR. ASKEW: Yes. No show of hands.

CHAIR BRODERICK: Now, can I ask you a question? We've been at it for about an hour and a half. I wonder if anyone there would like about a five-minute break to stretch their legs, then come back and finish this agenda, or whether you would just as soon plow through.

MS. MORGAN BATTLE: Sounds good.

MR. ASKEW: Yes.

CHAIR BRODERICK: So like a five-minute break?

VOICES: Yes.

CHAIR BRODERICK: Why don't we take a 10-minute break?

MS. CONDRAY: I'm willing to hurry back in five.

MR. ASKEW: It will bring us back to noon, which is when we're supposed to break for lunch. We've got some more work to do.

CHAIR BRODERICK: Why don't we take five minutes? Someone will call me back?

MS. CONDRAY: But we have a number of other items on the agenda, so --

CHAIR BRODERICK: Wonderful. Thank you. We're in recess.

(A brief recess was taken.)

CHAIR BRODERICK: I'm sorry the recess took longer than five minutes, but I'm delighted we're back. And hopefully, we can run through the balance here, although we do have some other items that may take a bit of time.

Before we move forward to the fourth item on the agenda, with respect to 1611, I don't think we selected at the time of our vote the time period we were looking for for comment, or at least to make a recommendation to the board relative to that.

MS. CONDRAY: Good point.

M O T I O N

CHAIR BRODERICK: Yes. And I think we should -- my recommendation would be that we have 30 days for comment, given the extensive work done on the regulation, and we need to move it forward. So I would move that we recommend a 30-

day comment period.

MS. MORGAN BATTLE: I'll second that.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: That's the ruling, 30 days.

Item 4 in our agenda is consider and act on 1602, Draft Notice of Proposed Rulemaking, and it deals with the LSC's FOIA regulation. And from my review of it, it sounds as if it's making some technical changes on the one hand, and making explicit that which was perhaps somewhat more informal or implicit.

But what I'd like to do is ask Mattie, since I don't think these amendments are particularly controversial, to spend what she deems an appropriate amount of time explaining what it does in a little more detail, then taking any questions that we might have.

MS. CONDRAY: Okay. Yeah. They were all fairly technical in nature. The biggest new piece that we're proposing to put into the regulation is what we call the submitter's right to process. This is something that exists, and it's something that's currently done, but just isn't

actually in the regulation.

If somebody requests grant applications, or portions thereof, we contact the grant applicant and give them an opportunity to object to the disclosure of the information, particularly under Exemption 4, which is confidential and financial information, before we make a decision on releasing information or not. That process has been in use for some time. We're not looking to make any changes to it, but just simply to formalize that into the regulations.

Authority to Defer Action Pending Receipt of Payments or Fees. Currently, our regulations provide us the authority if someone owes us fees to not kind of work on that particular regulation of that particular FOIA request, but it doesn't give us the express authority to defer action on other requests that may come in an appending basis while fees are overdue. Most other agencies have that express authority. It's acceptable under the statute, and we wanted to write that authority in. It's particularly useful.

We have a couple of requesters who file repeated requests for us. They are people who are not very happy,

generally, and probably need some help. But they file lots of FOIA requests, and then -- and we're stuck, as long as we don't have a hope to not deal with them. But this is a little bit of an assistance to us.

The Fee Waiver Criteria. We're not looking to make any substantive changes to the Fee Waiver Criteria section, but merely to flesh out a little bit more of what the standards that exist mean. We've had a couple of instances where we've had people apply for fee waivers and not adequately address on their initial application the factors, and we end up denying it. And on appeal, it turns out that they have, in fact, a basis for a fee waiver. If they had articulated it better in the first place, it would have saved everybody some time. So I'm hoping that by having the standards set out, that will help people articulate better in their fee waiver requests what standards have to be met.

And then there are just a couple of real technical amendments. Changing the references of "General Counsel" to "Office of Legal Affairs," changing the address of our reading room in anticipation of our move, and then finally, increasing the fees for search and review time and copying to

better reflect what LSC's actual costs are. And they are minor adjustments.

CHAIR BRODERICK: Are there any -- Mattie, obviously, I can't see the folks in the room. I wonder if there's any comment that we need to receive.

MS. MORGAN BATTLE: I see heads shaking to say no, John, on that.

CHAIR BRODERICK: The answer is no?

MR. ASKEW: Yes.

CHAIR BRODERICK: I will entertain a motion.

M O T I O N

MS. MORGAN BATTLE: So moved, that we adopt the proposed regulation and put it out for comment for a period of 30 days, 1602 as presented.

MS. CONDRAY: I'm actually proposing 60 days, because this didn't have any prior -- unlike the negotiated rulemaking, where we fleshed out the issues.

MS. MORGAN BATTLE: I'm sorry. Sixty days. Let me amend my motion to 60 days for notice and comment, and make that our recommendation to the board at the board meeting today.

CHAIR BRODERICK: Is there a second?

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

MR. ASKEW: Mattie, even with a 60-day comment, this could be on the agenda if we have a board meeting in late January. We should have time to get it before us in January?

MS. CONDRAY: Oh, probably not. Not with a 60-day comment period. If you wanted to do a 45-day comment period -- if you did a 45-day comment period, we could probably have it for the next board meeting.

CHAIR BRODERICK: LaVeeda, do you want to amend your motion?

M O T I O N

MS. MORGAN BATTLE: Yeah. Why don't I amend it to 45 days, I think, once we get this out.

MS. CONDRAY: I know. Because I don't think it's very controversial. I don't think we'll engender a lot of comment.

MS. MORGAN BATTLE: Forty-five days, so that we can address this at our next board meeting.

CHAIR BRODERICK: All right. That's amended. Bucky, do you want to second that?

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: So it's passed, and we'll send it out for comment. And we'll receive that, hopefully, within the 45-day period.

The next item on the agenda is one that was much discussed at the last meeting, when I reviewed all of those minutes. And LaVeeda in particular was interested in it, and I think Bucky as well. And a number of very good issues were raised relative to that, and we have received a report from the staff relative to that issue, the issues that were raised. And I don't know whether Victor and Mattie want to discuss that with us, or how they want to proceed.

MS. CONDRAY: All right. Victor is coming up to join us.

The report both discusses our experience to date,

and kind of introduces suggested revisions to the rulemaking protocol. I think in the interest of time, I will kind of start with our suggested revisions, because they all come out of specific comments on what our experience was to date. And then I can fill in anything as we discuss the proposed. There is a proposed revision attached in the materials.

MS. MORGAN BATTLE: This is my own pet peeve. When you do drafts, put the word "draft" at the top, instead of across the whole writing. It makes it a little bit harder --

MS. CONDRAY: Instead of a water mark? Okay.

MS. MORGAN BATTLE: Yeah. It's harder to read.

MS. CONDRAY: We'll do that. And the comments will follow in structure kind of the rulemaking process, and then the revised draft protocol.

Initiation of Rulemaking. I think one of the issues that came up was the time lag between when the board started us on the path and when we actually got the rulemaking formally initiated. Under the current protocol, the board would identify an issue for rulemaking, and then there would be some time before the president, in consultation with the chair of the Operations and Regulations

Committee, would, in fact, determine to initiate a rulemaking. In the negotiated rulemaking, in fact, that turned out to be like a nine-month lag.

MS. MORGAN BATTLE: Why do we need that?

MS. CONDRAY: Right. Exactly.

MS. MORGAN BATTLE: I mean, once the board identifies that this is what we need to do --

MS. CONDRAY: This is what we want to do, yeah.

MS. MORGAN BATTLE: -- let's go do.

MS. CONDRAY: I'm trying to think of the circumstances under which there would then be -- after that had happened that the president would say, "Oh, no, let's not do this." And the committee chair would say, "No, you're right. We shouldn't have done that in the first place."

MS. MORGAN BATTLE: Yeah.

MS. CONDRAY: So I'm proposing we kind of scrap that. The one thing that I thought was really useful from that process was the rulemaking options paper, but I think that can be done as prep for the committee.

MS. MORGAN BATTLE: Yeah, I think that's right.

MS. CONDRAY: That, you know, we'll do this prep

work so the committee can start talking about not just "Well, we think this is a good idea for rulemaking, but these are going to be the issues in it, and here's some policy guidance." So I think that will be a big time-saver.

For Notice and Comment Rulemaking, I want to -- we're proposing the addition of an option for the use of a rulemaking workshop. And this is because we're also proposing really curtailing the situations in which we would use negotiated rulemaking.

CHAIR BRODERICK: Mattie, under the revisions, negotiated rulemaking would no longer be the presumptive route.

MS. CONDRAY: That would be correct.

CHAIR BRODERICK: It would be the exception.

MS. CONDRAY: That would be correct.

CHAIR BRODERICK: And by adding these so-called working groups to notice and comment, we'll get a lot of the same input from the field and others.

MS. CONDRAY: Hopefully, yes. They have a workshop where you can air a lot of the issues and talk a lot of issues out where you're not looking to, in fact, negotiate

language, which is -- you know, that's very sloggy work, but talk about the -- you get a lot of that same information about "Well, where are the real problems? What's the administrative burden? What are the compliance issues we're having?" And you talk a lot of that out. You have a much better basis for actually drafting a Notice of Proposed Rulemaking. So we think that will still be very collaborative.

CHAIR BRODERICK: Can I ask you, Mattie, with respect to these rulemaking workshops, how are people invited to attend? And how does that work, or how do you envision it working?

MS. CONDRAY: We can talk about that. I'm not sure I have a definitive answer. I mean, certainly, you know, the representative organizations would obviously be invited, because they're the ones who speak, you know, collectively.

But also, we could either do -- kind of just leave it unspoken and where we'll figure out who's really hot, if it's a particular issue that some programs have expertise on, or just publish a notice on our web site and in the federal register saying, you know, "We're going to have a meeting

this day. If you're really interested in coming, come on out to it and talk to it."

CHAIR BRODERICK: Okay.

MS. MORGAN BATTLE: My suggestion on both methodologies is that I think Mattie is right. I think that the board, once it's decided that we're going to look at a rule, needs to take the first cut at the policy decisions and give some thought to that, and give some suggestions to give guidance to the group as to which way they need to be going on those issues. Then the groups can meet either in a workshop or negotiate at reg-making around those things, so that by the time it gets back to the board, what we're getting back are the thoughts that the staff and the field have about our policy thinking about which way the reg needs to go, rather than at present, where it, at least in the negotiated process, goes straight out, and we get it on the tail end with only the places where there is disagreement, without any thought given from us as to how we think the policy decisions ought to be.

I think that if you get that on the front end, that might actually short circuit a lot of lengthy discussions

that have taken place around some issues, because both the field and staff have some idea of where we are. And I think that that also, since it's really our responsibility to make those policy decisions, it doesn't really abrogate that for others who try to figure out where we might be or what they think it ought to be, but to know where we are and to be able to have that as part of their discussion.

CHAIR BRODERICK: What I'm concerned about -- I agree with LaVeeda, and I don't know how the field will react to this proposal. But I think there's something to be said for doing this more quickly. There's something to be said for saving some money in the process. But there's a lot to be said.

And it was very true, as I can see on 1611, we're getting as broad a cross section as we can and getting inputs so the field understands the restrictions in a different way that we work under, and that we're more sensitized to the practical effects of rulemaking on the field. And I hope that this process that we're talking about modifying is not abrogating the benefit, the crude benefit that we get, and that the field gets through the presumptive negotiated

rulemaking. I mean, I think it's important we do everything we can to keep as much of the benefit as we can.

MS. MORGAN BATTLE: Yeah. And that's why I agree that before we make a final decision, the idea of either having a workshop or some negotiated process for really complex rules where there's a lot of interest needs to be part of the process. So I guess I'm agreeing with you, John, on that.

CHAIR BRODERICK: Yes.

MS. MORGAN BATTLE: I want to see us come out of this experience having learned a lot about how useful it can be when you bring stakeholders to the table to be involved in the process of developing rules that are going to have a dramatic impact on the work that they do. And at the same time, I guess what we've learned is that as board members with our responsibility, we need to get in the process as well, on the front end, in my view, and have it roll out in a way that's cost-effective, and that does mean that it's quite participatory as well.

CHAIR BRODERICK: Mattie, do you want to add anything further on this? I know we kind of intersected you

here. We didn't mean to do that.

MS. CONDRAY: No, no, that's fine. And I agree. And I think that place for input can happen at the initiation of rulemaking stage, and/or, in addition, during a workshop. You know, you can do it both places, depending on interest and availability.

MS. MORGAN BATTLE: Well, I guess what I'm saying is a session, a meeting of the committee on the rule before it goes out for either the workshop or the reg-neg group in which the board is apprised of the policy issues that are going to be involved in this, and they get a chance to at least give some initial comments about their thinking on those policy issues.

MS. CONDRAY: Right. And I'm seeing that you have that -- that opportunity is built into -- when you decide to initiate rulemaking, you've got -- the way it's proposed here, you'd have the rulemaking options paper to kind of put out some of at least our initial thinking of what the issues are. And then in making the decision to initiate a rulemaking, the committee could have that discussion about "Okay, we're going to initiate a rulemaking, and these are

the issues, and here is some initial policy guidance." So I see that as part of this process.

CHAIR BRODERICK: I know LaVeeda at the last meeting, I think, in August was intent about that. I think she's exactly right about it, and that we ought to get our policy in the water earlier than we do now. And I think, speaking only for myself, that the revised rulemaking protocol that was included in the packet addresses all of the concerns.

And unless, Bucky, you and LaVeeda want to speak about it further, I wondered if there are any comments by field people, or others, frankly, relative to it, or whether the three of us are able to move forward. But I don't want to cut off my fellow board members if they want to talk further about it.

MS. MORGAN BATTLE: I see Linda Perle joining us, Mr. Chairman, if you'd like to recognize her, and then we'll comment.

MS. PERLE: I just have a couple of brief comments. Although Mattie and I had some discussion about this issue a while back, I haven't had an opportunity to see this document

until this morning. But I do have two relatively minor comments. Although one is a minor comment, but I think it has a more significant impact, which is that both in the memo and in the document itself, it suggests that the reg-neg process is to be used only rarely. And I would suggest that we should not -- that you should not say that.

I think that it's -- I don't have any problems with eliminating the presumption that you'll use reg-neg. But I think it really should say, rather than only in those rare instances when the corporation decides --

MR. ASKEW: We're not going to predict how often it will be used.

MS. PERLE: Right. I think that, you know, you should just leave it as one of two options, and that given the particular circumstances, a determination will be made. But there shouldn't be a presumption against it. You don't want to flip that presumption entirely.

CHAIR BRODERICK: Linda, can I interrupt you for a second? My fellow board members, do you have any objection to that change?

MR. ASKEW: No. That seems like a good --

CHAIR BRODERICK: It makes sense to me. LaVeeda?

MS. MORGAN BATTLE: Yeah, it makes sense. I think that the real concern was the expense, and if there's a way to -- the expense and the time. If there's a way to do it so that we aren't spending as much money and time, then I don't have a problem with it.

CHAIR BRODERICK: I mean, pretty clearly, under the revisions, presumptive rulemaking will be noted for comment. But I think Linda is right. We don't need to characterize it as "rarely." It may turn out to be such, but I don't think we should --

MS. MORGAN BATTLE: Tell me where "rarely" is in here, because I'm not exactly -- show me --

MS. CONDRAY: On page 161.

MS. PERLE: And also on page 156 in the memo.

MS. MORGAN BATTLE: 161, top or bottom? Where is it?

MR. FORTUNO: Did you look at page 154?

MS. MERCADO: It says "rare occasions"?

MS. CONDRAY: In the draft revised protocol itself, it was on page 161.

MS. MORGAN BATTLE: Take the word "rare" out. "On occasions in which LSC believes the notice and comment process," that it "will not suffice." I think that's fine. I don't have any objection to that.

CHAIR BRODERICK: We'll make that change.

MS. PERLE: And then the only other thing which is a minor suggestion. It's on page 4 of the actual protocol, which I don't know what the --

MR. FORTUNO: Page 160.

MS. PERLE: 160? All right, it's the same page.

MR. FORTUNO: First full paragraph.

MS. PERLE: I would suggest that the draft Notice of Proposed Rulemaking be either shared, or there be a notice to those people that participated in the workshop, rather than requiring them to check the web site or the Federal Register, that they should be notified --

MS. MORGAN BATTLE: Just e-mail it out to everybody.

MS. PERLE: -- right -- so that they have an opportunity to either make some comments to Mattie before the board sees it, or they have an opportunity to prepare

comments that they can present to the committee when it considers it.

MS. CONDRAY: That's a great idea.

MS. PERLE: As I said, i just had a chance to read it over briefly while I was trying to listen to the Provisions Committee meeting this morning, so there may be other concerns. But those are the two that I noticed.

CHAIR BRODERICK: I'm sorry, Linda. What page?

MS. PERLE: It's on page 160, or page 4 of the memo. There are two paragraphs, one that starts, "OLA will have primary responsibility for drafting of the Draft NPRM." And then the next paragraph, "Once approved, the Draft NPRM will be sent for consideration in a public meeting."

All I'm suggesting is that at some point in one of those paragraphs you say that the staff will share with those who participated in the workshop the Draft NPRM that was a result of that discussion.

MS. CONDRAY: Yeah, in addition to just posting it on the web site. Yeah, I think that's a great idea.

MS. MERCADO: That's page 158 of our board book.

MS. PERLE: Okay. The numbers are different.

CHAIR BRODERICK: Mattie, will you make those changes?

MS. CONDRAY: Yes, I will.

CHAIR BRODERICK: That makes perfect sense to me. I don't know, Bucky or LaVeeda, how you feel about it.

MS. MORGAN BATTLE: That's fine. I don't have an objection. The only thing, going back -- I'm fine with that. Is there anything else?

Going back, as I read the way that the Initiation of Rulemaking works, and the section on Notice and Comment, it talks about the board's involvement in establishing -- hold on just a second. I'm trying to find in here -- Mattie, you help me. Where does it say that the board has its opportunity to make initial policy determinations before the workshop?

MS. CONDRAY: Well, I believe that to the extent that either -- well, at the Initiation of Rulemaking, and I can add some words to make this clearer --

MS. MORGAN BATTLE: Yeah.

MS. CONDRAY: -- that in that discussion where the board decides, "Okay, we're going to do the rulemaking on,

you know, 1627," instead of just saying, "Yeah, go out and do a rulemaking on 1627," we can have a discussion of the sum and substance of it, and, you know, "Do a rulemaking on 1627, and here is some policy guidance on the issues that we're concerned about."

MS. MORGAN BATTLE: Exactly. I'd like to see that.

MS. CONDRAY: Yeah. That would be one place. And then the other place in terms of if there are board members and committee members who choose to participate in the rulemaking workshops, you know, as we talked about, "Here are the problems. Here are the issues." We could then get some additional feedback on it. And, you know, "Yeah, I think this really is a problem, and it's just something you guys are going to need to address."

MS. MORGAN BATTLE: Right. It doesn't quite say the policy piece that I feel very strongly about. So I'd like to have that in the language under the Initiation of Rulemaking.

MS. CONDRAY: I already have written a note there for it. Yeah, I agree.

MS. MORGAN BATTLE: Okay, thank you.

CHAIR BRODERICK: Any other comments relative to the revision?

(No response.)

CHAIR BRODERICK: Linda, have you had a chance to speak your mind?

MS. PERLE: For the moment. As I said, I really haven't had a chance to study the document closely, but I think for the moment, it's okay.

CHAIR BRODERICK: All right. Any other comment, Bucky or LaVeeda?

MR. ASKEW: I would just like to note for the record that Mattie Condray has three aspirins sitting here in front of her on the table.

MS. CONDRAY: This is the backup ones to the stuff I've already taken.

CHAIR BRODERICK: I do want to say before we go further here that I know firsthand the amount of time that Mattie has spent on this activity since the board last convened. And she and I have spoken. And I want to publicly thank her. I know that she's not looking for additional work to do. But she's taken on a lot of work on our request since

the last meeting, and it's generally appreciated.

And I know a lot of other people in the working groups have worked very hard to bring us to where we are today, and I want to thank them as well.

Are there any other comments on the LSC Rulemaking Protocol as revised, other than the ones we have already mentioned which are going to be incorporated? If not, it seems to me we ought to recommend its adoption by the board.

M O T I O N

MS. MORGAN BATTLE: I would so move. And I'd like to ditto your comments about the work that Mattie has done. She is extraordinary. Not anybody and everybody can write a reg, and she does it, and does it very well. So I just wanted to express my appreciation as well for all her hard work.

MS. CONDRAY: Oh, you're very welcome.

CHAIR BRODERICK: Bucky, do you want to second that motion?

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: It's unanimous, and it's recommended.

We are now moving to "Consider and act on Limited English Proficiency Guidance for LSC recipients." Mattie, maybe you want to briefly -- I know it was discussed the last time in August, and you had conflicting views or various views. No firm opinion at that time. And I wonder if you could tell us what this accomplishes and what you're recommending. MS. CONDRAY: Right. We had provided a couple of options the last time, and we were asked to go back and think about them more and confer with the field and recommend something. And in doing that, and going back and talking to Linda, really what we're recommending now is that instead of making a decision, that we really do need broader input.

So our recommendation is that we issue a notice discussing all of the issues that were in this memo, and then the previous version, and asking for some real comment from the field. We've got -- I know there's a meeting coming up in D.C. from Randi's staff -- I don't know if she's in here -- people looking at diversity issues and other sorts of

things like that. I'm going to meet with them and hopefully get some input from them, if the committee and the board give me the go-ahead to take this approach, and work on developing a notice that really sets out all of these issues.

You know, some of the issues involved with "Well, to what extent legally does Title VI apply independently to our grantees?" I mean, that's an open question. And then there are a number of policy and practical questions in terms of "Well, how many of our grantees are already getting federal grants and are going to be covered by the DOJ guidance? And if it's a lot of them, would issuing our own guidance, in fact, be superfluous, or would it, in fact, be more helpful because it's going to be more tailored to their particular situation?"

And I didn't feel that we had a really good handle on the answers to those sorts of questions. And since there's no statutory deadline for us to be doing this, it struck me that what makes sense is to, in fact, take a little time with this. Put out a notice. Really gather some good comment.

I suspect there are some of our grantees who are

way out in front on these issues, because they've always had persons of limited English proficiency in their client base, and they're probably doing all sorts of great things.

There may be grantees who, because of merges and consolidations and estate planning and just changing demographics, have new limited English proficiency client bases that they really haven't quite assimilated well. And can we use this as a way of information sharing amongst our grantees?

So our proposal is that you give us the go-ahead to develop a notice that we will put out and ask for a lot of comment on these issues, and then figure out, okay, now on the basis of these comments, we can make an informed decision about what we want to do, whether we want to issue guidance, and if so, what that would look like.

CHAIR BRODERICK: Mattie, what do you think the time frame would be for all of this?

MS. CONDRAY: Well, I would think we could get the notice drafted, hopefully, you know -- what's it now? Early November? Certainly, you know, in a month. I don't know if we'd get all the comments back within a month. You know,

around the holidays, you want to leave plenty of time for people to be able to get their comments together, and that may be hard for organizations to do.

But I would like to think that we might -- since the next scheduled meeting isn't until the very end of January, I would hope that we would be able to come back with a recommendation about what we're going to do by then. That will hopefully give us enough time.

MS. MORGAN BATTLE: So 45 days?

CHAIR BRODERICK: Bucky or LaVeeda, any comments or thoughts?

MS. MORGAN BATTLE: Maria has her hand up.

CHAIR BRODERICK: Maria?

MS. MERCADO: Yes. How are you, Justice?

CHAIR BRODERICK: Good morning. Good afternoon now, I guess.

MS. MERCADO: Yes. Actually, you would have been very thrilled at seeing the huge diversity of limited English proficient clients in our presentation at the Provisions Committee this morning. Because we had Legal Services workers, attorneys, paralegals, other community workers that

spoke in their native languages, from Vietnamese to Cambodian to Thai to Spanish to Russian and Armenian and different languages.

And so obviously, some of our programs, our grantees are very aggressive by making sure that they do provide that access of language, and others may not be as well. And so the question is whether or not there needs to be a bigger requirement to do that.

But definitely, we could get some of those best practices from some of those grantees that are already doing that kind of work, both in the kiosk in those languages, as well as the printed material and media that they do in language services.

So just sort of as an aside, that we already have some grantees doing that.

MS. CONDRAY: Yeah. I figured we do.

MR. ASKEW: So 45 days should be sufficient?

M O T I O N

MS. MORGAN BATTLE: I'd so move. I move that we go ahead and put it out for notice and comment for 45 days.

CHAIR BRODERICK: Was that LaVeeda's motion?

MR. ASKEW: Yes.

CHAIR BRODERICK: Bucky, do you second that?

MR. ASKEW: Yes.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: That's unanimous. That will be done. Thank you.

The next item on our agenda is "Staff report on other rulemakings." And Mattie, Victor, I'll let you address that.

MS. CONDRAY: As requested at the last meeting of this committee and the board, we were directed to republish our 1995 Notice of Proposed Rulemaking on the Outside Practice of Law, part 1604. We went ahead and did so. We added a few -- we didn't make any changes to our previous proposals. We did add some language in the preamble addressing a couple of proposals that we had made in 1995 that I particularly want to reassess in light of the 1996 restrictions to make sure that what we proposed in 1995 is still legal. I don't have an abiding sense that it's not. When I read through it, I thought, "Hmmm, this needs a little

more thought."

So hopefully, we will get some comments on that. Actually, I've received like three comments already early, which was amazing. The comment period closes next Tuesday.

So once the comment period is closed, I will be able to assess the comments we've gotten and start working on a final rule. I have no reason -- I say this -- to think that we won't have a final rule for the committee's consideration at the next committee meeting. And we will get the comments --

CHAIR BRODERICK: When does the comment period end, Mattie?

MS. CONDRAY: Tuesday.

CHAIR BRODERICK: Oh, okay. It's coming up very quickly.

MS. CONDRAY: Yes.

CHAIR BRODERICK: Good.

MS. CONDRAY: So I expect to receive some additional comments in this coming week. And we will -- as required, we will get the comments out to the committee, and we'll get a notice out to the rest of the board that we've

sent them all the comments that we've received. And if anybody else wants to take a look at them, they'll be welcome to do so. We will get the comments that we've received up on our web site, so all of the comments that have come in to us will be publicly available for anybody who wants to read anybody else's comments. And we'll work on a draft final rule for the committee's consideration at the next meeting.

The only other open rulemaking is 1626. A second draft of the 1626 Notice of Proposed Rulemaking is out to the working group and is being considered by the working group. And I have asked people to give me comments on that -- from the working group to give me comments by December 6th, which was about 30 days. And hopefully -- I know that's a little tough with Thanksgiving, but hopefully, everybody in the working group will have put that hat back on and get me comments, and we'll see where we are with that. But that second draft has gone out and is being considered by the working group.

MR. FORTUNO: Justice Broderick, if I may, this is Vic. I have one point to make. This seems like an opportune time to make it. The board at is last meeting scheduled a

one-day meeting at the end of January.

When the board last met and scheduled this meeting and the next meeting, there was some discussion about whether the next meeting, which is the annual meeting, would be a one- or a two-day meeting. It was anticipated that there would be a new board in place, and that the new board would prefer to have a one-day meeting so it could organize itself and make committee assignments.

At this point, it sounds like the board may want to take up tomorrow. And I mention it just because we've had some discussion today about things to bring before the committee at its next meeting. So tomorrow, the board may want to take up the scheduling issue, and may want to make it a two-day meeting, with committees meeting the first day and the board meeting the second. Otherwise, it's currently structured I think there's just one day of meetings, and this wasn't contemplated at the time.

CHAIR BRODERICK: I agree with you if we are the board, and we're still in place and still acting, I think it ought to be two days. But we can talk about that at the board tomorrow.

MR. ASKEW: Did we pick a date? Set a date?

MS. MORGAN BATTLE: What's the date?

MS. CONDRAY: January 31st, I believe.

CHAIR BRODERICK: And February 1, I think.

MS. CONDRAY: And so if you added a day, then it would be February 1st.

CHAIR BRODERICK: Are there any questions or comments for Mattie, or any public comment on what Mattie discussed?

MR. ASKEW: Let me make a comment, John. Despite the time we spent on 1611, and despite the changes we're making to negotiated rulemaking, I've heard a lot of comment from people who participated in the process that they thought it was a very constructive, positive, effective, and efficient way of doing this. Even though in retrospect, it looks like it took a lot of time and it cost a lot of money, most of the people I've heard from were very pleased with the way it went. And the fact that the goal we had set, particularly on 1611, to clarify the regulation to fix some issues, 95 percent of that was all agreed to by consensus, and I think worked the way negotiated rulemaking is supposed

to, and it bubbled up the two policy issues that we had to deal with. So in a sense, it worked the way we wanted it to work.

I'm a little bit envious, because Mattie was able to get in six months praise I've been looking for for 30 years from Steve Gottlieb at the Atlanta Legal Aid Society, who has never had anything good to say about the Legal Services Corporation, said that Mattie did a remarkable job of running it, was an honest broker for all of the information back and forth, kept them on track, and did a very good job with it, and so that with Victor and John here, they should hear that.

But I think, hopefully, we've learned from that ways to do this even more efficiently in the future, and some of these changes of ways we can do that are reflected in what we just agreed to do. But I think it's a process that worked the way it was supposed to, and I think everybody who was engaged in it were pleased with the outcome.

Now, whether that's going to continue with 1626 and others, we'll see. But I think we can clearly do it more quickly, less expensively, but just as effectively in the

future, from what we've learned through these first two.

MR. EAKELEY: Let me just add, hello, Mr. Chairman, Mr. Justice.

CHAIR BRODERICK: Mr. Eakeley, how are you?

MR. EAKELEY: Fine, thanks. I'm sorry I'm so late to your meeting. But I did want to just commend Mattie for her hard work and diligence and patience. I think that she's really done an exemplary job in an area that I try and avoid at all costs.

CHAIR BRODERICK: I think Mattie has become the Thomas Jefferson of rulemaking.

MR. EAKELEY: John, if we're in public comment, Linda Perle had her hand up.

MS. PERLE: I just wanted to say as a member of the working group, I wanted to echo what Bucky said. First of all, Mattie did an extraordinary job of sort of pulling together all these varied interests and different views, and really was an honest broker. And the members of the field felt that our views were very well represented by the way she did the materials and the way she communicated them, I think, to the LSC staff and sort of helped -- even though she wasn't

officially a facilitator, her presence there really did help facilitate the process.

And I also want to echo what Bucky said about the value that the working group members put on the negotiated rulemaking process. I mean, I understand that it was expensive. I don't think it really took that much more time than other rulemakings have taken, but it really was a wonderful forum for everybody to state their views and to have an opportunity to clarify why various issues were important, I think both the field programs and the LSC staff as well.

And that was one of the reasons that I thought it was so important in the last discussion that we had to say that we shouldn't say this was something we should only do rarely. I mean, maybe we can do it a little less expensively, but that there are a lot of issues, I think, that may come up in the future that are going to be very controversial, and where the views of the corporation and the field may differ. And I think it's really going to be important that in those instances, we do have an opportunity to use this process again. Because I think most of us felt

that it was a very good -- both a good experience personally, but I think that we felt that the views of the field were really well heard.

MS. CONDRAY: Thank you. I think everybody learned a lot, which is one of the things I was hoping would come out of it, both the specific issues, but also just a lot about all right, yeah, I think the LSC folks got to learn a lot about how our regs play, you know, where the rubber hits the road. And I think it was also an opportunity for a lot of our grantees to kind of understand how we see our responsibilities and what we need to do to carry them out, that we're really trying not to just be arbitrary pains.

MS. PERLE: And, you know, I think that 1611 was, in certain respects, simpler than 1626. There are lots of very complicated and varying interests in that rule, but we did manage to reach consensus on a huge number of issues on that rule, as well as on 1611. So I think all in all, it was an excellent way to go.

CHAIR BRODERICK: Mattie?

MS. CONDRAY: Yes.

CHAIR BRODERICK: It looks like an auspicious time

to us for a raise.

(Laughter.)

CHAIR BRODERICK: It doesn't get better than this, Mattie.

MR. ERLENBORN: John, this is John Erlenborn. First of all, let me say I'm glad to hear you have not lost your sense of humor.

CHAIR BRODERICK: Thank you for that.

MR. ERLENBORN: It's good to hear --

MS. CONDRAY: I think in addition to asking for a raise, I think this is the time for me to ask for a good office in the new building.

MR. ERLENBORN: It's good to hear your voice. We're very sorry that you couldn't be with us.

CHAIR BRODERICK: Well, I'm very sorry I can't be with you, too. I'm looking forward -- I hope that we're all still on the board the end of January, because I will be able to come to Washington. And I promise you I won't frighten you.

MR. EAKELEY: John, will you be able to participate in our discussion this afternoon on strategic directions?

CHAIR BRODERICK: I was not aware of it, Doug, and the answer is no. And I apologize for that. I was not aware of that, and I have to be somewhere. It's about almost 4:00 my time. I'm leaving here at 4:30.

MR. EAKELEY: Right. The timing is awkward.

CHAIR BRODERICK: I apologize.

MR. EAKELEY: Not to worry.

CHAIR BRODERICK: But I do intend to be part of the board meeting tomorrow. If somebody remembers to cal me, I'll be happy to do that.

With respect to the agenda we're working on now, the eighth item is "Consider and act on other business." I don't know if there is any.

MS. MORGAN BATTLE: It looks like there is none.

CHAIR BRODERICK: And then we end with public comment. Although we've had a fair amount of comment today. I don't know if anyone would like to avail themselves of that opportunity.

MR. EAKELEY: I think we just had it from Linda.

CHAIR BRODERICK: Wonderful. Then with that, I would entertain a motion to adjourn.

M O T I O N

MS. MORGAN BATTLE: So moved.

MR. ASKEW: Second.

CHAIR BRODERICK: All those in favor?

(Chorus of ayes.)

CHAIR BRODERICK: The committee meeting is adjourned. Have a wonderful time out there.

(Whereupon, at 12:50 p.m., the meeting was concluded.)