SUPREME COURT OF THE STATE OF NEW YORK
THIRD DEPARTMENT

CHIEF JUDGE'S HEARING:

COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

COURT OF APPEALS
20 Eagle Street
Albany, New York 12207
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MR. JOHNSON: Good morning, everyone. Welcome to the first of three public hearings to be held around the state by the Commission on Statewide Attorney Discipline. We're so delighted that you're here with us today here at the Court of Appeals in Albany, New York, on this wonderful sunny day.

My name is Peter Johnson and I'm a member of the Chief Judge's Commission and a co-chair of its Subcommittee on Uniformity and Fairness. Chief Administrative Judge A. Gail Prudenti was planning to preside over this hearing, but she cannot today. May I also thank Judge Prudenti for her singular efforts in helping establish this Commission and for her incredible career of public service here in New York State. It's an example to all of us her sacrifice and willingness to do so much for so many and so we acknowledge and thank her for her contribution in improving the judiciary and the legal profession in this state.

By way of background, I'm president of a law firm in New York City called Leahey & Johnson, and also Chair of the Committee on Character and Fitness, Appellate Division, First Judicial Department.

So on behalf of Judge Prudenti, Chief Judge Jonathan Lippman, whose brainchild this Commission was, and all my brothers and sisters on this Commission, I want to thank you for taking time out of your busy schedules to come before us today and share your thoughts and insights about the really important issues that the Commission is undertaking and is tasked with addressing in a formal and important way for everyone in this state.

By way of brief background, in February 2015 Chief Judge

Jonathan Lippman established the Commission on Statewide Attorney Discipline to conduct a comprehensive review of the state's attorney disciplinary system and to determine what is working well and what can work much, much better. After conducting this top-to-bottom no-holds-barred review, the Commission is charged with offering recommendations to the Chief Judge, to the Court of Appeals, and the Administrative Board of the Courts about how to best enhance the efficiency, the effectiveness, and the public confidence in New York's attorney discipline process, and hence in all of our attorneys.

Among the primary issues under consideration by this Commission are — and we'll talk about a few of them — whether New York's departmental based system leads to regional disparities in the implementation of discipline of attorneys in New York State; if conversion to a statewide system is desirable and effective; the point at which disciplinary charges or findings should be publicly revealed; and finally, how to achieve dispositions more quickly in an effort to provide much needed closure to both clients and attorneys and the public.

By holding these public hearings here in Albany and in New York City and in Buffalo, and also accepting written testimony, we hope to hear from a diverse cross-section of interested individuals, organizations and entities and all New Yorkers about their views on these and other related issues that they feel are relevant to our task at large. We believe that by inviting and considering different viewpoints the Commission will gain a more complete understanding of

all the issues at hand and in turn be in a better position to formulate the best possible recommendations for the state.

Now, we know that the attorney disciplinary process has a tremendous impact not only on attorneys who are subject to discipline and their clients and their potential clients, but also on the public's trust and competence in our entire legal system. So we want to thank you once again for helping us in our important mission to examine the need for change, and how that change can best be achieved in that system.

Each of you testifying here today will have up to ten minutes to present your testimony and then hopefully we will ask you questions that you can briefly answer. We kindly ask that you please stick to the time limit so that everyone and all the speakers will have time to testify. If you run over, then we'll let you know. I've had the privilege and honor of arguing in this court before and sometimes the Court will let you know. I won't presume that I'm a member of that august panel, but in a nice way we will give you some indication that the time is up.

I am really honored to have this opportunity to sit in for Judge Prudenti today and to be part of an incredible panel of dozens of lawyers who volunteer their time across the state, and also sitting members of the judiciary. Each of these lawyers, these judges, these former judges, has special experience in the disciplinary field and in the field of fitness to practice law, and each serves as a member of this Commission on Statewide Discipline. Let me tell you who is with us today so you know who you will be

speaking to:

Monica Duffy, Chief Counsel, Committee on Professional Standards, Appellate Division Third Judicial Department. Monica is also on the Subcommittee of Enhancing Efficiency. Monica, thank you so much.

Robert Guido, Esquire, Executive Director for Attorney Matters for the Appellate Division Second Judicial Department. I'm honored to serve as a co-chair with Bob on the Subcommittee on Uniformity and Fairness. Good morning, Bob.

To my left, Devika Kewalramani, who is a partner and general counsel of Moses & Singer, and Chair of the New York City Bar Association's Committee on Professional Discipline. She is co-chair of the Subcommittee on Transparency and Access.

Also to my left, Mark Zauderer, who is a partner at Flemming, Zulack, Williamson, Zauderer, LLP, in New York City, one of our great trial lawyers. He's on the Subcommittee on Uniformity and Fairness as well.

And Professor W. Bradley Wendel, he is a professor at Cornell University Law School and he is part of the Subcommittee on Transparency and Access.

In addition, we have other members of the Commission: Sean Morton, a member of the Commission and Deputy Clerk of the Appellate Division, Third Department, is with us here today. Good morning, Sean. He is a member of the Subcommittee on Uniformity and Fairness.

Also a member of the Commission, E.J. Thorsen, is with us here today, she's a member of the Commission and a member of the

Subcommittee on Uniformity, and she is an attorney with Vishnick, McGovern in New York City and Long Island.

We are deeply grateful to the members of the Commission for their hard work. And they've been doing this truly day in day out, week in week out for the last several months. And we thank everyone who is able to join us today.

I would also like to thank Matt Kiernan and John Caher and Cindy McCormick for their efforts in ensuring that we have this time at the Court of Appeals, and all the court officers and clerks and attorneys here at the Court of Appeals.

I would ask you when you testify to keep your voice up. We do have a kind and diligent court reporter present. And I will remind you that a transcript of your testimony will be posted to the Commission's web page and possibly included as an appendix as well to our final report. So in other words, whatever you say here today at this public hearing will have an impact statewide and in Internet perpetuity.

I'm happy to call as our first witness this morning Timothy O'Sullivan, who is the Executive Director of the Lawyers' Fund for Client Protection. Mr. O'Sullivan, good morning.

MR. O'SULLIVAN: Good morning. Good morning, Committee Members, my name is Timothy O'Sullivan. Since 1986 I have been an attorney with the Lawyers' Fund for Client Protection. For the past 15 years I have served as the Fund's Executive Director and Counsel. The Lawyers' Fund is administered by a Board of Trustees appointed by the Court of Appeals. On behalf of our Trustees, I wish to thank

Chief Judge Lippman, Chief Administrative Judge Prudenti, and the entire Commission for the opportunity to participate in the Commission's review of the attorney disciplinary system in New York State.

The mission of the Lawyers' Fund is to protect legal consumers from dishonest conduct in the practice of law, to help preserve the integrity of the bar, to safeguard the good name of lawyers for their honesty in handling client money, and to promote public confidence in the administration of justice in New York State.

The primary focus of the Lawyers' Fund is to reimburse law clients who have lost money or property due to their lawyer's dishonest conduct in the practice of law. Since the Fund's inception in 1982 our Trustees have granted 8,032 awards, reimbursing over $181 million. In 2014, our Fund paid 559 awards totaling $6.1 million.

The Lawyers' Fund, with a staff of only five, is one of the smallest of state agencies. We therefore rely greatly upon the invaluable assistance and the unfailing support that we receive daily from our colleagues in the attorney disciplinary system.

Our Trustees continue to promote improvements and believe that our attorney disciplinary system can be enhanced by reforms to court rules and procedures which further the goals of protecting the public and detecting and deterring lawyer misconduct.

One area of study by this Commission is disparity among the Appellate Divisions and whether uniformity could improve our disciplinary system.

I have one fairly simple but important example of a rule

disparity which could be addressed. Lawyers in the First and Second Judicial Departments are required to execute an affirmation as part of their biennial attorney registration process which states they have read and they are in compliance with Rule 1.15 of the Rules of Professional Conduct governing an attorney's fiduciary requirements for safeguarding and segregating money and property.

The purpose of this registration certification is to sensitize attorneys to and to encourage compliance with their fiduciary requirements under the Rules of Professional Conduct and to protect law clients.

This certification of compliance is not required of attorneys in the Third and Fourth Judicial Departments. The Lawyers' Fund sees no reason why attorneys in certain portions of the state should be omitted from this certification process. Adoption of a uniform court rule requiring certification is appropriate here.

A second example of a court rule disparity concerns random audits. Court rules in the First and Second Judicial Departments now authorize the Disciplinary and Grievance Committees to develop programs to conduct a random review and audit of an attorney's escrow account to ensure compliance with the attorney's fiduciary requirements under Rule 1.15. While these random audit rules exist, it is my understanding such audits have not been conducted for financial reasons.

This Commission, though, now has the opportunity to recommend adoption of a uniform court rule authorizing random audits, perhaps on a pilot project basis, throughout New York State. With

such a rule in place this client protection device could be implemented in the future if and when financing for a random audit program becomes available.

Our Fund's recent experience suggests that random audits should be considered as a possible addition to our client protection system in New York.

We are fortunate to have successfully proposed two loss detection and prevention devices which now exist in New York State. Payee notification, which is also known as Insurance Department Regulation 64, and the Dishonored Check Notice Rule, were both adopted in New York at the urging of the Lawyers' Fund Trustees. While these client protection measures have proven to be effective, they are not foolproof.

Within the past six months the Lawyers' Fund has granted 64 awards totaling $1.5 million reimbursing the thefts of personal injury settlements by two now disbarred Manhattan attorneys, Stephen Krawitz and Donald B. Rosenberg. More awards will soon follow.

In investigating complaints against Rosenberg, the Disciplinary Committee obtained his trust account records and they discovered his thefts over a twelve-year period, from 2002 to 2014. Rosenberg pled guilty to stealing over $2 million from 63 clients over the years.

These lawyers' thefts were not detected by the Payee Notification or the Dishonored Check Rule. These lawyers were able to conceal their thefts by offering excuses and explaining away their delay without paying clients their net settlement proceeds. They also

did not bounce any trust account checks. A random audit program may have deterred, detected and prevented these losses caused by these two lawyers, which will now likely result in about $3 million in awards from the Lawyers' Fund. The lingering but unfortunate experience for the clients may also have been preventable.

This Commission is also studying possible regional disparities in disciplinary sanctions. Lawyers who steal should be disbarred. The Fund's Trustees recommend that there be a uniform firm statewide disciplinary policy imposing disbarment as the sanction for a lawyer who injures his or her client by intentionally converting escrow funds. Such a policy will deliver a strong message to victims, the public and to lawyers about the administration of justice in New York State.

Another issue for consideration by this Commission is the confidentiality provisions of Section 90 of the Judiciary Law which governs attorney disciplinary proceedings. Lawyers who steal should be criminally prosecuted. Our Trustees recommend that there be a uniform disciplinary policy that a Disciplinary Committee will make a prompt referral to the local district attorney when that committee has uncontested evidence of theft by a lawyer injuring a client or in admission of culpability.

Section 90 of the Judiciary Law permits the Appellate Divisions by written order to divulge all or any part of disciplinary papers, records and documents upon a showing of good cause. The Disciplinary Committee with an admission of wrongdoing or uncontested evidence of larceny by a lawyer should promptly secure an Appellate

Division sharing order so that the district attorney can be notified.

This policy should help protect law clients and promote public confidence in our justice system.

The Fund's Trustees share the Commission's concerns with any prolonged delays and disciplinary proceedings.

Our Trustees render determinations in claims for reimbursement after the conclusion of disciplinary proceedings against the accused attorney. Our Trustees therefore encourage any efforts to achieve prompt disciplinary dispositions.

Any delay between the filing of disciplinary complaints or the filing of formal disciplinary charges and the final disciplinary sanction against a guilty attorney does, on occasion, contribute to client losses which our Fund reimburses. Such cases though are by far the exception, not the rule.

The Lawyers' Fund analyzed 3,479 awards from the Fund over a seven-year period from 2009 to July 1st of this year to assess whether delays in disciplinary proceedings were a factor in clients' losses which our Fund reimbursed. In 28 of those 3,479 awards, delays in the proceedings appeared to have played a role in the losses in our awards. This represents .8 percent, or less than 1 percent, of the Fund's awards over this period of time. These 28 awards account for $131,000 of the $47 million we paid out over this period of time.

The vast majority of these 28 awards reimbursed advance legal fees, which these lawyers, who were already the subject of pending disciplinary proceedings or complaints of misconduct,

accepted. These lawyers failed to provide the promised services and then abandoned their clients.

I will briefly describe one example where a disciplinary proceeding delay was a factor in a client's losses which our Fund reimbursed. Six months after submitting his resignation affidavit admitting that he could not defend against disciplinary charges of neglect, failure to communicate, and failure to cooperate, and after agreeing not to accept any more new clients and any further advance fees former Orange County Attorney F. Daniel Blizzard accepted $4,850 in advance legal fees from two clients. He provided no services and he abandoned the unsuspecting clients. The Appellate Division finally accepted Blizzard's resignation and disbarred him eight months after his resignation was submitted to the court.

Our Fund's experience demonstrates that these examples of delay and resulting client losses are very rare, but while they are few they do suggest room for improvement.

On behalf of my Trustees, I wish to thank the Commission for including the Lawyers' Fund in your deliberations regarding this important topic. I want you to know that we remain at your disposal should you require any additional information, or if we can answer any questions at any time.

MR. JOHNSON: Thank you, Mr. O'Sullivan. I'm sure there are questions. What you talked about is not only illuminating, but is unsettling in many, many respects, and you bring to it a perspective that few people have in this state or in this country because you see the effects of lawyers gone bad.

So there's two issues I would like to focus on with you. The first that you mentioned is that — and it seems to be a cardinal rule that is very clear, lawyers who steal should be disbarred. Is that not the standard in New York State at this time?

MR. O'SULLIVAN: Unfortunately, I don't believe it's a standard among the four Appellate Divisions, no.

MR. JOHNSON: And the second issue is with regard to confidentiality and criminal prosecution. Does the confidentiality of the process, in your opinion, sometimes result in the fact that people are not being prosecuted when they should be?

MR. O'SULLIVAN: Yes. Our experience is that on occasion when committees have evidence of theft by a lawyer injuring a client there are not referrals being made by the disciplinary committees or grievance committees to the district attorney's office. There's not an open line of communication in appropriate circumstances.

MR. JOHNSON: Thank you.

MR. O'SULLIVAN: Not in all cases. It does happen, but not in all cases.

MR. JOHNSON: Thank you for your frankness on this issue. Any other questions? Mr. Zauderer.

MR. ZAUDERER: Again, thank you for testifying here today.

MR. O'SULLIVAN: You're welcome.

MR. ZAUDERER: I have a question. If I'm not mistaken, we have a court rule, commonly known as Part 130, which has a provision for lawyers who are found by a court to have engaged in frivolous conduct. There can be an award of up to $10,000 per incident payable

to your Fund. And I wonder, do you monitor that? Are courts awarding that? Do you monitor it and do you engage in any efforts to collect those sums of money?

MR. O'SULLIVAN: Yes. Lawyers who engage in frivolous conduct can be ordered to pay a judicial sanction to the Lawyers' Fund. We receive those sanctions, we docket them, we have a system where we follow up on whether they are paid or not. If they are not paid our policy is to contact the Court that imposed the sanction to advise the justice that that sanction has not been paid. But if that sanction is further not paid, we then make referral to the appropriate attorney Disciplinary Committee. And if it's further not paid, at that point we also refer it to the Attorney General's Office for collection of receipt.

MR. JOHNSON: Mr. O'Sullivan, thank you for your time here today, we appreciate you being here and testifying, and we thank you for your written statements.

MR. O'SULLIVAN: Thank you very much.

MR. JOHNSON: May I call our next witness here this morning, Ms. Denise Kronstadt, who is Deputy Executive Director/Director of Advocacy for the funds for Modern Courts. Good morning.

MS. KRONSTADT: Good morning. Thank you very much. On behalf of the Committee for Modern Courts, I just want to thank this Commission on Statewide Discipline for providing Modern Courts the opportunity to present testimony here, as well as the illuminating testimony that just came from the Lawyers' Fund. It was fascinating

and I will bring that back to my organization.

Modern Courts is an independent nonpartisan statewide court reform organization committed to improving the court system for all New Yorkers. We support a judiciary that provides the fair administration of justice, equal access to the courts, and that is independent, highly qualified and diverse. By research, public outreach, education and lobbying efforts, Modern Courts seeks to advance these goals.

I am the Deputy Executive Director and the Director of Advocacy, as well as the co-chair for the New York State Coalition for More Family Court Judges, which we successfully got last year, which was very exciting for all.

Modern Courts is pleased that Chief Judge Jonathan Lippman has created this Commission for the purpose of conducting a comprehensive review of the state's attorney disciplinary system to determine what is working well and what could be better in order to develop recommendations to enhance the efficiency and effectiveness of New York's disciplinary system.

We agree with the Chief Judge that an efficient and effective attorney disciplinary system is fundamental to the sound administration of justice, and it is for this reason we are presenting testimony today.

In his State of the Judiciary, the Chief Judge also stated that an important and challenging question includes whether our department-based system leads to regional disparities in the implementation of discipline, whether conversion to a statewide

system is desirable. This should be addressed.

While Modern Courts has not focused on the issue of attorney discipline in the past, Modern Courts believes that the Commission on Judicial Conduct offers something of a model to be considered, especially with respect to its statewide jurisdiction, as you proceed.

Modern Courts supported the legislative initiative establishing a temporary Commission on Judicial Conduct. The temporary act of the Legislature was crucial at the time because it reformed a disjointed conduct, quote unquote, system. In the 1970s, to ensure a permanent Commission on Judicial Conduct, Modern Courts and many civic groups across the state campaigned in support of Constitutional amendments to establish the statewide Commission on Judicial Conduct. We understood then, as we do now, the critical importance of ensuring oversight and accountability in our judicial system and in our court system. When the voters approved the Constitutional Amendments, the Commission was established in 1978.

The Commission on Judicial Conduct is the only forum responsible for enforcing violations of the ethical standards of all judges of the State of New York. The gravity of that task must be viewed in light of the enormity of our court system and the large number of legal actions considered by the courts every year. This provides a particular challenge to the Commission on Judicial Conduct because the Commission is required to address complaints that result from every part of our state and from every court, not dissimilar to the work of the Disciplinary Committee.

The Commission has successfully worked within difficult resource constraints and Modern Courts believes that the Commission takes disciplinary action against those who have violated the Rules of Conduct, and equally important to our democratic system, makes certain that unfounded complaints do not negatively mar the reputation of the vast number of excellent judges in the state. This is important for the judges, for the judicial system and for the public because judges must be able to rule on cases based upon the law and facts, without fear of unfounded negative public opinion.

The same can be said for attorneys. The balance between offering the public a means — uniform across the state — to file a complaint against an attorney while ensuring proper disciplinary action as well as making certain that unfounded complaints do not impact an attorney's ability to practice law. There is an inherent opportunity for unfairness, as has been demonstrated, if different standards apply differently across the state. We certainly wouldn't want that for judges within the statewide system, and we do not think attorneys should be treated differently depending upon their geographic location.

One of the questions often asked is the value of confidentiality of proceedings and at what stage confidentiality ends and public view begins. The Judiciary Law requires that the Judicial Conduct Commission investigations and formal hearings remain confidential. Commission activity is only made public at the very end of the disciplinary proceeding, when a determination of public admonition or censure or removal from office is made and filed with

the Chief Judge, or when the accused judge requests that the disciplinary hearing be public.

Modern Courts strongly supports confidentiality during the investigatory phase of the Judiciary Commission's work because unfounded claims can damage the reputation of individual judges and undermine the public confidence in the judiciary. However, Modern Courts believes and has publicly stated that the confidentiality should cease after the Commission finds reasonable cause to file formal disciplinary charges against a judge and decides to hold a formal hearing. That hearing should be public. This may be an issue that this Commission wants to review as well: Whether there is a determinate moment when transparency could serve the purposes of the balance between the right to file a grievance against an attorney and the attorney's right to fairness in the process that is not compromised by perception over reality.

We thank you for the opportunity to present testimony here and our example of the work of the Commission on Judicial Conduct. Thank you.

MR. JOHNSON: Thank you. Thank you for what Modern Courts does, for what you do and has done in the past. And it really was an excellent history lesson in terms of what we will be recommending going forward.

I would ask the members if they have any questions of Ms. Kronstadt this morning? I have one question for Ms. Kronstadt. Would it also take a Constitutional amendment, in your mind, to foster something akin to what there is on the Commission on Judicial

Conduct for lawyers?

MS. KRONSTADT: I don't believe so. I believe that's different. I think this is something that didn't exist at the time at all, it was just more haphazard. And that was the time when there were three Constitutional amendments that went up. One was to create the Court of Appeals as an appointive system, the other was to establish the Judicial Conduct Commission, and the third was to create a uniform court system. So I think historically it's different.

MR. JOHNSON: Thank you. Yes, Ms. Duffy?

MS. DUFFY: Do you know the number of judges that the Commission oversees, has jurisdiction over, in New York State?

MS. KRONSTADT: They have jurisdiction over all judges in New York State, including town and village judges.

MS. DUFFY: Correct.

MS. KRONSTADT: I believe it's a number over 2500. So I don't know specifically the number of full judges in the system.

MS. DUFFY: Thank you.

MR. JOHNSON: Thank you so much, we appreciate it very much.

MS. KRONSTADT: Thank you.

MR. JOHNSON: Our next witness this morning is Stephen Downs who was formerly Chief Attorney for the New York State Commission on Judicial Conduct. Good morning, Mr. Downs.

MR. DOWNS: Good morning. And I want to thank Ms. Kronstadt and the Fund for Modern Courts for that lovely lead-in to

what I'm about to tell you. It couldn't have worked out better.

I'm the former Chief Attorney in Albany for the Commission on Judicial Conduct, I had that job for 28 years. It was a great 28 years of my life. But I'm here to ask you to endorse an independent commission on prosecutorial conduct, similar in all respects to Commission on Judicial Conduct.

And just for a little bit of background, as Ms. Kronstadt described to you we have now had about 40 years of experience with the Commission on Judicial Conduct and I believe that it is now widely accepted both in the public and within the judiciary for providing an essential function of fairness and completeness, firmness in enforcing the rules governing judicial conduct on judges.

I retired in 2003 and became associated with a group called It Could Happen to You, ICHTY, and ICHTY was basically made up of exonerees, people who were wrongfully convicted, people who were wrongfully prosecuted, and people, professionals like myself and other lawyers, who defend them in court. And we're trying to reform the system, change the system.

One of the things that has been a major problem that we see is that there's no effective discipline for prosecutors who commit misconduct. At present, it is said, the Appellate Division Grievance Committees are probably the only group that would have jurisdiction over that. But in fact, that has not been exercised to any extent that we are able to determine. I have not exhaustively read every decision that has come out of the Grievance Committee for the last 50 years. I cannot say that no prosecutor has ever been disciplined for

a violation of particular rules governing prosecutors. But certainly I think it is fair to say, and I think everyone would agree, that if there has been any discipline of prosecutors it is at a level so low that it goes nowhere near meeting the kinds of needs that we have and nowhere near the level that is necessary to deter prosecutors from wrongful conduct.

Certainly in my experience of dealing with exonerees, people who have been wrongfully convicted and now found innocent, in virtually every case I should say no discipline was taken against the prosecutor who caused this problem to occur. And prosecutorial misconduct was a factor in most, if not all, of these cases.

So ICHTY — and I helped to do this because I was familiar with the Commission on Judicial Conduct — has introduced a bill into the Legislature to create a parallel commission on prosecutorial conduct. It seems to make perfect sense to us that if you have as one of the pillars of our judicial system a Commission on Judicial Conduct for the judges, we should have a similar oversight for the other pillar of the judicial system, which is the prosecution side.

Prosecutors have their own independent ethical obligations. Unfortunately, in New York State there is no mandatory ethical guidelines on the prosecutorial function. There are, of course, ABA standards, there are other standards that float around, but there is nothing that is mandated for the prosecutor to follow. And so one of the things that the bill does is that it for the first time establishes in New York State a statement as to what are the guidelines, the ethical guidelines, that prosecutors are required to

follow, and including primarily I would say the ABA standards on the prosecutorial function.

This particular bill, in other respects the disciplinary aspects of it follow very closely with what the Commission on Judicial Conduct provides. And as Ms. Kronstadt has explained them to you, and I won't necessarily go into them now because I'm going to repeat what she said, the bill was introduced into this session of the Legislature and actually got all the way through the committee in both the Senate and the Assembly, all the committees, but it did not quite get to the floor. It just ran out of time at the end. So, we are hoping that we could get an endorsement from this Committee that this would be an appropriate way to go.

I want to just list some of the benefits that you would get from a Commission on Prosecutorial Conduct. The first thing is that it would provide independent oversight. Independence is absolutely critical here. I think the history of the Commission on Judicial Conduct describes very clearly what the problem is with the prosecutors. It was perceived that when you have the Appellate Divisions trying to impose discipline on judges that are under that Appellate Division, you have judges trying to discipline judges, and it doesn't work. It can never work. No system has ever been set up in which the body that is trying to impose the discipline is made up of the members that themselves are getting disciplined. It becomes clubbing and it becomes impossible to work.

I would suggest that because of the power of the prosecutors in the system and the way they move from being judges to

prosecutors and how their relationships build up which has caused the same problem here. No system can be set up which is going to have the confidence of the public unless it is truly independent, and that is what the Commission on Judicial Conduct has provided for judges. We think that the same thing ought to be true for prosecutors.

Another very important factor of this would be to unify the ethical obligations of prosecutors across the state. This is what the Commission on Judicial Conduct does. It took small judges way up in Malone town and village courts and said you're under the same ethical obligations as judges down in New York City are. You may have different physical facts that you're going to have to deal with, you're going to have different circumstances, but in the end you all have to obey the same ethical constraints, and I think the same should be true of prosecutors. It's crazy to think that somebody could be prosecuted in one county and could face one set of prosecutor ethical constraints as opposed to being a prosecutor in a neighboring county and finding something totally different. So I think that is something that is very important.

One of the big features of such a commission is for the first time it could focus on why there is wrongful convictions. New York State is second only to Texas, I believe, in the number of wrongful convictions, and every year we pay out an enormous number, millions of dollars, in fees to people who have been wrongfully convicted, in damages to people who have been wrongfully convicted. And yet the same prosecutors that created the wrongful convictions go right on prosecuting because there is nobody there to remove them.

If we had a commission that could look at this and first of all develop a staff that has expertise, could develop a record as to what these prosecutors have faced in the past, it would be possible to start to look at patterns. What are the patterns here that cause wrongful convictions? One of the things that we all know is that in the hospital if somebody is injured, dies on the operating table, people go in and they try to figure out why that person died. If there's a train accident we send people in. If there's a plane accident. Because you want to improve the system. It's the only way you can improve it. We don't do that with wrongful convictions, there's no systematic way to study the subject of wrongful convictions and try to determine what we can do to avoid it. If this Commission could avoid one wrongful conviction a year it would more than pay for itself many times over.

And the final thing that makes both the Commission on Judicial Conduct and the Commission on Prosecutorial Conduct a very strong thing is that in each case there is a direct appeal to the Court of Appeals and that allows the Court of Appeals to essentially set the rules for the kind of judicial system we want. Right now, they can do it with the judges. They do not have that ability with the prosecutors.

And it would tie it into a very tight system to be able to have the Court of Appeals be able to review what the Commission does and say this is what we like, this is what we don't like, because this is the kind of system we want in New York State.

So I thank you very much for allowing me to present

testimony here today.

MR. JOHNSON: Thank you, Mr. Downs. Do you have any tangible direct evidence that the disciplinary process in New York State is turning its back on prosecutorial misconduct?

MR. DOWNS: Well, I would say from my point of view any wrongful convictions that I've talked to the prosecutors were never disciplined. The Bar Association, the New York Bar Association, did a relatively recent study on it and concluded that it was ineffective.

Bennett Gershman I think is going to be testifying before the Commission, I think he's studied this in much more detail than I have and will be able to provide you more evidence. But I think from an anecdotal point of view, I believe almost nobody has any faith in the system. They don't believe it works. I don't believe they even think that the Grievance Committees take up the subject of prosecutorial misconduct. And I have to emphasize that prosecutorial misconduct —

MR. JOHNSON: My understanding is the opposite on that one point, that they do take up prosecutorial misconduct.

MR. DOWNS: I'm sorry, what?

MR. JOHNSON: My understanding is the opposite of yours, that they do take it up.

MR. DOWNS: I'm not aware of any significant number of prosecutors that have been disciplined for it. And the people in my community that we talk to are not aware of that either. But I would defer to Bennett Gershman. He's studied it more than I have.

MR. JOHNSON: You have a question?

MS. KEWALRAMANI: Yes. Mr. Downs, thank you for your testimony. Do you believe that prosecutors are not currently subject to the New York Rules of Professional Conduct which govern all lawyers licensed to practice law?

MR. DOWNS: Absolutely, yes. No question about it. And I'm sure because that would be under the Grievance Committees. But I think the problem, and why I'm raising it, is that prosecutors have very special obligations because they're public officials, they have particular constraints with respect to their acts as prosecutors where they have to ask for justice not just for prosecutions. I think it is those rules that are not being enforced by the Grievance Committees. If that clarifies it for you? I'm not saying they're not under the regular rules, yes.

MR. JOHNSON: Thank you, Mr. Downs. Professor.

MR. WENDEL: These are just still a follow-up, and I wanted to comment when you said there are no mandatory rules for prosecutors. Rule 328 is of course in effect a mandatory rule and it sets forth many of the obligations you were talking about, including the obligation to administer justice and not just advocate.

And you mentioned the ABA standards. You noted they are not mandatory. They are not mandatory anywhere. They're not mandatory anyplace. They're advisory, they're interesting, they're useful, but they're not mandatory. The question I have for you, beyond the comment, was what you thought accounted for the lack of action in the disciplinary committees, whether it's no referrals from judges or

defense lawyers, and if that's the case why do you believe the independent commission would be in any better position to receive referrals? If no one is making referrals, then what is the independent commission going to have as a basis for investigating prosecutorial misconduct?

MR. DOWNS: Right. I do think that one of the problems here is the fact that over the years, because the Grievance Committees have not wanted to take on the prosecutors, most lawyers would advise their clients, don't even bother, it's a waste of time. And I've heard that over and over again anecdotally in the community. So that's probably one reason why they're not getting a lot. And as there's a perception of more and more prosecutorial misconduct and less and less is done about it, I think people become more and more discouraged with the system.

One of the things when we started out the Commission on Judicial Conduct was that we faced the same problem, people were very discouraged about any judicial discipline being imposed. And so we tried to be very active. We went out and talked about the Commission, talked about the things that could be done, and we tried to be very open about it. We published annual reports. Every year there was an annual report that came out. We sent that out to every judge. We sent that out to all different sorts of organizations so that they would know that we were active, and slowly we began to see people starting to file complaints.

And so I think that it is partly a difference between simply sitting back and waiting and slowly going into a death spiral,

in which nobody bothers referring because they don't see anything coming out, or being a little proactive and trying to get out the idea that you're actually there and you care about discipline.

MR. JOHNSON: Ms. Duffy?

MS. DUFFY: Yes. You just stated that grievance departments do not want to take on prosecutorial complaints and I have to say as Chief Attorney for the Third Department I don't believe that. A complaint with respect to any attorney, regardless of the area of practice, is considered by our Committee and investigated. If there's a finding of professional misconduct the Committee takes action in the form of private discipline or it basically authorizes additional charges.

And if you look at all the Departments, the four Departments, and I can tell you for the Third Department, there are district attorneys and assistant district attorneys that the Court has imposed public discipline with respect to those attorneys with respect to prosecutorial misconduct.

Our Committee has also issued private letters of discipline with respect to district attorneys and assistant district attorneys with respect to private discipline. As for the transparency, the decisions are available to the public and you can read them with respect to every Department. So, there is data to support the fact that prosecutors are not treated differently by the Grievance Committees.

In addition, the Fourth Department for a number of years has issued in a sanitized fashion all of their cases involving

private discipline. The Third Department just recently started that this year where the Committee published its first annual report of private discipline, public and private discipline, and again have sanitized the decisions and determinations by the Committee with respect to private discipline. But that is available to the public.

So by reading through those you can see that the grievance departments certainly do consider complaints against prosecutors, they are attorneys. The grievance department has — the grievance departments in all four Departments have jurisdiction over all attorneys, regardless of the area of practice that they partake in.

MR. DOWNS: I absolutely agree with that. I don't disagree with that at all. If anything I said led you to think that I did not think discipline over district attorneys, I'm sorry, I apologize, that's not my testimony. All I'm saying is that given the magnitude of the problem, the amount of discipline that has been imposed is not sufficient to convince the public that anything is going to be done about it.

I'm not here to take on the Grievance Committees. A lot of people on the Grievance Committees are my friends, I understand them, we talk to each other. What I'm trying to say is that there is a better way to do it and I think an independent commission on prosecutorial conduct would be a better way to do it because it's parallel to what is already imposed on the judges, and that has been a big success over 40 years.

MR. JOHNSON: Mr. Downs, one final question, which will be short and I would ask that your response be short, and after that

we'll thank you for your time here today. You've been very interesting and we've learned a lot in listening to you and listening to the dialogue in terms of some of these statistics specifically.

MS. KEWALRAMANI: Mr. Downs, are you aware of any other state in the country having such a commission on prosecutorial misconduct?

MR. DOWNS: No, I'm not. I believe this would be the first if they were to do it. There are a number of other states that have done wrongful conviction panels or wrongful conviction places, but I don't know of anyone that has treated it as a disciplinary process against the prosecutors.

MR. JOHNSON: Mr. Downs, thank you, and thank you for your service to the state as well. Thank you so much.

MR. DOWNS: Thank you.

MR. JOHNSON: Next we'll call to the lectern Janet Silver who is the President of the Albany County Bar Association. Good morning, Ms. Silver.

MS. SILVER: Good morning. Thank you to the Commission members for having me here today and for the opportunity to present testimony. My name is Janet Silver and I am the president of the Albany County Bar Association.

In preparing for today's hearing and in speaking with members of our Association and the staff it became apparent that our Association interacts with attorney discipline from a number of viewpoints, some of which may not always be aligned.

Our Association represents over 1100 attorneys, each of

whom are subject to the Rules of Professional Conduct and potential discipline. The majority of our members do not practice exclusively in the Third Department nor do they practice in only one area of our state. Our attorneys within our Association practice in a variety of settings. We have litigators, we have government attorneys. I think that makes us very unique. We have court attorneys. Being here in Albany, we have a very different viewpoint of our membership, each of which has a different viewpoint on the rules, procedures and processes. Inconsistent and at times conflicting rules can be confusing for attorneys. Moreover, inconsistent interpretations and sanctions between Departments do not protect the public and can be unfair to attorneys as well.

The Association also has a Grievance Committee that is responsible for reviewing and reporting back on matters referred by the Committee on Professional Standards after a finding of undue delay in rendering legal services not constituting neglect, fee disputes not subject to Rule 137, or inadequate representation that does not rise to the level of professional misconduct. We have been lucky that we have not received a referral in many years.

Fee disputes and inadequate representation are usually based on a lack of communication or understanding on both the attorney and the client. In the past, these cases were difficult to resolve because the attorney felt strongly in the representation and fee structure, but the client felt as though he or she was not well represented and it was unfair to have to pay a fee associated with that representation.

Lastly, we operate a Lawyer Referral Line and provide pro bono assistance to clients in need of civil legal services, either directly through staff in our Association or through our members who volunteer to take cases. While our Lawyer Referral Line is designed to help residents of Albany County find legal representation, the general public calls our office with complaints and dissatisfaction with current representation. In fact, they use our number to call for lots of questions that have nothing to do with legal representation at all. Many are low income or lower middle income residents who lack the education or understanding of our legal system. They are seeking assistance to resolve a matter and the referrals whether for pro bono or through our referral line are extremely important. Our staff takes the time to listen and refer matters in the most appropriate manner. Having a clear and transparent disciplinary system will protect the public at times which do not understand the system in which they're seeking help from.

Each of these subgroups may look at the matter of attorney discipline differently and could very well agree or disagree on individual matters. I think everyone can agree efficiency, fairness, uniformity and transparency are goals that can be supported and should be advanced by this Commission. Our disciplinary system must protect the public and ensure attorneys are fit to practice.

A statewide disciplinary system would help create a consistent process, efficiencies within the system and ensure the public is being protected. The system should have a clear set of

rules both for procedure and implementation of sanctions. Moreover, the system should be efficient and matters should be resolved as quickly as possible for both the attorney and the public.

While a statewide system is desirable, there are many questions that remain regarding procedures, standards, privacy versus public information. A statewide system should have procedures that are transparent. The system should clearly indicate how to file a complaint, how a complaint would be reviewed and investigated, who will determine whether there is misconduct, the hearing process, evidentiary standards, potential sanctions that can be imposed, and if there is an appeal process.

Currently, in New York, other professions — medicine, nursing, architects, teachers — have a statewide disciplinary system. There is one entity responsible for investigating complaints, conducting disciplinary hearings, determining wrongdoing and imposing sanctions. This same entity, with the exception of medicine, also licenses the professional and is responsible for interpreting the rules of practice. This system creates one point of reference for the professional as well as the general public.

New York historically does not publish or make public complaints against other professionals unless there is a finding of misconduct or disciplinary action has been taken. While not under the directive of this Commission, I urge consideration of the impact it will have on our profession if there is not some consistency between the various disciplinary boards in relation to when and what type of information becomes public.

The issue of how much information should be public and when is a difficult question. We would all agree it is important for the public to know whether they are dealing with an attorney who is fit to practice or has been subject to discipline in the past. But we also know each year there are unfounded complaints made that could damage the reputation or, if a small/solo attorney, their ability to maintain a practice. Therefore, the system needs to strike a balance between information that is available to the general public and protecting the attorney from having allegations or information made public that are later found not substantiated.

Earlier this year, the Chief Judge announced that attorneys' public disciplinary histories are accessible via the Unified Court System's website. This is a great first step, but there is room for improvement. The website should be easy to use and contain a database that will enable an individual to look up an individual attorney, determine whether they are in good standing, and whether sanctions or disciplinary actions have been taken against the attorney. The website should contain information about the disciplinary process and the point in time when disciplinary information becomes public.

The disciplinary process and hearing should enable an attorney to discovery, including access to the complaint. It is critical that an attorney subject to discipline have due process and the ability to fully defend his or herself. Rules relating to information provided, at which point during the process and what type of discovery is allowed should be clearly articulated within a

statewide disciplinary system.

The New York State Bar Association has spent considerable time reviewing and putting forward recommendations on ways to improve the current system and as such they are much better suited to speak on this issue.

A statewide disciplinary system seems logical and will create efficiencies, improve public protection and standardize sanctions. While the overall goal of a statewide system is laudable, the devil is in the detail and I would strongly urge the Commission to seek input from local bar associations or other groups as you move forward, if there's an opportunity, prior to the report being finalized.

I know you are working under a deadline established by the Chief Judge, but it benefits everyone to have an opportunity to review and vet the recommendations of this Commission. Each recommendation should also articulate the goal and purpose as a way to educate attorneys and the general public on the rationale for the recommendation. Time should also be spent educating practicing attorneys on the differences between the current disciplinary systems and the need for uniformity.

Attorney discipline is an important matter that protects the public and our legal system. The work of this Commission is extremely important and relevant.

Thank you again for the opportunity to present testimony today. As you move forward, I hope you will reach out and seek enrollment from the various bar associations and groups around the

state. And I'm happy to answer any questions you may have.

MR. JOHNSON: Thank you, Ms. Silver. For myself, may I say you put forward a courageous and commonsensical approach that some would not expect from a lawyers association in some ways. You're calling for greater transparency and you're also calling for some better rules to ensure due process for attorneys.

One of the things that you mentioned is what will be the impact going forward if we don't achieve the balance that you're talking about, the balance in terms of uniformity and transparency but at the same time ensuring due process in charges against attorneys in this state. What is the impact in terms of confidence in the public, in the client base towards lawyers, but at the same time in the well-being of lawyers in operating within the confines that exist today. So it's kind of a dual-ended question.

MS. SILVER: And I think that's why when we looked at this, obviously we're an Association that represents attorneys, we are also an Association that provides direct legal services utilizing our attorneys through our referral system, and so you can see both sides of the issues when you stand in our viewpoint. I think that's one of the reasons why I think there needs to be input and vetting from local bar associations and practicing attorneys.

Beyond my role as President of the Bar Association I spend a lot of time working with government in how you're finding these compromises within groups, and a lot of times you find where people don't understand the other side of communication or why it is needed there is an automatic resistance to no or we shouldn't do that. I

think that there is an opportunity to really educate here, to understand more about what the current process is. What are those inconsistencies? And if the goal is to create a statewide system, what are the benefits of that within the process? Because I think if the process is clear and the standards are clear, while it's a change, over time people will come to respect that system. But I think it's a lot of education, a lot of work beyond just your recommendations.

MR. JOHNSON: Any other questions for Ms. Silver? Ms. Silver, thank you for an excellent presentation this morning. We appreciate your time. Thank you very much.

MS. SILVER: Thank you.

MR. JOHNSON: May I call to the lectern Mr. Benjamin Cunningham, who is a legal services consumer. Mr. Cunningham, good morning, sir. Thank you for being here today and thank you for expending the time, we appreciate it. We're happy to hear your testimony. And if you would like to take questions afterwards, we're happy to pose those to you.

MR. CUNNINGHAM: Thank you very much. Thank you for providing the invitation for me to appear today and testify. I'm a member of the public, I'm a consumer of New York State, an American citizen. And what brings me here today is the fact that — not only that, I'm a nurse by trade. I'm not a member of an organization. I'm not a member of the legal community. I'm a homeowner, father, the guy next door.

I filed a disciplinary complaint against an attorney who I

hired to represent me in the Second Circuit Court of Appeals, the attorney defrauded money out of me. I paid him a $7,000 down payment and — I paid him a $7,000 down payment. The attorney signed an attorney agreement contract with me, but the attorney never filed a brief. A government attorney never participated — both attorneys never participated in the appeal and the Second Circuit went ahead and dismissed the appeal on the pro se status as frivolous.

The attorney signed the attorney agreement contract in November 2011 and he filed — sixty days later he filed his appearance in the Second Circuit. Two months later. So that was a gap. But he didn't file a brief. And when I brought this to the attention of the Disciplinary Committee in Manhattan under docket number 2012-2312 the staff there was very unprofessional. They told me I'm not allowed to have a copy of the attorney response and I said that's a violation of your mission statement. And they said, well this is our internal, independent — what do you say, that's they're independent —

MR. JOHNSON: Rule?

MR. CUNNINGHAM: Rule of their own decision, whatever. There's nobody here to represent the public. Every person that stood up today represents an organization. Who represented me, the public, the litigant, the consumer who hired an attorney? These attorneys who practiced an ethical violation and criminal conduct is getting a free pass by the Disciplinary Committee. And while they're doing that, there's no oversight, there's no advocates to protect the public's interest.

And the Disciplinary Committee process is not transparent.

For example, the decision the committee used, the reason for dismissing my Disciplinary Committee complaint is vague. It's not withstanding to the average public matter, consumer.

The lawyer charged me — I'm sorry, I paid a down payment of $7,000 and I owe the attorney $60,000. He's been billing me for an appeal that never happened. And I produced all the evidence to the Disciplinary Committee and to this day it's not explained in full form and I wasn't invited to come down to face the attorney. The only thing they told me was it was dismissed, insufficient evidence, it's too vague.

Now, I mentioned to the committee's chief counsel named George Dopico, I said, Sir, I'm not satisfied with the committee's ruling, where do I go to file an appeal to the Disciplinary Committee? This is your last level. There are none. Well, my gut reactions told me go up to the Appellate Division, First Department, and ask them and they said, we are, our deputy clerk by the name of Margaret, S-O-W-A-H, that's the person here who reviews the Disciplinary Committee decisions when a member of the public is dissatisfied with the ruling. I said, well why isn't that being posted in all the Disciplinary Committee branches? It's not. It's a big secret. They're keeping that from the public. Why?

So I say it's not fair. The public is not being fully represented at the Disciplinary Committee. I'm a nurse. If I violate a patient's medical rights or patient care rights, do you know how much trouble I would be in? But a lawyer can violate a client's civil rights and get away with it. Something is wrong. The system

is broken. And this Disciplinary Committee, there's no oversight. I don't know what's wrong. The public trust is eroded. There would be many more members of the public here if this committee hearing, public hearing today, was broadcast in the media. A member of the legal community is the one who alerted me to the hearing today.

Any questions, please feel free to ask. But I have one question. Is it possible there could be a liaison in store, a public liaison, representing the public's interest in the State of New York? Maybe that would be a deterrent to these lawyers, because these lawyers are going back out there robbing more and more clients. There's no deterrence. What is the problem, ladies and gentlemen?

MR. JOHNSON: So Mr. Cunningham, number one, I'm sorry for your troubles. Number two, I thank you for coming from New York City to be here today, I know it's been a difficult journey, but I appreciate you coming here on this summer day. Number three, we're listening very closely. Number four, if I could take that last point you just made, which is an interesting point. What you're suggesting is that perhaps there should be some liaison or ombudsman or someone to render advice or provide assistance to folks who feel that they've been aggrieved by a lawyer's conduct so that they can navigate the disciplinary system themselves to achieve the outcome that they think is just and fair in terms of ensuring that the lawyer who's done them harm is properly disciplined. That's what you're talking about, right? Liaison, an ombudsman, is that what you're referring to?

MR. CUNNINGHAM: Yes, that's one aspect.

MR. JOHNSON: Yes, I understand that's one aspect. That's

an interesting aspect that I haven't heard before because the issue becomes who does an aggrieved client turn to in terms of the lawyer's alleged misconduct towards them. Should they spend more money on another lawyer to get advice on that issue. And so I think what you're saying makes sense in terms of consideration.

Is there anything else you would like to tell us before you leave here today, Mr. Cunningham?

MR. CUNNINGHAM: Yes. The Appellate Division deputy clerk I provided the same evidence and she affirmed and the evidence came from the lawyer's own admission. The lawyer's own admission letters where he never filed a brief, yet he charged. He got away.

MR. JOHNSON: Mr. Cunningham, my colleague, Mr. Guido, has a question for you.

MR. GUIDO: Mr. Cunningham, I also get a little distressed when I hear statements like yours where you've had such a terrible personal experience in dealing with the personnel, the grievance, and I'm frankly a little surprised because I know my colleagues in the First Department well and I'm not sure what happened here.

But the thing that struck a note to me was when you said you were not permitted to see the explanation submitted by the attorney. That's rather unusual and it seems to me that that's a product or a function of what we call the screening process or the intake process of complaints that varies among the different Judicial Departments. So bear with me, I'm going to explain that. When complaints are filed with the Grievance Committee they go through a very rigorous screening process to determine if in fact it is

something that's within the jurisdiction of the Committee and is it something that should be open for investigation or not. And if it is not and it is rejected, there will be no communication with the attorney requesting that attorney to answer. In most cases, when the attorney is requested to answer it's because that determination has been made that this is something that warrants investigation.

Because you're in the First Department it seems to me, it sounds to me, as if this screening process that they have there differs in that they may ask for an answer from the attorney upfront before they formally decide to open the complaint, and then after getting that answer they chose not to go forward. That's what it sounds like, I'm not sure.

MR. CUNNINGHAM: Can I answer that question?

MR. GUIDO: You can, but what I wanted to tell you was, what I wanted to show you was, that these kind of differences in the screening process, the way we evaluate complaints, what is being told to complainants and how that differs among the various departments, all of that is being examined with a view as to whether or not changes need to be made and uniformity should be in place in terms of how we're engaging with complainants such as yourself so that all complainants are treated the same.

And in addition to that, we're also examining what right of review are we giving to complainants whose complaints are either rejected in the screening process or even dismissed. Are we treating all complainants the same throughout the state or are some enjoying different benefits.

And one of things that disturbs me is, because I can tell you my experience in the Second Department, if you had written a letter to the Presiding Justice in the Second Department complaining about your experience and what had transpired, you would have gotten a complete detailed explanation written back to you, maybe which you ultimately didn't agree with, but at least explaining to you in detail how the process transpires and how we see it from our point of view.

So these are the kind of things that this Commission is going to address so hopefully all complainants will have whatever right of review is available throughout the state and get the same level of communication so that you can better understand why or why a committee didn't go forward.

Again, all complainants will not always agree, but you're entitled to get the full explanation from the body that's making that determination. I interrupted you, so go ahead.

MR. CUNNINGHAM: So what is your question? Because you mixed apples and oranges. With respect.

MR. GUIDO: It wasn't a question, it was to tell you these kinds of things are being examined in terms of what happened to you, you weren't fully informed, you didn't have the right of review, you claimed you were misinformed. These are the kinds of things we are trying to address because no complainant should have to go through this kind of trial where they're left in the dark as to exactly how this all transpired. So you just reinforced why we need to have this Commission and why we need to make sure that we have some kind of

uniformity in this respect. Because this isn't just about treating lawyers the same, this is also about treating public and complainants so that they get equal treatment throughout the state and there shouldn't be disparity in that respect either. So I don't know if that gives you a measure of comfort, but it reinforces why we're doing this.

MR. CUNNINGHAM: Thank you. The lawyer did file a response. I wasn't entitled to it. Now, I don't know how the process works in the other departments throughout the rest of the state. I don't know, I'm not a connoisseur, I'm a member of the public, and my jurisdiction is the First Department, so I can only focus on the First Department.

MR. JOHNSON: Mr. Cunningham, thank you. There's one additional question. But I think that's the point Mr. Guido is making, that we've actually been looking at it rule by rule, department by department, to see disparity, to see how things are being handled so we can make those recommendations. So, when you give us specific examples like that, that's very important for us to understand one specific issue and how it works. So I don't think there was a question, but I think there was an effort by Mr. Guido, and I think a successful effort, to say we recognize you as a homeowner, an American, a nurse, someone from the First Department, a father who's coming here today to try to take what occurred to him and improve the system in a big way. And that's why we're here, that's why we've traveled to Albany and we'll travel to Buffalo and around the state to do that. So, I have one question from my

colleague, Mr. Zauderer.

MR. ZAUDERER: Thank you. Again, thank you for your very articulate and compelling presentation, in my view. And I just want to clarify a couple of facts about the situation which as you described sounds very significant to me as one commission member. Am I clear that at no point, either formally or informally, you were offered an explanation as to why the brief was not filed or money returned? Did you get an explanation from the lawyer? Did you get an explanation informally from the staff when you've made a complaint? Do you have any idea?

MR. CUNNINGHAM: Yes, I have documents as evidence presented, if you need it, that I'm going to leave here today if possible. But I have a decision from the Disciplinary Committee and I can read it to you. It doesn't mention any reason why the attorney didn't file the brief, didn't mention any reason why I wasn't entitled to the attorney's response. It didn't mention any reason, what evidence they used to dismiss the complaint.

MR. ZAUDERER: I would like to see that if the Commission receives it. But other than that, what you're going to give us, was there any explanation given to you orally or otherwise by the Committee?

MR. CUNNINGHAM: Yes. In writing, very vague — insufficient evidence. And verbally they said it's confidentiality. When I asked the Chief Counse, can I have a copy of the Committee's evidence that they used to determine to dismiss my valid complaint?, and he said no not even we are entitled, it's confidential, the

public cannot have access, not even us attorneys, us investigators.

MR. ZAUDERER: Did you ask for your money back from the lawyer? Did you refuse to pay the bill and did the lawyer respond?

MR. CUNNINGHAM: No, I asked the Disciplinary Committee. Also the lawyer's malpractice license expired and I mentioned that to the Committee as well. And the Committee said we don't have jurisdiction to entertain getting your money back, you're on your own with that. About the ethical violations we feel that he didn't reach — his conduct didn't reach the level of ethical violations. I owe him $60,000 as of today.

MR. JOHNSON: Are those documents for us?

MR. CUNNINGHAM: Yes.

MR. JOHNSON: May I have those?

MR. CUNNINGHAM: Yes. Shall I bring them to you?

MR. JOHNSON: Yes, sir. We'll be in touch. Thank you very much. God bless you.

MR. CUNNINGHAM: Thank you, everybody.

MR. JOHNSON: Thank you, sir. Our next witness this morning is Jennifer Wilkov who is a member of the board of It Could Happen to You. Ms. Wilkov, good afternoon.

MS. WILKOV: Good afternoon. I would like to thank the Commission and Chief Judge Lippman and Chief Administrative Judge Prudenti for this opportunity to testify before you this afternoon at this hearing.

I am the victim of a prosecutorial attorney as well as judicial misconduct in a matter that left me with an E felony when I

was verifiably innocent. I am also a board member of the It Could Happen to You organization and I came today from Brooklyn to speak with you.

In 2006, I found myself at the center of a legal storm where I was incarcerated in Rikers Island for a crime that the Financial Industry Regulatory Authority, known as FINRA, ruled I did not commit three years after I had already been railroaded into pleading guilty by an assistant district attorney in Manhattan and the judge in my case, as well as my own criminal defense attorney who engaged in questionable practices which caused the criminal justice system to fail to uphold my rights to fair prosecutorial practices and proper representation.

As a decorated, award-winning certified financial planner practitioner at American Express Financial Advisors, Inc., which is now Ameriprise Financial, I was inappropriately told to plead guilty to a crime I did not commit by the assistant district attorney, the judge and an attorney who mishandled my case and requested in the courtroom, and was granted, a withdrawal, just prior to my sentencing. My Sixth Amendment right was overlooked by the judge in my case when I was denied my request at that time for an adjournment to seek new representation. My statements were also taken off the record twice during my plea allocution hearing and once during my sentencing hearing.

The District Attorney's Office hid exculpatory evidence in my case by not introducing evidence in the grand jury hearings from the investigating detective from the Los Angeles County Sheriff's

Department wherein he told the assistant district attorney that I was innocent and that the investigation he had done revealed no indications of wrongdoing on my part. She did not question him in the grand jury. And the District Attorney's Office never investigated the financial firm I worked for, who stated in the grand jury that I never informed the firm about the investments in question, which was false and proven in the FINRA arbitration. The evidence and facts show that the financial firm was in fact internally disciplining my compliance supervisor for his lack of compliance supervision of me and the questionable investments at the same time that the grand jury hearings were being conducted in my case. The firm was virtually permitted to commit perjury by the assistant district attorney and the DA's office, thereby leaving me, an innocent person and a professional, with an E felony, loss of nearly everything I had, and a smeared public reputation that was plastered throughout the media, which also caused me to withdraw my professional license and lose my professional career.

Three years later, in 2011, after my compliance supervisor testified on the record that he did not follow the NASD Rules or the Ameriprise Financial Compliance Supervision Guidelines during his supervision of me with these investments which I did in fact bring to his attention at that time, the Financial Industry Regulatory Authority denied in their entirety all charges, beyond what happened in the criminal proceedings, including fraud, withholding material facts, failure to disclose, and breach of the franchise agreement which were brought by the firm, then Ameriprise Financial, against me

as a third-party respondent during an arbitration held in May of 2011. Please note that these charges and claims in the FINRA arbitration went beyond the charge of scheme to defraud which was levied by the Manhattan District Attorney's Office in my criminal case.

I was later told by several attorneys that there was no real remedy in the current judicial system to file a grievance against the district attorney about the prosecutorial misconduct that occurred in my case, especially since the prosecutors could invoke immunity, thereby making my efforts pointless and time and money wasted.

To add insult to injury, the present Manhattan District Attorney, Cyrus Vance, Jr., who was a partner at the law firm of my former criminal defense attorney in this matter, continues to acknowledge that there is a conflict of interest in my case when it comes to my appeals, yet he and his staff refuse to allow me to move my case to another jurisdiction so I may receive unbiased due process.

An independent level of accountability is needed to examine complaints of prosecutorial misconduct. I want to second what Mr. Cunningham also said, that there was no liaison or ombudsman in this case for me to tell me where to go to file a grievance against any of these people, which I agree with him would be very helpful.

An independent level of accountability is needed to examine complaints of prosecutorial misconduct. We need to establish uniform best practices for DAs so what has happened to me does not happen to

anyone else.

Every other profession that licenses its professionals has an accountability oversight and disciplinary entity and formal system in place. One point, one system, one place. It provides the pivotal checks and balances needed to regulate any industry. The district attorney should have the same level of accountability in one place. The judges who are also elected have this through the Commission on Judicial Conduct — one place — which faced the same resistance when it was initially introduced and has been working for decades in exactly the way it was intended. The criminal defense attorneys are held accountable, as their actions can be questioned through the documented procedures in the Unified Court System, which I learned about five years later by the way. Nobody told me what to do. I don't understand why the district attorneys should be an exception or immune to the same level of accountability as every other profession, including other officers of the court.

There is current legislation pending, which Mr. Downs referred to, in the New York State Legislature that has been modeled after the successful Commission on Judicial conduct. As a board member of It Could Happen to You that forged this legislation and drafted bills now under consideration, I offer this unique perspective of the white-collar worker who pays taxes for these officials who otherwise may believe that this could not happen to them, and when I tell them what happened to me they're appalled and they're scared, because their belief system about the judicial system is not what happened to me. It can and it does happen. It happened

to me and I'm telling you — I'm here today to tell you it destroys lives and careers like mine.

It's important for us to breed confidence that the disciplinary review will indeed be reformed, that people like me have information about where to go and what to do. And most importantly, that when it comes to the prosecutors, there's a place to go that everyone in the system speaks with confidence about and doesn't deter someone like me, who has been through so much, where I feel like there's no place for me to go.

I'm happy and at your disposal to answer questions and to provide you with any evidence. I got it all, it took me years, I got every document.

MR. JOHNSON: Ms. Wilkov, thank you for your written submission and for your statement here this afternoon. Are there any questions by members of the panel? Mr. Zauderer.

MR. ZAUDERER: Thank you. And I hope we'll take what it is you wish to submit. May I ask you, what was the factual underpinning of the E felony? And secondly, did you ever file a complaint with the Disciplinary Committee?

MS. WILKOV: No. Well, let me answer your question backwards.

MR. ZAUDERER: Thank you.

MS. WILKOV: I have spoken with — are you talking about the Unified Court System?

MR. ZAUDERER: The formal Disciplinary Committee that governs lawyers' conduct.

MS. WILKOV: I don't even know what that is. I know that the Unified Court System who I've spoken with has told me — when I told them what happened to me they said that's exactly what we investigate, there's no statute of limitations for me to file that. It took a lot for me to get my case files from the criminal defense attorney. I have every document.

I called the Commission on Judicial Conduct. They said the same thing about the judge. I haven't told you everything that she did, but I'm sure you get the idea, and they said we want to see those transcripts and you can send them in whenever you are ready, there's no statute of limitations.

If you're talking about something other than that, I'm telling you as a member of the public and a licensed professional who's pretty smart, I have no idea what you're talking about, which is really sad considering everything I've looked at and everything I've been through.

MR. ZAUDERER: Appreciate your time.

MS. WILKOV: And I wish I knew what it was.

MR. ZAUDERER: This is the committee that exists in Manhattan to hear complaints against lawyers, that's what we're talking about. Thank you for telling us. And the factual basis for the E felony plea was what?

MS. WILKOV: You mean the scheme to defraud?

MR. ZAUDERER: Right.

MS. WILKOV: I went through a lot with the assistant district attorney, which I'm not going to take up your time with

today, but getting that allocution together was quite a task because they asked me to tell all kinds of lies in that allocution which I refused over and over and over again.

When you actually read through the indictment, it's inconsistent, from the different investors that are in it to different investors that are not, and there's one pivotal fact that is incorrect. I never received and I never touched any of the money. So when you actually look at the scheme to defraud charge and the general business liability and all of those things, that was the factual basis of what they were using. They were using misstatements and other things in their indictment. And the problem is when you actually talk to the detective out in California, I actually — he is available for me to subpoena at any moment he's told me. I understand your question and I respect it, but I don't want you to get the wrong idea, please.

MR. ZAUDERER: You pled guilty though? Did you admit the facts in the indictment?

MS. WILKOV: I was told to do so by my attorney. It doesn't mean that I agree with it. And when I went off the record — or I'm sorry when they took me off the record I was speaking the truth outside of that allocution. And the judge told me to speak and she told me that I was speaking on the record. And I can give you those transcripts from that plea allocution. There are two big boxes in my transcript that say off the record, which is unfortunate, because they didn't want the truth, they wanted me to say what they wanted in their statement.

MR. ZAUDERER: Thank you.

MR. GUIDO: Ms. Wilkov, can you clarify, are you actually pursuing an appeal of your conviction now?

MS. WILKOV: I appealed the first 440. And that was involving the judge, which was a mess because, first of all, that was when Cyrus Vance, Jr.'s office actually acknowledged the conflict that I mentioned and then refused to change the venue. That 440 was then denied by a judge who about three months later was in the New York Post where he had lied on a mortgage application, which I'm sure all of you know what the penalties are for that.

So my confidence in the justice system as a public person — it's difficult. I got to tell you as a person that was a licensed professional who votes, you're supposed to be, you know, understanding the system and thinking that the system is working for me and paying for it, it's very complicated to find yourself in a situation. I'm a person who has college degrees, never had anything — and by the way, I never had a complaint. As a certified financial practitioner, I never had a complaint against me until this occurred.

MR. GUIDO: So did you file a 440 motion to set aside your conviction after you pled guilty, is that what happened?

MS. WILKOV: I did once. And I have another one that's being prepared. But quite frankly, I'm not willing to pay for it until I know that it has a correct avenue to go. It doesn't make me feel good when the District Attorney in Manhattan is the former partner where that firm, I will use the word decimated, me

voluntarily. I don't know anybody who's a logical thinker that would want to move forward with that. I mean, you know, money is money and dollars are dollars. And when you put in dollars you would like the best return on your investment. As a former certified financial planner, I want the best investment return and I can't do that when I have a district attorney that, if you're telling me I need to take him to his own Manhattan Disciplinary Committee, I don't know how they're going to actually be objective with somebody who's sitting in the seat of the District Attorney's Office in Manhattan. If you can assure me of that, I'll take all the time necessary to go file it. I will. I would be happy to do it.

MR. JOHNSON: Ms. Wilkov, thank you very much for your time.

MS. WILKOV: Thank you, I really appreciate the opportunity.

MR. JOHNSON: Thank you. Our next witness and final witness this morning is David Miranda, President of the New York State Bar Association. Good afternoon, Mr. Miranda, how are you?

MR. MIRANDA: Good afternoon, how are you?

MR. JOHNSON: Thank you for joining us here today.

MR. MIRANDA: Thank you for having me. Members of the Commission, on behalf of the New York State Bar Association I thank you for providing us with the opportunity to testify before you today. I know that there are many important issues that you're considering as you deliberate over the possible changes to our state's attorney disciplinary process.

My focus today is on one particular issue that we believe deserves the attention of this Commission, which is discovery in the disciplinary process. Our State Bar Association's Committee on Professional Discipline, which is chaired by one of your Commissioners, Sarah Jo Hamilton, studied this topic in depth and issued a report containing some thoughtful recommendations.

The Committee's report was approved last week by our Association's Executive Committee and has become the policy of our Association and I'm pleased to have this opportunity to summarize our report and recommendations for you and will be providing you with a full copy of our report and recommendations today following this testimony.

Our New York State Bar Association Committee began by studying disciplinary discovery in all 50 states and the District of Columbia to take a survey of how discovery is taken in disciplinary proceedings throughout the country. It broke down the discovery afforded in each state into three categories: Those with the greatest amount of discovery, those with limited discovery, and those with little or no discovery. It found that 35 states and the District of Columbia fall within the first category, providing a substantial amount of discovery, demonstrating that well over one half of the jurisdictions allow for reasonably extensive discovery. It further found eight states provided limited discovery and six, including New York, authorize little or no discovery.

In looking at New York, the Committee found that all four of our Departments of the Appellate Division provide for either

limited or no discovery. While each has somewhat different provisions, all fall within this category of limited or no discovery. Thus, we in New York fall within the relatively small minority of states that provide very little or no discovery.

As you know, affording due process to anyone accused of wrongdoing is certainly a fundamental requirement of our legal system. And despite some reports to the contrary, lawyers are people too. Our Committee and its review understood that extensive discovery often delays resolution of proceedings and in civil litigation, as you well know, discovery disputes can sometimes tie up attorneys and judges, sometimes over relatively minor matters. In addition, we recognize that open discovery, including depositions, might in some instances discourage those with legitimate complaints from presenting them. Complainants could also get tied up in time consuming and procedural delays. Thus, taking that into account our report balanced the need to afford due process without overwhelming the process and burdening complainants.

With this in mind, we offer five modest recommendations. Two reflect changes in discovery during the investigative phase of disciplinary proceedings and three are changes that are applicable after charges have been filed. I would like to start with the first two that reflect changes during the investigative phase. First, a respondent should always be provided with the initial complaint and any supplemental materials supplied by the complainants. Well, this seems fundamental. Respondents are sometimes not given these documents when they are submitted by a member of the judiciary, for

example, or a governmental official. In those cases, fairness to the person accused must take precedence. Where there is no complaint and a sua sponte investigation is opened, the respondent should, at the very least, be entitled to be apprised of the facts underlying the investigation. With this proposal we are urging only very limited but fundamental discovery at the outset.

We also believe that during the investigative stage the respondent should be given access to any exculpatory material and portions of the disciplinary committee's files that are not work product and would not jeopardize the investigation. All of these materials help the respondent better understand what is being considered by the Committee allowing for a more formal and informed response. Not only is this fair to the respondent, but it allows the Committee to better understand both sides of the matter it is considering.

We also offer three recommendations related to discovery after the charges have been presented. First, the respondent should have the clear authority to subpoena documents from third parties. Certainly if there are documents that are relevant and not in the possession of the Disciplinary Committee the respondent should have a straightforward and effective method of obtaining those documents.

Second, and for the same reasons, the respondent should have the ability to request documents from the Disciplinary Committee. This serves the same purpose as the first recommendation, but a subpoena certainly should not be necessary.

Finally, and thirdly, more extensive discovery should be

available upon application and a showing of good cause. While we're not proposing the right of the respondent to necessarily take any deposition, we believe that upon making the required showing the referee should be authorized to order the depositions of the complainant or any fact witness or expert the disciplinary counsel intends to call at the hearing. While we recognize that this also can be burdensome and perhaps slow the process, it is controlled by a neutral who can balance the conflicting interest.

The New York State Bar Association believes that these proposals will add to the fairness of the proceedings without causing the unnecessary delays we sometimes see in more expansive discovery permitted in civil litigation.

On behalf of the New York State Bar Association, we thank the Commission for its time and its efforts. Its work here is of great importance to lawyers, to our Bar Association, and to the general public. I appreciate having the opportunity to present these concerns and recommendations of the New York State Bar Association, and I thank you for the opportunity to talk here today.

MR. JOHNSON: Thank you, Mr. Miranda. I just have one question. And I appreciate the thoughtful proposals that you've talked about. They seem to make a lot of sense. But I guess the greater question I would like to discuss as well, generally do you think the process should be more public in terms of the disciplinary process of lawyers? Is it too secretive at this point in New York State? Should there be greater transparency? And then the second part of it is, is there a disparity between how justice is meted out

in different parts of the state in terms of lawyers?

MR. MIRANDA: Well, to answer your first question, in order for our Association to comment on it we would really need to see exactly what you mean by transparency. I think as an organization that represents attorneys we would be concerned about attorneys that have conducted no wrongdoing having a complaint aired against them that was completely unfounded. So there may be some opportunity for greater transparency, but I think it has to be balanced with an understanding that unfettered complaints that are unfounded are something that can in fact unnecessarily damage a career and not help the process in any way.

The second question about uniformity —

MR. JOHNSON: Disparity in uniformity, how decisions are made and what those decisions are. We heard testimony this morning that it's not in stone that the lawyers who steal, that he or she is disbarred.

MR. MIRANDA: Our Association has looked at this over the course of many years and many different variations. And, you know, I think there's a consensus that there should be — that because we have the four Departments and they each have their own sort of procedures and rules and methods of determining things, that uniformity might be helpful. The unfortunate part is that everyone thinks that their Department is the one that the other three should follow. So we have a little bit of an issue there. Our position is basically that there should be greater consistency amongst the Departments if not uniformity.

MR. JOHNSON: In terms of such consistency, and if you haven't looked at this issue I don't expect an answer, but we would appreciate your thoughts on it or that of the Association going forward, this notion of the statewide commission on attorney conduct.

MR. MIRANDA: Right. I would very much appreciate that opportunity and what I would expect is that if there is a recommendation from this Commission that our Committee and our Association is going to look at it very carefully and that we will provide comment on the recommendations of this Commission.

MR. JOHNSON: If you have any data or information, we would love to have that in making our recommendations. That would be very helpful.

MR. MIRANDA: Very good.

MR. JOHNSON: Because it's a great Association with a great President and you have a lot of information at your fingertips. Any other members have questions? Yes, Mr. Zauderer.

MR. ZAUDERER: Thank you. Mr. Miranda, good afternoon.

MR. MIRANDA: Good afternoon.

MR. ZAUDERER: I for one am quite surprised to hear, troubled by it, frankly, that New York finds itself among that group of states for which there is the least discovery available in these proceedings. It's something I think we should think about. I know I certainly will. And of course discovery in any kind of proceeding, judicial or administrative, always has a certain degree of burden attached, certain amount of time-consuming processes that has to be gone through. What is the justification that's been offered for

those who defend a system that provides such limited discovery in such an important proceeding where a person's license and reputation is at stake? How is it defended?

MR. MIRANDA: What is the position on the other side?

MR. ZAUDERER: Yes.

MR. MIRANDA: I think the position is that it is going to unnecessarily complicate the proceedings. I mean for those of us who are litigators, we understand that sometimes discovery in civil litigation can take on a life of its own. So we took that into account. And what we're looking for here and suggesting is a very limited fundamental discovery that we hope and expect will actually help the process move forward because the issues will be put on the table sooner.

MR. ZAUDERER: I would think so. We allow it in a commercial breach of contract case, sometimes perhaps too much, but it's quite extensive and that's an accepted process. And not to allow it in a disciplinary proceeding certainly is something worthy of attention. Thank you for that.

MR. MIRANDA: Thank you.

MS. KEWALRAMANI: Mr. Miranda, thank you. One of the things you mentioned is your Committee on Professional Discipline at the State Bar has studied the discovery rights around the country. Was there anything remarkable about how in one of the model states may have implemented changes and allowed for greater discovery rights that they have before for respondents.

MR. MIRANDA: For changing that?

MS. KEWALRAMANI: Yes.

MR. MIRANDA: I don't know that there's any discussion of any particular state's method of changing, it was more of a landscape survey of what the states would do. And we also talk in the report about some of the larger states that might be similar to New York are the ones that do provide for greater discovery.

MR. JOHNSON: Any other questions? Mr. Miranda, thank you so much for being here today, appreciate it.

MR. MIRANDA: Thank you.

MR. JOHNSON: And we appreciate your help going forward. It's a great help to us.

MR. MIRANDA: Thank you.

MR. JOHNSON: Members of the Commission and you members of the public who attended here today, we thank you for your time and your interest. And on behalf of the Commission, I thank Chief Judge Lippman, especially for his groundbreaking and historic developments he's been able to put forward in the state, and this is one of them I think, in the last few years. And for our Chief Administrative Judge Prudenti, who has had a marvelous service in the judiciary here in New York State.

So we look forward to our next hearing in Buffalo and then on to New York City. And any comments that we have statewide we would love. But we thank you all for being here. Have a wonderful day, everybody.

C E R T I F I C A T E

I, **COLLEEN B. NEAL,** Senior Court Reporter in and for the Third Judicial District, State of New York, **DO HEREBY CERTIFY** that the foregoing is a true and correct transcript of my stenographic notes in the above-entitled matter.

DATED: July 29, 2015

SUPREME COURT OF THE STATE OF NEW YORK
FOURTH DEPARTMENT

1 CHIEF JUDGE'S HEARING:

2 COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

3

4

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6 92 Franklin Street Buffalo, New York August 4, 2 015

7 COMMISSION MEMBERS:

8

9 HONORABLE BARRY A. COZIER

10 HONORABLE STEPHEN K. LINDLEY

11 MARK C. ZAUDERER, ESQ.

12 ROBERT P. GUIDO, ESQ.

13 PROFESSOR W. BRADLEY WENDEL

14 VINCENT E. DOYLE, III, ESQ.

15 JUSTICE COZIER: Good afternoon and welcome to the second of three

16 public hearings scheduled by the Commission on the Statewide Attorney Discipline.

17 My name is Barry A. Cozier and I am the chair of the Commission. I am currently

18 senior counselor at LeClair Ryan in New York City and have been practicing for

19 approximately 40 years in one capacity or another. From 1986 through 2006, I served

20 as a member of the New York State Judiciary as a Family Court judge, a justice of the

21 Supreme Court, and an associate justice of the Appellate Division, Second Department.

22 On behalf of Chief Judge Jonathan Lippman and myself and all of the members of the

23 commission, I want to thank each of you for taking the time to come before us today

24 and share your thoughts and insights about the important issues the Commission is

25 tasked with addressing.

1 In February 2015, Chief Judge Lippman established a Commission on
2 Statewide Attorney Discipline to conduct a comprehensive review of the state's attorney
3 disciplinary system to determine what is working well and what can work better. After
4 conducting this top-to-bottom review, the Commission is charged with offering
5 recommendations to the chief judge, the Court of Appeals and the administrative board
6 of the courts about how to best enhance efficiency, effectiveness, and public confidence
7 in New York's attorney discipline process.
8 Among the primary issues under consideration by the Commission are:
9 One, whether New York's departmental-based system leads to regional disparities in
10 the implementation of discipline; two, if conversion to a statewide system is
11 desirable; three, the point at which disciplinary charges or findings should be publicly
12 revealed; and, four, how to achieve dispositions more quickly in an effort to provide
13 much needed closure to both clients, complainants and attorneys.
14 By holding these public hearings, and also accepting written testimony,
15 we hope to hear from a diverse cross-section of interested individuals, organizations
16 and entities about their views on these and related issues they feel are relevant to the
17 Commission's task. We believe that by inviting and considering different viewpoints,
18 the Commission will gain a more complete understanding of the issues at hand and in
19 turn be in a better position to formulate the best possible recommendations for the
20 state of New York.
21 We know that the attorney discipline process has a tremendous impact
22 not only on attorneys subject to discipline and their clients and potential clients, but
23 also on the public's trust and confidence in our legal system. We want to thank you
24 once again for helping us in our important mission to carefully examine the need for
25 change in New York's attorney disciplinary system.

You will each have up to ten minutes to present your testimony and
1 then you may be asked questions from the panel. We kindly ask that you please
2 strictly stick to your time limit so to ensure that all of our speakers have enough time
3 to testify. If you begin to run over your time, we will certainly let you know and we
4 will give you some indications as your time is winding down. If you wish to submit
5 additional written testimony to the Commission, you are most welcome to do so
6 following the hearing.
7 I am pleased to have this afternoon a distinguished panel joining me.
8 Each of these professionals has special experience in the disciplinary field and
9 currently serves as a member of the Commission on Statewide Attorney Discipline.
10 First to my left, the Honorable Stephen Lindley, associate justice of the Appellate
11 Division, Fourth Department, which sits in Rochester. Justice Lindley is co-chair of
12 the Subcommittee on Enhancing Efficiency.
13 On my far right, Vincent E. Doyle, III, a partner at Connors & Vilardo
14 here in Buffalo and former president of the New York State Bar Association. Mr.
15 Doyle is a member of the Subcommittee on Uniformity and Access.
16 To my immediate right, Mark Zauderer, a partner at Flemming Zulack
17 Williamson & Zauderer LLP in New York City and a distinguished trial lawyer. Mark
18 is on the Subcommittee on Uniformity and Fairness.
19 To my left in the center, Professor W. Bradley Wendel, Cornell
20 University Law School. Professor Wendel is with the Subcommittee on
21 Transparency and Access.
22 And to my far left, Robert Guido, Esquire, the executive director for
23 attorney matters at the Appellate Division, Second Judicial Department. And Mr.
24 Guido is a co-chair of the Subcommittee on Uniformity and Fairness.
25 Also, in addition to these members, we also have with us this

afternoon Sean Morton, who is seated to my right in the jury box. He is a member of the Commission and also the deputy clerk of the Appellate Division in the Third Judicial Department, and he is a member of the Committee on Uniformity and Fairness. I'm deeply grateful to the members of the Commission for their hard work these past several months, and I thank all who has been able to join us today.

I would also like to thank the Counsel to the Commission, Matthew Kiernan, who is also seated in the jury box; and John Caher, the senior advisor to the Commission and the point person for both of them helping to bring order and organization to both the process and the hearings.

1 I would ask that the witnesses keep their voices up as we do have a
2 court reporter present. And I would like to remind the witnesses that a transcript of
3 their testimony will be posted to the Commission's web page and possibly included as
4 an appendix to our final report. In other words, whatever you say here today at this
5 public hearing will be available to the public.
6 Our first witness this afternoon is Kevin Spitler, the president of the
7 Erie County Bar Association. Mr. Spitler?
8 MR. SPITLER: Thank you very much. Members of the Commission,
9 we appreciate the opportunity to appear before you today with our comments. I, as the
10 judge said, am the president of the Erie County Bar Association, the voluntary bar
11 association here in Western New York, with approximately 3,700 members.
12 In preparation for my testimony today, I've had an opportunity to read
13 Professor Gillers' law review article. I've also read his article that appeared in one of
14 the local papers. I've had an opportunity to discuss my testimony with former chairs
15 of the grievance committee here in the Eighth Judicial District. I have had an
16 opportunity to talk to their staff attorneys. I have spoken with a number of people
17 who have commented to me that are members of my association.
18 The first item I'd like to address is the issue of confidentiality. We
19 strongly advocate for the current system of confidentiality, and that status being that
20 there be no public disclosure of any grievance that's been filed until such time as there's
21 been a finding of a preponderance of the evidence. Respectfully, we think that a review
22 of those — I have had an opportunity to review the Model Rules for Lawyer
23 Disciplinary Enforcement filed by the ABA, and I do note that in some of those rules
24 they suggest that clear and convincing evidence may be a better standard for there to be
25 public disclosure.

1 Why confidentiality as it currently exists? As the members of the panel
2 are aware, Rule 12 of the uniform, of the Model Rules, states that while it's unlikely
3 that malicious complaints would be made, and if those malicious complaints were made
4 against an attorney, it's really not that damaging if they're found not to be substantiated,
5 and with that I respectfully disagree. One of the things that bothers me under Rule 12 of
6 the Model Rules is that there's an issue of, of immunity. So if a client chooses to make a
7 malicious complaint against an attorney which then becomes a part of the record, and
8 the attorney is then found -- is found to be malicious,
9 found to have no basis. If there's not been confidentiality, of course the bell
10 has been rung, and we are very concerned about that.
11 You know, most of the members of our bar association are sole
12 practitioners and members of two and three, four person attorneys, and any negative
13 comment is — can be — is immediately and in the long term very hurtful. People
14 have suggested that that happens anyways with the Internet. Anyone can go on the
15 Internet, post something concerning my name and indicating what a poor job I did in
16 defense of them. Well, that's right, they can. But if the, but if we remove
17 confidentiality to a place that as soon as a complaint is made that complaint now
18 becomes listed on a government-sponsored server of some type, in other words,
19 somebody going to the grievance committee locally and saying, 'Has Kevin Spitler,
20 ever had a complaint filed against him?' And if we show him that I did, the bell I
21 believe has been rung. Whether or not the person then bothers to go further along and
22 see that the complaint was found to be unfounded, respectfully the strength of that
23 governmental listing has much greater weight in my opinion than it does if it's just
24 posted on the Internet. So confidentiality is foremost in our minds.
25

1 As to efficiency, we do not oppose any increase
2 in efficiency, a shortening of the time period. We note that Rule 15 of the Model
3 Rules has suggested that there be, for instance, a 20-day time limitation for
4 voluntary discovery between the panel and 60 days for some at least initial
5 disposition of the complaint, whether it's going to be dismissed or taken further. We
6 certainly on behalf of our members would be glad to resolve these things quickly,
7 and I can tell you that we have a very efficient group of investigators and attorneys
8 on staff here who handle these matters in what we think is the most expeditious
9 manner, but certainly we would not be opposed to any additional limitations.
10 We believe that the use of judicial hearing officers, as we do here in
11 the Fourth Department, is an appropriate use of that resource. We think it helps the
12 Appellate Division better have the issues properly set out for them and so we would
13 encourage that that be continued.
14 Uniformed penalties for violation. I know from reading Professor
15 Gillers' argument and his citing of the egregious conduct that he cites in those cases
16 between 2008 and 2014, that he makes -- he shows differences between the
17 departments, and we would not be opposed to some sort of a uniformed list. My
18 concern is as a practitioner in the federal system, doing a lot of
19 criminal defense in the federal system, the sentencing guidelines, as we all know, have
20 proved to be problematic because they're of -- initially they're mandatory in nature. If
21 there were to be some sort of uniformity of penalties, we would want those to be
22 advisory only similar to what the what the guidelines are now. Uniformity of
23 procedures across the departments, we would not be opposed to that. However, going
24 back to my first point, I would certainly hope that whatever that uniformity of process
25 was, realize the importance of the confidentiality. We didn't get into the bell's been

rung, now somebody's got to go un-ring it four months, three months, whatever down

the road, but -- but the issue of uniformity would be fine.

1 Currently, any attorney who has to face a complaint if it gets to our
2 grievance committee has the opportunity to appear on their own behalf with counsel or
3 without. We would certainly believe that any attorney who's got a charge brought
4 against him, grievance brought against him, should have the opportunity to appear
5 before the panel who is hearing that complaint and we would be in favor of that.
6 We are opposed to a statewide grievance committee. I know the uniform
7 -- the Model Rules suggests there be this, and I know Professor Gillers has talked about
8 the California situation. Model Rules talk about a unit area and agency that would not
9 only prosecute but also adjudicate. We feel that that would be — and although it
10 indicates that those two units would have some sort of a wall between them,
11 respectfully we think that that would be very difficult for the adjudication people when
12 a case comes before them, knowing that their, their work mates, they are people that
13 work for the same department or office or agency as they do have found it appropriate
14 to bring this case before them, there would be some bias against the attorney.
15 As the Chair said in its opening comments, we understand that the
16 purpose of attorney grievance is to protect the public. On behalf of my members, we
17 also understand that we need to make sure that any attorney grieved is afforded every
18 right that they have, since it's their livelihood, and we, therefore, would, on the issue of
19 a statewide, we believe that not only does the statewide have the issue of the crossover
20 of the prosecutorial and adjudication units, but also we question how such an agency
21 would be funded. If it was to be funded by some sort of a charge or a fee against all the
22 attorneys, I think as all the members of the panel can be -- are aware, many solo and
23 small attorney practitioners are faced with very tough economic times
24 sometimes, and to have one more additional cost, whatever that would be, $200,
25 $300 every year to help fund this agency, I respectfully suggest would put an undue

1 burden on the members of the bar, particularly because I think when we look at the
2 number of grievances that are brought against whom they are brought, it represents a
3 very small percentage of all attorneys licensed in, in the state.
4 JUSTICE COZIER: Excuse me, Mr. Spitler, your time is just about up.
5 MR. SPITLER: Thank you.
6 JUSTICE COZIER: So maybe you can wrap it up?
7 MR. SPITLER: Yes, sir. Thank you. I've reached my last point, Mr.
8 Chairman, which is the current system. We favor the current system. We believe that
9 it functions properly. We feel that it protects the citizens who seek the services of
10 attorneys. We have — I said we have a central intake office. We have well, very
11 bright and very articulate attorneys, skilled lawyers and wonderful investigators. And
12 if there are any questions, I'd be glad to address them.
13 JUSTICE COZIER: Yes. Professor Wendel?
14 MR. WENDEL: On confidentiality, you object to a rule that would
15 permit disclosure of a grievance as soon as it's filed, but, of course, the Model Rules
16 and a version of the Model Rules which are in effect in about 40
17 states only permit disclosure after there's been a confidential investigation and a
18 finding of probable cause. So does your organization have a position on the
19 confidentiality rule that's actually in the Model Rules?
20 MR. SPITLER: Yes. I believe that the -- our position is that, rather
21 than probable cause, I would respectfully suggest that it either be a preponderance of
22 the evidence and/or I think, quite honestly, the best standard would be clear and
23 convincing evidence.
24 MR. WENDEL: But that would be before there's a final determination?
25 MR. SPITLER: That's correct. And if that's found, then certainly

1 publication would not be opposed.

2 JUSTICE COZIER: Yes. Mr. Zauderer?

3 MR. ZAUDERER: Well, thank you for your testimony. You certainly
4 raise an important issue about confidentiality. Those who — there's some who make
5 the analogy to the criminal justice system. they say, well, in essence, when there is a
6 criminal charge it's a matter of public record. Why do you think that's an
7 inappropriate model for the way one should look at attorney or any professional
8 discipline? Maybe you can give us your thoughts on that.

9 MR. SPITLER: Yes. I find the difference being once a criminal
10 complaint is filed against someone, that
11 criminal complaint may obviously impact the accused, but does it cost him his job?
12 Does it cost him clients? Does it cost him people who say, Oh, my attorney was found
13 to, to not have done something he was supposed to do or there's an allegation that he
14 doesn't, and that's where I find the difference. And, I guess, particularly if there's no
15 penalty for filing a malicious grievance, as the Model Rules may suggest, at least in the
16 criminal system when you sign your criminal complaint there's that little paragraph that
17 says, false statements are subject to at least a misdemeanor charge.

18 MR. ZAUDERER: Just one more follow-up on that, if I may, Mr.
19 Chairman?

20 JUSTICE COZIER: Sure.

21 MR. ZAUDERER: Arguments also been made that greater public
22 disclosure is necessary because the disciplinary process takes a lot of time, and if
23 someone is a malefactor, damage may be done unless the public knows about it. Might
24 it not be better to address that by greater efficiency in the process rather than changing
25 the confidentiality?

1 MR. SPITLER: I think that the ability — I know that — that there's the
2 process or the ability for an immediate suspension based upon the seriousness of the
3 allegation against the attorney. If the allegation
4 against the attorney doesn't rise to that level, I think that the, the the penalty
5 suffered or the harm suffered by the attorney, it outweighs the protection of the
6 public.
7 MR. ZAUDERER: Okay.
8 MR. DOYLE: Mr. Chairman?
9 JUSTICE COZIER: Yes.
10 MR. DOYLE: Mr. Spitler, thank you for your testimony. I wanted to
11 ask you a little bit. We have people from across the state on the Commission, many
12 from New York City and many from different areas. being up here in Western New
13 York, and you're the president of the Erie County Bar which includes not only
14 Buffalo but smaller communities, and I assume you're familiar with even smaller
15 communities out in some of the other counties of Western New York. Is there a lot of
16 attention that comes from a grievance action when it is taken? Is there media,
17 newspaper, other media attention that comes along with that?
18 MR. SPITLER: It does, particularly when it hits the newspaper. The
19 local newspaper, the regional newspapers will report on that. It's. it's, I don't know, I
20 guess it's maybe the great fall or whatever you want to say, but people held in high
21 regard or high positions when they have trouble like everything
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1 else. So, yes, it does, it has a negative impact. It's not like it's a -- in my opinion it's a
2 matter of some major newsworthy which is reported by the media, both the print
3 and, and the electronic media.
4 MR. DOYLE: Thank you.
5 JUSTICE COZIER: Thank you very much.
6 MR. SPITLER: Mr. Chairman, thank you very much. Members of the
7 committee, thank you for your time.
8 JUSTICE COZIER: The next witness is Stephanie Saunders, the president
9 of the Minority Bar Association of Western New York.
10 MS. SAUNDERS: Good afternoon, Chair, and the members of the
11 distinguished panel. My name is Stephanie Saunders. I'm president of the Minority Bar
12 Association of Western New York. I'm honored to have this opportunity to comment on
13 the state of attorney disciplinary matters.
14 I just want to give you a brief background about what the minority bar
15 association is. We're an organization comprised of over a hundred attorneys, judges and
16 law students. The mission of our organization is to improve the administration of
17 justice, the protection of civil and political rights for all citizens while providing a
18 vehicle for professional and social interaction of all minority attorneys.
19 Also, I want to give the disclaimer that any
20 statements that I'm making today are my personal reflections and not representative of
21 the executive board or entire membership of the organization.
22 In looking at the questions posed for discussion during these proceedings,
23 I'm submitting commentary on two issues: Whether New York's departmental-based
24 system of attorney discipline leads to regional disparities in the implementation of
25 discipline, and, secondly, at what point disciplinary charges or findings should be

1 revealed to the public.
2 On the first topic, I think that there are vast differences in the type of
3 disciplinary matters adjudicated in different departments. Moreover, there's just not
4 regional disparities, but differences in the manner of the adjudication of matters within
5 departments.
6 Looking at reported grievances in the Fourth Department, I was doing
7 some research for this discussion and I note there was one matter where an attorney
8 received censure for failure to timely file to pay income taxes. Another case where an
9 attorney received a suspension for two years for a similar offense. I'm not privy to all
10 the information that the learned justice reviewed in making these decisions; however,
11 from the observation from the public, one would wonder, how could these disparities
12 exist?
13 Also, I cannot offer any commentary on any racial profiling because it's
14 my understanding there's no racial profiling information available. But in the minority
15 community there is a perception that there are more attorneys of color being subject to
16 disciplinary actions than non-minority attorneys.
17 Looking at the question of what the, at what point the public should be
18 privy to disciplinary charges or findings, I think it's best to leave disclosure till the
19 matter of final ruling. Early disclosure can lead to, can be very problematic, especially
20 to the younger attorneys who have not fully developed a reputation in our community.
21 Disclosure too early in the process can become a scarlet letter to the public and damage
22 a practitioner's reputation indefinitely. And I thank you for this opportunity to provide
23 this testimony and look forward to your questions.
24 JUSTICE COZIER: Thank you. Mr. Lindley?
25 JUSTICE LINDLEY: You mentioned two cases from the Fourth

Department?

MS. SAUNDERS: Yes, sir.

1 JUSTICE LINDLEY: Yes. And do you know the names of those lawyers
2 involved in those cases? This is not confidential, we've already published their
3 names. I'm just curious 'cause I think I know what case you're talking about.
4 MS. SAUNDERS: I can give that information to you, Judge,
5 definitely.
6 JUSTICE LINDLEY: 'Cause I think I know what cases you're referring
7 to and there's a lawyer from Buffalo who pleaded guilty to a tax fraud case, a felony
8 in federal court?
9 MS. SAUNDERS: Yes. That's what I'm —
10 JUSTICE LINDLEY: And she filed three false tax returns in a row to
11 the federal government, underreported income, pled to a felony fraud charge in
12 federal court. We suspended her — I was on that case. We suspended her for two
13 years. The lawyers were censured, and there are a number of them. These lawyers
14 failed to file tax returns. Failure to file. They didn't engage in any fraud, they just
15 hadn't gotten around to it yet. They pled to misdemeanor offenses. They had
16 unblemished records. So if that's the case you're talking about, which I think it is, then
17 I respectfully submit that there was a reasonable, a rational reason to treat those
18 lawyers differently. Again, one was a felony,fraud; one was failure to file. I'm not
19 saying that we are consistent uniformly. There's probably cases that one might be able
20 to dig up where lawyers might have been treated a little bit differently, but I caution
21 you and
22 others that in our writings we don't put everything in there. There's, there are reasons
23 that we do what we do, and our decisions — perhaps they should be more detailed,
24 maybe they should be longer, but we're aware of our prior cases, and we look at
25 them, and generally we try to, to treat more leniently those who deserve it and we

1 treat more harshly those who deserve it. But I think in that instance that those
2 disparities were justified.
3 MS. SAUNDERS: Your Honor, I'm not privy to everything, of
4 course, that the panel looks at, but from the public it can give that perception that
5 there is a great disparity.
6 JUSTICE COZIER: Yes. Mr. Doyle?
7 MR. DOYLE: Miss Saunders, thank you for your testimony. Thank
8 you for coming today.
9 MS. SAUNDERS: Thank you.
10 MR. DOYLE: Your comment that there may be an impression among
11 the minority legal community that they may be more frequently looked at by the
12 grievance process.
13 MS. SAUNDERS: Yes.
14 MR. DOYLE: Is that local? Is that statewide? Is that, where do you
15 get that impression from?
16 MS. SAUNDERS: I can only speak to locality. I just recently rejoined
17 a national bar association and
18 become very active in region two, so I will begin to have those discussions with
19 leadership down in New York City and throughout the region which also encompasses
20 Connecticut and -- I don't know. I know Connecticut. I don't want to guess what other
21 states are included in the region. But I can say in this community in which I reside,
22 there is not necessarily that the perception's true, but there is the perception that
23 minority attorneys are looked at just a little bit more frequently. And when they are
24 looked at, the sentencing or the decision is more harsh.
25 MR. DOYLE: I know I, and I suspect the rest of the Commission, would

1 be very interested in anything you learned from your discussions with
2 the national bar, whether this is a common perception that's out there.True or false, it's
3 still concerning if the perception is there. But whether that is, you know, national,
4 statewide or something local, we'd be very interested in anything else you learn about
5 that.
6 MS. SAUNDERS: And I will have an opportunity to submit more
7 information?
8 MR. DOYLE: Right. We'll be continuing our work for a while, I think,
9 right? Thank you.
10 JUSTICE LINDLEY: I too share Mr. Doyle's concern that there's a
11 perception of racial bias in the
12 Fourth Department. When I saw your proposed testimony that was submitted in
13 writing, I was concerned and I, I looked into it.
14 MS. SAUNDERS: Okay.
15 JUSTICE LINDLEY: And I went through the list of attorneys who
16 have been sanctioned by the Appellate Division over the last ten years. If I'm not
17 mistaken, there have been no African-American lawyers who have been disbarred
18 during the period of time in the Fourth Department. There has been one African-
19 American, there was one African-American lawyer who was suspended. He failed to
20 respond to the complaint, he failed to show up in court, he, he was suspended. As far
21 as I'm aware, those are the only two lawyers that have been suspended or disbarred.
22 There have been a few who have been censured, but I would be, I know our court
23 would be, interested if you had any more detailed allegations, we would certainly, we
24 take those allegations very seriously and we will look into it.
25 MS. SAUNDERS: Okay. Your Honor, when I did make the inquiry, I

1 was advised that there were no statistics that were kept. So, therefore, I
2 had to premise my statement on.
3 JUSTICE LINDLEY: I understand.
4 MS. SAUNDERS: I have no data to back up what
5 I'm saying, but that perception is there.
6 JUSTICE COZIER: Miss Saunders, in your initial remarks you made
7 reference to disparities, both procedural and substantive disparities, that seem to arise in
8 the disciplinary process. Do you have a position on whether or not those disparities can
9 be addressed by greater uniformity?
10 MS. SAUNDERS: I think that's a difficult decision, your Honor, because
11 just because the difference of the practice Downstate and Upstate. I feel I'm a member
12 of a very collegial bar in Western New York. I don't know if it would be beneficial if
13 there is uniformity across the state for members here in Western New York. That's a
14 very difficult, you know, question for me to answer to you today, Judge, and I would
15 just like to give some more thought and to give you some more in writing.
16 JUSTICE COZIER: Thank you.
17 MS. SAUNDERS: Thank you, sir.
18 JUSTICE COZIER: Any other members?
19 MR. DOYLE: Judge, just one other comment. Ms. Saunders, one thing
20 I'd suggest, sometimes if the minority legal profession has concern, sometimes those
21 concerns are based out of fear of the unknown maybe how the grievance process works.
22 You know, it's the type of thing that
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1 education might be able to help with. I know Mr. Huether is here, the chief attorney
2 of the Grievance Committee of the Fourth Department. I know we've had several of
3 their attorneys come and speak at different bar groups, explain the process, answer
4 questions, and sometimes that -- you know, that sort of educational effort helps bridge
5 a situation where there is fear of the unknown. I'm sure Mr. Huether and his staff and
6 other people involved in the Grievance Committees would be willing to, to work with
7 your, your group on that type of effort.
8 MS. SAUNDERS: We've actually had the opportunity
9 to have Mr. Huether present CLEs.
10 MR. DOYLE: Oh, great.
11 MS. SAUNDERS: And it was very informative and we would really
12 like that to be an annual thing so our membership can be better informed and
13 prepared.
14 MR. DOYLE: That's terrific.
15 MS. SAUNDERS: Thank you so much.
16 JUSTICE COZIER: Thank you so much. Our next witness is Bill
17 Bastuk, the founder and co-chair of the organization It Could Happen to You.
18 MR. BASTUK: Thank you. Honorable members of this
19 Commission, let me start off by saying that prior to founding It Could Happen to
20 You, I had about 35 years in public policy which ranged from serving in the --
21 MR. ZAUDERER: Maybe you can slow down and speak up a little bit.
22 MR. BASTUK: I've had 35 years of public policy or reform that
23 included serving in the Monroe County Legislature, service as an Irondequoit
24 councilman, and working for the state Legislature in the late '80s and early 1990s.
25 My life changed dramatically in May of 2008 when I received a call for

1 help from the Monroe County Sheriff's Department and I naturally
2 agreed to help them. They were looking into something. And about half an hour later,
3 they told me that a 16-year-old girl had accused me of raping her in a shed at the
4 Rochester Yacht Club. I met with an attorney the very next day, John Speranza, and
5 John called me into his office and said, I have the lawyer you want. I didn't know what
6 that meant. And what John told me was: This is what's going to happen to you. You are
7 going to be arrested, you are going to be indicted and I'm going to have to fight like hell
8 to keep you out of prison for the next 25 years. And this could take up to a year to get to
9 trial because we're going to go through a series of mini trials involving requests for
10 information that I'm going to need to help exonerate you. And I said, John, how do you
11 know, how do you know all this, this just happened yesterday. And he said, Bill, he
12 said, 'cause that's the way the system operates. You are presumed guilty until
13 innocent and the prosecutor's goal nowadays is not the truth but to do everything
14 possible to put you away.
15 What John told me turned out to be exactly true. Matter of fact, it took
16 me a year to get to trial. The reason it took me a year to get to trial is because the
17 assistant DA, Kristy Karle, working under Michael Green, was withholding
18 exculpatory material, very critical material that she didn't deem necessary but that my
19 attorney deemed necessary. Bear in mind that the sole driving force that resulted in
20 my arrest was a diary entry that this girl's father found in which she accused me of
21 raping her the previous September 2007.
22 After I was arrested, I actually turned myself in —I, John began to
23 issue motions of demand. Actually, that occurred shortly after my indictment in
24 August. My trial was set for November, my first trial date, but it was postponed four
25 times. The reason it was postponed four times was because John was issuing motions

1 for two critical pieces of material: He wanted all of the girl's diaries
2 and he wanted any existing medical records. She refused. The ADA kept refusing.
3 Fortunately we had a good judge, Judge Valentino, and we were getting the granted
4 delays.
5 Finally, six months after my indictment in May — excuse me, in
6 February of 2009, Washington's birthday — John called me into his office, and
7 scattered all over his desk were numerous diary entries, one of which she predicted
8 the date and time I was going to rape her. The second in which she said, I wish I
9 could make this all go away but my parents want me to go to court. And a stack of
10 psychiatric medical records in which she was a self-mutilator. These medical records
11 went prior to the alleged, prior to the alleged rape incident. The, the ADA had been
12 telling us that her only medical records after the alleged incident.
13 I went to court on May 1st and prior to that there were a series of
14 pretrial motions not related to discovery. But John wanted -- the trial was supposed to
15 begin on a Friday, John wanted the trial to begin on Monday, and one of the
16 arguments he used was, I still haven't gotten all the diaries. The judge asked the ADA
17 where the diaries were and she said she gave them back to the girl, that she had
18 already gone through them. Judge Valentino was not happy about that and he said by
19 the end of the day today I will have all the diaries on my desk.
20 That Thursday, less than 24 hours before I was due, the jury selection
21 was due to begin, John called me and asked me if I knew a Mr. Yandou and I said no.
22 He
23 said, Here we are 24 hours before we go to court and I get an excerpt -- another excerpt
24 from the diary in which this girl has Mr. Yandou climbing into her window, the bedroom
25 window, and raping her. We tracked down Mr. Yandou. It was her high school social

1 studies teacher who was studying to become a Brother at an All Catholic girls high
2 school.
3 After my acquittal, I began to look at the criminal justice system and
4 learned two things: The public really doesn't understand how it's operating and how
5 it's intended to operate, and prosecutorial wrongful prosecutions, prosecutorial
6 misconduct is rampant.
7 Regarding the existing system, I'm sure you've heard this in some of the
8 previous hearings, a public health study of the current disciplinary process between
9 2001 and 2009 found that just one percent of roughly 91,000 complaints received by
10 First and Second Department Committees resulted in public sanctions. And just five
11 percent of all complaints resulted in so much as private letters of caution. Bear in mind,
12 for that reason I did not waste my time filing a complaint. Because the system, I had
13 learned about going through my trial, is defunct and basically a joke.
14 A New York Times 2008 article of 80 cases of
15 prosecutorial misconduct in Queens between 1989 and 2000, 80 convictions
16 overturned by appeals courts for prosecutorial misconduct, senior officials took no
17 disciplinary action.
18 The University of Michigan Law School study which tracks
19 wrongful convictions notes that New York State is second in the nation in
20 wrongful convictions, only behind the state of Texas, costing state taxpayers
21 hundreds of millions of dollars in payouts, not including the cost of counties
22 going to trial to reach those settlements.
23 In Marvin Gaye's words, what's going on? We have an epidemic. We
24 don't even have a system of tracking wrongful prosecutions such as false accusations
25 in indictments. Generally, those who are indicted and then acquitted want to put it

1 behind them. We have a freedom tour that includes some of those
2 brave souls as well as the wrongfully convicted. And when we speak to quantum
3 clubs and Rotary Clubs and tell our stories, they are outraged. They are outraged at
4 the lack of accountability. They are outraged that I can't get back the $150,000 that it
5 cost me to defend myself, my wife's retirement fund. And the acts of the ADA, Kristy
6 Karle, went on practicing her merry way and nothing happened to her, even though I
7 filed a lawsuit that was thrown out by the Western District Court because all the, all
8 of the immunity of prosecutorial misconduct. The standard language is used in
9 practically every wrongful indictment.
10 JUSTICE COZIER: Excuse me, Mr. Bastuk, you have approximately
11 1 minute of your time so you may want to just summarize it.
12 MR. BASTUK: Okay. All right. I will, I will. It Could Happen to You
13 recommends the establishment of the commission on prosecutorial conduct, S 24/
14 A1131, which has broad bipartisan support state legislature, as a matter of fact, it
15 made it to the seventh floor in the supplemental calendar. I can tell you I -- that that --
16 in every committee that it went through, it was broad bipartisan support. The votes
17 were not even close. We also have memos of support from 12 different organizations
18 including New York State United Teachers, New York State Catholic Conference,
19 New York State Trial Lawyers. I will provide you with that list of support.
20 We need a system that will operate in a proactive mode rather than a
21 reactive mode, just as the Commission on Judicial Conduct has for over 35 years, a
22 wholistic approach which is not purely discipline focused but works to establish
23 uniformed best practices for all DAs in the state and the re-establishment of the
24 adversarial vertical system of justice rather than the cooperative horizontal system
25 of justice which has resulted in presumption of guilt rather than innocence. Every

1 other profession is subject to best practices and accountability except the most
2 powerful players in the justice system, the prosecutors.
3 If you have a car that's not working and it's causing you trouble
4 over and over again, you don't go and keep pouring money into that rusty old
5 engine, and you probably would not go out and buy the same model again. We
6 have a model that we're proposing based on a working model. Any questions?
7 JUSTICE COZIER: Thank you. Members? Yes, Mr. Zauderer?
8 MR. ZAUDERER: Certainly as you described a horrible story of
9 what occurred to you, did you, I wasn't clear, did you file a complaint with the
10 relevant disciplinary authority with respect to the prosecutor's action?
11 MR. BASTUK: No, no, I didn't because I was told that I was better
12 off filing a lawsuit, that it would probably just be discharged as a harmless error,
13 which basically the Innocence Project's study of prosecutorial misconduct found.
14 They surveyed 200 cases and 80 percent of those cases were dismissed as harmless
15 errors. So I
16 would have had a $150,000-dollar harmless error.
17 MR. ZAUDERER: So the question would arise, you certainly need to
18 think about, even if there were such a separate commission, why the same
19 circumstances would, wouldn't preclude review or, or people wouldn't file maybe?
20 MR. BASTUK: Well, if such a commission was made known to the
21 public, okay, they would file. By the way, this ADA had a reputation of doing this.
22 Defense attorneys -- and I even asked my defense attorney, Why, why don't you file a
23 complaint with the local bar or with the, with the, the division? And he said, It's not
24 going to do me any good and I'm only going to end up burning bridges.
25 A independent commission on prosecutorial conduct will conduct a

1 confidential investigation with neither parties being disclosed. And I've
2 heard the, the question of confidentiality come up, and I know for a fact, I know that
3 you heard from Steven Downs a couple weeks ago, who's the counsel for the
4 Commission on Judicial Conduct. He'll draft this legislation at the request of Senator
5 DeFrancisco, that that Commission is operated with the highest degree of
6 confidentiality, even though at times there was tremendous pressure from the public to
7 disclose names of those being investigated, of
8 those judges being investigated, this Commission would operate with that same
9 high degree of integrity and confidentiality.
10 JUSTICE COZIER: Okay.
11 MR. BASTUK: Oh, Judge Lindley.
12 JUSTICE LINDLEY: Mr. Bastuk, good morning. Thank you for your
13 testimony. I have known you for quite many years and I remember when you got
14 arrested, and I, I have no doubt about everything you said this morning is true, not
15 just because I know you. I haven't seen you in 23 years, but I've spent some time
16 looking into your case and I read about it and I wanted to know what, what happened
17 there, so I do believe that you were wrongly charged.
18 One thing, however, I want to, I just want to clarify: You were told not
19 to file a grievance because more often than not they are deemed to be harmless errors.
20 What I think the lawyer was referring to in that situation was an appeal from a
21 judgment of conviction where a defendant is convicted, files an appeal and said, My
22 conviction should be overturned due to prosecutorial misconduct. And we at times
23 will say that, Yes, there was misconduct, but it was harmless error. We don't have
24 harmless error grievance. We don't say, Well, the lawyer engaged in misconduct but it
25 was harmless. It certainly

1 wasn't harmless to you. So that harmless error analysis that was being
2 referred to by the attorney I think deals with a, with an appeal if you were convicted.
3 Of course you weren't convicted. The jury acquitted you in a very short period of
4 time, but we do have grievances that have been filed against prosecutors. I have four
5 prosecutors I know, looking at our records in anticipation of this hearing, that we
6 sanctioned, but it doesn't necessarily follow that there's no need for one centralized
7 agency to be handling these things. We don't get a lot of grievances. And so it doesn't,
8 it doesn't necessarily militate against what you're asking for, but I just wanted to make
9 it clear that we do get complaints, the Appellate Division, Fourth Department, does
10 get complaints against prosecutors. Some have been referred to the grievance
11 committee to the court, and we have sanctioned four lawyers over the last few years,
12 including the District Attorney from Albany County himself came up and he was, he
13 was sanctioned.
14 So, again, it doesn't mean that your arguments are not persuasive and
15 this should be some other court, but I just want to make it clear that we do — there
16 is a place to go right now.
17 MR. BASTUK: I guess, I guess a question I would have in that
18 regard is that why wouldn't a lawsuit
19 such as mine, okay, alleging prosecutorial misconduct, automatically trigger that
20 also being reviewed by the grievance committee?
21 JUSTICE LINDLEY: Without a complaint, just a sua sponte
22 investigation?
23 MR. BASTUK: Yeah. I mean, I mean, you pretty much know what the
24 result of that is going to be. But, I mean, it was -- it was -- my court document clearly
25 lays out all of the -- I mean -- I mean, you only know half the story so, but I have gotten

the sheriff's side, but that's not what you're addressing here. But I would think that that would help. And I just want to make note of the fact that when the DA's association got wind of the fact that this was sent to the Committee in the closing weeks of session, they descended upon the Capitol like paratroopers, and they met with the Senator DeFrancisco and Senator Bonacic and they claimed that the current system is working just fine. And the senators said -- and they also said that there's been a number of prosecutors and DAs who have been sanctioned and who have been disciplined. And this was about three weeks before the end of the session. And the senator said, Well, bring us a list. And the DA and the representative said, Okay, we'll bring you a list. Well, every day that I ran into one of the counsels to the senate either at Dunkin' Donuts

1 or in the halls I'd say, Did you get a list yet? And he would come up and say, No
2 list, no list, no list.
3 JUSTICE COZIER: All right. Any other questions? Thank
4 you very much.
5 MR. BASTUK: Thank you for your attention.
6 JUSTICE COZIER: I just want to introduce an additional member of
7 the Commission who is present with us this afternoon, Sheldon Smith, who is in the
8 second row.
9 The next witness is KP Brady, a legal consumer from Rochester. Is
10 Mr. Brady here? We will move on then.
11 The next witness is Richard T. Sullivan, a partner at Harris Beach and
12 former chair of the Eighth Judicial District Attorney Disciplinary Committee. Mr.
13 Sullivan?
14 MR. SULLIVAN: Good afternoon and thank you for the invitation. I
15 appreciate being here today. Vince called me on Thursday and I was more than
16 happy to give to the Committee what I believe is a somewhat unique perspective on
17 the attorney discipline process. And that's, frankly, what I referred to it as, the
18 attorney discipline process rather than the grievance process, because a grievance to
19 me is a very particular issue and attorney discipline is much broader.
20 Be that as it may, my perspective comes from the fact that I had the privilege of being
21 a chairman for six years of the Eighth Judicial District Grievance Committee here in
22 Buffalo, and after that for the past almost 20 years representing several lawyers
23 involving charges of professional misconduct, both at the grievance committee and
24 Appellate Division level. So I guess I've seen both sides of the story and I am pleased
25 to report, at least from my perspective, the good news; and the good news is that the

1 grievance process and attorney discipline process works in the Fourth Department.

2 The reason I say that is that we have an extremely dedicated staff of attorneys,

3 investigators and individuals who serve on the Appellate Division who take their role

4 extremely seriously and recognize the serious nature of any situation that could

5 jeopardize someone's professional license and ability to earn a living. Obviously,

6 there are some issues that I see as a defense lawyer in these situations which I will

7 talk about in a second, but overall the system works. And I guess my recommendation

8 to the committee here is if it ain't broke, don't fix it. And it isn't broke here in Buffalo.

9 I have not had the opportunity, being asked a little late in the game to

10 testify here today, to read Professor Gillers' law review article which I understand is

11 to some degree the impetus for this examination of the process. But I can tell you

12 this, that one of the things

13 that people tend to overlook is that much of the discipline process for the serious

14 cases -- and I understand there's a claim that maybe there's a disparity in punishments

15 or of dispositions between the departments. I actually question how significant that is,

16 and having not read the article, I'm not familiar with anything that supports that claim.

17 But as a matter of law, an attorney convicted of a felony in New York, whether you're

18 in New York City or Buffalo, is automatically disbarred. An attorney convicted of a

19 misdemeanor -- and those are obviously both very serious things for any professional

20 -- obviously very, very serious, an attorney committed -- committing a misdemeanor

21 in Buffalo and having been so convicted is automatically suspended and directed to

22 show cause why discipline should not be applied. So that process has its own built-in

23 mechanisms to where the very, very serious cases involving criminal conduct are

24 taken care of almost immediately, in one case immediately and another case almost

25 immediately after the criminal justice system has had the opportunity to take its

1 course. So that's not as serious an issue as everyone -- serious to the people involved,
2 but in terms of the disparity of dispositions, I don't believe it's all that serious an
3 issue.
4 I can say, without sounding smarter than I
5 really am, that when a lawyer comes in to see me and explains the situation that he or
6 she is involved in, if I recognize it as serious misconduct, and I include within that
7 obviously the failure to maintain adequate trust records, which is a wholly separate
8 issue that we in Erie County have tried for years to educate young lawyers about as to
9 what a trust account is and what it's for and how it should be maintained, I can pretty
10 much tell a lawyer who comes in to me facing a serious issue non-misdemeanor, non-
11 felony issue what I believe the disposition of the Appellate Division is going to be
12 within a range. Okay? It is then my job to offer in terms of the hearings that are
13 conducted before judicially-appointed former judges to offer mitigating facts in support
14 of the lawyer's claim as to why it happened, et cetera? But there really isn't any great
15 disparity or inconsistency in at least the Fourth Department's decisions in those areas.
16 The Grievance Committee itself has a great deal of broad discretion. I
17 know when I was the chairperson, that any case involving misuse of funds or
18 misapplication of a trust account, we felt, and I personally feel to this day, belongs
19 before the Appellate Division for a decision. And that has been a consistent rule I think
20 that has been followed in this department and in this district for many, many years.
21 That having been said, I also understand that there is a cry or perhaps a
22 request that the confidentiality of the process be removed. I think that would be a
23 terrible mistake. I think it is unfair to the participants involved, because the statistics
24 are there. I know at least in the Eighth Judicial District there in the Fourth
25 Department, the statistics are published annually in a report by the Committee as to

1 how many complaints come in and how many actually proceed to
2 some form of disciplinary action short of dismissal or a letter of caution, and you will
3 find that the statistics on that issue are rather startling; that the huge majority of
4 complaints that come in -- and this was my experience in six years — the huge
5 majority of complaints that come in are dismissed or can be resolved with an
6 explanation to the client or grievant as to actually what happened. They just want to
7 know what happened. And the very, very small portion get to the letter of admonition
8 situation, and an even smaller portion get to the situation where there was a grievance
9 filed.
10 I believe confidentiality is essential to the fairness of this process, and I say
11 that, Committee Members, against my own interests and I'll tell you why. I probably
12 practice the only area of law in New York State where the good authority I can't find.
13 And what I mean by that is I can cite reported cases of, you know, the court did this in
14 this case, but they all involve discipline because they're the public ones. I don't have
15 the authority or the, the data on cases that are dismissed because they are confidential,
16 okay? So I don't have a lot of authority on my side when I go up and face Judge
17 Lindley and the rest of the Appellate Division. And that's a good thing. I have no
18 problem with that. The Appellate Division can give me guidance on what happened in
19 a particular case, but I have no problem with that because I believe that the
20 confidentiality process trumps that issue.
21 I had a situation here with a fellow lawyer,
22 Joel Daniels. Is Joel testifying? Is he here?
23 MR. DOYLE: Yes, he's right here.
24 MR. SULLIVAN: Where he and I represented some lawyers who were
25 well known in the area. And a newspaper, Joel and I, and perhaps the grievance

1 people -- the Court didn't know, the Court didn't have the case yet --
2 were perhaps the only people who knew what the case was all about, yet for almost a
3 year, lawyers would come up to me, not even knowing I represented these individuals
4 and said, Hey, did you hear what's going to happen to so and so? I said, Geez, no, I
5 didn't hear what's going to happen. And they'd give me this big litany of things that
6 were going
7 to happen to these two lawyers, none of which was true. I was the only person who
8 probably knew what was going to happen at that stage, and, in fact, all the bad things
9 that people said were going to happen really didn't happen anyway. They deserve better
10 probably because of the outcome of the process. There was a major newspaper article
11 about the case, which I think was unfair to the entire process and unfair to them by the
12 time the Court made its ultimate determination. So I think confidentiality is, is critical
13 to the process. The process that is fair, could move a little bit faster, but I think is fair in
14 its overall procedure. And finally –
15 JUSTICE COZIER: Excuse me, Mr. Sullivan, I just want you to wrap
16 up. Your time is just about done.
17 MR. SULLIVAN: Sure. Judge Lindley usually talks about that. I just
18 want to make a final remark about a uniform, a uniform statewide system. I, too, feel
19 that that would be a mistake, for this reason: The felonies and misdemeanors are taken
20 care of as a matter of law. There is no substitute, no substitute for the 18 lawyers and
21 three lay people who sit on a committee who know their community, who know the,
22 maybe know the particular lawyer. That's not a bad thing, okay, to know the lawyer, to
23 know the background, and apply a community -- not only a community standard but the
24 rules
25 of discipline to a particular situation. The fact that there are more disbarments in New

York City doesn't trouble me at all. There are more lawyers in New York City. Maybe more lawyers doing bad things in New York City, I don't know. But I think taking the jurisdiction of this process from the Appellate Division — I had the privilege of teaching at the University at Buffalo Law School for 29 years. I taught the civil practice course there. And I always told my students when we were talking about the Appellate Division, I said, They're the ones that swore you in and they can be the ones to swear you out, and that's the way I think it should be. Local involvement in the process is, I think, critical. And, again, if it ain't broke, don't fix it. Thanks.

JUSTICE COZIER: Thank you. Members? Mr. Zauderer?

MR. ZAUDERER: Thank you. Let me ask you a question I asked a little earlier to someone who made a similar argument about confidentiality: Those who are suggesting relaxing controls or standards in that regard, analogizing to the criminal justice system where criminal charges are filed and public, why is that an inappropriate comparison or analogy?

MR. SULLIVAN: Because at least in the criminal justice system everybody has the presumption of innocence.

1 and everybody knows that in the criminal justice system. Well, he's not
2 guilty until proven guilty. I think in the lawyer -- I'm not so sure lawyers would be
3 afforded that same presumption under those circumstances. And as I said, the clear --
4 one statistic, the statistic that I can rely on, as I referenced, are the statistics that show
5 that the number of complaints as opposed to the number of actual disciplinary
6 proceedings is so small that all of these lawyers who have complaints filed against
7 them that go nowhere, really, the damage is done once it's published. You know, you
8 get the complaint in the newspaper, you don't get the fact that the grievance
9 committee later dismissed it before it even went to the committee itself.
10 MR. DOYLE: Mr. Chair?
11 JUSTICE COZIER: Yes.
12 MR. DOYLE: Thank you, Mr. Sullivan for coming. I appreciate it. The process now
13 makes public those determinations that the Court has ruled on –
14 MR. SULLIVAN: Correct.
15 MR. DOYLE: -- that if there was professional misconduct and, and
16 whatever discipline is imposed. So, obviously I hear you speaking against making the
17 mere filing of a grievance or a complaint by a client or anyone else, you would be
18 opposed to making that public?
19 MR. SULLIVAN: Yes, I would.
20 MR. DOYLE: How about once a decision is made by the grievance
21 committee itself to file what we would call a petition, would you be opposed to having
22 that be made public at that point?
23 MR. SULLIVAN: Yes, I would, because that is — well, yes, I would.
24 Because, again, that process has to get carried out in terms of answering the petition,
25 having the hearing, having the testimony and making the Court have the, the

1 determination. So I would continue that confidentiality through that
2 process. And, by the way, we publish here — I'm sorry if my time is up, but in our local
3 bar journal, we regularly publish letters of admonition that are issued without the
4 lawyer. I don't think -- I don't have the lawyer's name, right? Yeah. But we publish
5 letters of admonition regularly to give lawyers some idea as to where the committee
6 stands on some things, which I think is a good thing.
7 JUSTICE COZIER: Mr. Guido?
8 MR. GUIDO: Thank you. Mr. Sullivan, you had a rather unique
9 perspective having been on the adjudicated enforcement side, now on the other side. So
10 given that background and your experience, I'm interested in what your view is, at least
11 insofar as the Eighth District or the Fourth Department, as to whether or not your view
12 there is a reluctance on the part of the grievance process to investigate and prosecute
13 prosecutors in criminal cases?
14 MR. SULLIVAN: Prosecutors?
15 MR. GUIDO: Yes.
16 MR. SULLIVAN: I doubt it. I am not familiar with any case where that
17 has been done. I'm sure it has been done. But it also reminds me of something, 'cause I
18 wrote a note to myself about sua sponte investigations by the grievance committee. I
19 believe our Fourth Department rules have been modified primarily as a result of an
20 argument I was always making with them that they didn't have sua sponte authority.
21 Now they do, okay? I mean, they can pick up a newspaper. When this gentleman was
22 talking about the fact that he sues a district attorney in federal court for a civil rights
23 violation, in my opinion, that would open a Grievance Committee investigation in the
24 Eighth Judicial District. But the answer to your question is a prosecutor, I don't, I've
25 never represented one.

1 MR. GUIDO: One other thing I just wanted to have you clarify, on the
2 statewide uniform system.
3 MR. SULLIVAN: Right.
4 MR. GUIDO: But if we were to maintain the system administered
5 through the four Appellate divisions, you wouldn't necessarily be opposed to a uniform
6 statewide set of procedures, would you?
7 MR. SULLIVAN: Oh, no. No, no, no, no, no, no. As a matter of fact, I
8 was kind of a fish out of water down in the Second Department when I went down
9 there. But that's a very valid point. I would have no problem with that.
10 MR. ZAUDERER: I would like to draw on your experience here. I'm
11 trying to find my way in what is the right result here, as I'm sure the other
12 commissioners are. With your extensive experience in this area in representing people,
13 can you just describe briefly for us, 'cause our time is limited, reference has been made
14 to the adverse effects of an allegation against a lawyer and which may be unfounded
15 and proved to be in the thousands of them in relation to the ones that are upheld.
16 MR. SULLIVAN: Yep.
17 MR. ZAUDERER: Can you just kind of give me an executive summary
18 of what the kind of effects are on a lawyer when that happens?
19 MR. SULLIVAN: Well, sure. Some people have described Buffalo not
20 only as a small town but a big room, and it is readily apparent to me that the law
21 business, as competitive as it is in so many areas, that that kind of public knowledge
22 will be used against the lawyer in his professional practice. I have -- sadly I have
23 absolutely
24
25

1 no doubt about that. And I think that that's -- you know, there's a famous -- Roy
2 Donovan was the commissioner, the laborer commissioner, and I tried defamation
3 cases, and he went outside the county courthouse and you know what he said was,
4 Where do I go to get my reputation back? And that has always stuck in my head.
5 And that's, that's the bottom line answer.
6 MR. ZAUDERER: Thank you.
7 JUSTICE COZIER: Thank you, Mr. Sullivan.
8 MR. SULLIVAN: Okay. My pleasure. Thank you.
9 JUSTICE COZIER: Our next witness is Joel Daniels, an attorney in
10 Buffalo who also handles attorney disciplinary matters. Good afternoon.
11 MR. DANIELS: Good afternoon, members of the Committee. Thank
12 you for inviting me here. I always agree with Mr. Sullivan. In fact, I can't say when I
13 had disagreed with him. And we did handle a case together that he referred to. That
14 was a case — again, that was banged around in the press quite a bit before the results
15 came out, and those lawyers took their amount of hits, but time heals some things
16 sometimes. I can say that those two gentleman have done very, very, very -- three
17 verys— have done very, very well for themselves since that matter was concluded. I
18 know the Committee has a great interest in
19 whether or not charges against the lawyer should be made public. Mr. Doyle
20 suggested perhaps that after the Committee finds that it should be petitioned or
21 maybe at some earlier stage in the proceedings. Personally, I can say without any
22 hesitation or reluctance that any publicity on a grievance matter where charges
23 have been levelled claiming that a lawyer is unethical before there's been a final
24 determination would be devastating. It would be not only unfair, but it would be a
25 major,

1 major mistake.

2 As a lawyer, few things are more important than your reputation, and
3 without it, you're in trouble. Your career's in trouble. You're in a great jeopardy.
4 That's why we feel, and I think I speak for lawyers who handle grievance matters, that
5 we think the process should be allowed to take its course. Committee investigates;
6 Committee determines whether to go forward. Here in the Fourth Department, we are
7 blessed with a Committee that we can appear before. I understand the other
8 departments don't have that, and I think that's a very, very, very important rule. If
9 you're talking about uniformity, maybe that's something that we could have across the
10 state. You have a couple of dozen people, lay people and lawyers who listen to these
11 matters and they could determine whether or not it should be petitioned. And if it is
12 petitioned,
13 the case takes its course; you go before a JHO, a JHO hears facts, you could present
14 your case, you could present your litigation, you may win, you may lose, you go to the
15 Appellate Division, you can still argue some of the legal issues, you can argue what the
16 final sanctions should be, and if the Appellate Division decides that that lawyer should
17 be sanctioned, then it's public, whether it's a censure, suspension, disbarment, whatever
18 it is, then it's time to pay the price. But if you choose to publicize, for example, a
19 petition that's filed against the lawyer with allegations that will never be sustained,
20 because that does happen, sometimes they're not sustained. If we were talking about 30,
21 40 or 50 years ago when we just had three TV stations, we didn't have cable, we didn't
22 have Facebook, we didn't have social media, then maybe it's a different story. But today
23 — and I'm not telling the Committee anything that I'm sure they're not aware of, that
24 social media, the way it is today, once that petition or once that charge hits, hits the
25 social media pages, you're in trouble. And the petition would be out there. All you have

1 to do is hit your iPhone and Google that lawyer's name and that's the first thing that's
2 going to come up. So I think for fairness, for even-handedness, for taking into
3 consideration that reputation is so critical to a lawyer, that we should
4 wait, let's talk about due process, wait until the system has taken its course, and at the
5 end if there is a decision against a lawyer, fine.
6 I know the issue was raised before about criminal cases. Well,
7 those are different. Those have always been open. The day a criminal case is
8 filed,that's, that's fair game. That's a public record. You can go over to the
9 courthouse and you can pull any of those records, that's, that's it. And often times
10 a public official, lawyer or otherwise, you can be charged with some offenses and
11 down the road you may be cleared, hopefully. As long as Mr. Doyle's firm is
12 involved, there's a good chance that that will happen, and you can say, Well, the
13 slate is wiped clean, even though you've been Googled and you're hit in the
14 social media and you were vindicated. But, you know, with ethics violations,
15 that's just different. The connotation is different. And the way it is today and the
16 way the competition is today, these, these website lawyers, they're out there,
17 everything is, is public and you want to keep that reputation as solid as you can.
18 So for those reasons we think the best thing to do is to maintain confidentiality.
19 I'd like to address briefly the issue of uniformity. I know that
20 that's -- that's a question
21 that's troubling to a number of people who write on ethics and have serious
22 considerations as far as the ethics cases are concerned. We have four different, we have
23 four departments here. I believe our system here is different from the other three. I
24 haven't practiced in ethics cases in the other three departments, but very basically what
25 I would say as far as we're concerned here -- and, again, I'll quote Mr. Sullivan, if it

1 ain't broke, don't fix it. We have a Committee — and, again, I made reference to it
2 before earlier — that hears cases after the grievance committee. The attorneys believe
3 that there's cause to go forward and we've appeared before this Committee many,
4 many times, sometimes successfully, sometimes not, but this Committee is made up of
5 experienced individuals, lay people, lawyers, they've all been around, they all know the
6 score, and at least you give somebody a chance. Because rather than face the possibility
7 of a petition and having to go before the Appellate Division, at least you got a shot to
8 try and convince the Committee that this is a matter that should be handled with a letter
9 of caution, a letter of admonition, maybe you'll save the client a lot of trouble, and
10 believe me, a lot of aggravation.
11 I mean, let's face it, there are many, many serious cases. Again, I
12 think Richard alluded to them, where there are trust account violations, where
13 there's
14 thefts, there isn't much controversy there. Those are cases that are going to go
15 to the appellate court. There's no question about that. But you have a lot of
16 other cases that are kind of in the middle, potential conflicts, someone
17 represents both sides in a real estate deal, those are matters that in the long run
18 can be handled effectively before this Committee and maybe result, again, in a
19 letter of caution, a letter of admonition. And, again, if the Committee believes
20 that the matter goes forward, then the petition is prepared and you have a
21 hearing if you choose. You can have a hearing before the JHO, all the facts can
22 be disputed, but often times we decide to avoid the hearing and sometimes we'll
23 just go to the Appellate Division just on the issue of mitigation when the facts
24 really aren't in dispute. But at least that's an opportunity that we have for our
25 client and can make that choice.

1 So, again, we feel that the procedures that we have in the Fourth
2 Department are very, very good and very fair. And, again, if the State wanted to have
3 uniformity, I think instead of starting down in Manhattan or starting in the Bronx,
4 with all due respect to Manhattan and the Bronx, we ought to start here, because I
5 think our system is the best and it works and it's the fairest. There was some talk --
6 JUSTICE COZIER: Excuse me, I'm just going to ask you to conclude
7 your remarks.
8 MR. DANIELS: Yes, Judge. I'll be very quick, Judge. Just a couple of
9 other points. In speaking to one of the attorneys for grievance, I was told there was
10 some discussion of possibly having guidelines in effect for grievance cases. Maybe
11 I'm wrong on that, but that's not a good idea. If we had enough time we could talk
12 about guidelines that have been issued over in federal court, and believe me, you
13 don't want to adopt that system here.
14 As far as discovery is concerned, that may be an issue also. Again, our
15 Fourth Department we have what I consider to be a very fair method of handling
16 discovery. It's generally open. These aren't, we don't consider them that adversarial
17 here. It's not like a criminal case. If we have a matter with a grievance, that we can go
18 over there, the lawyers are very, very cooperative, they're very helpful, and often
19 times they open their file and they're going to show you what it's all about.
20 Because let's face it, we're not talking about a crime here, we're not talking about
21 putting somebody in jail. It's your reputation and that's what counts. So we, again,
22 our system, the Fourth Department, we think would be very helpful and everyone
23 should take a look. Thank you.
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1 JUSTICE COZIER: Thank you, Mr. Daniels. I do have a follow-up
2 question. You have made some persuasive arguments, I believe, for why confidentiality
3 should be maintained until and unless, of course, a sanction has been arrived at by the
4 Court. But it strikes me that those arguments are primarily for the protection of counsel,
5 primarily for the protection of the attorney. And my question to you is this: Isn't there a
6 balance to be struck with respect to protection of the public and where is that balance
7 being struck with respect to your position?
8 MR. DANIELS: I know that the medical profession has had similar
9 issues as well. I'm not certain exactly how that has, how that has resolved itself, but I
10 am very, very focused on the public being protected, and I think the public has a right
11 to certainly be protected from lawyers who may have, don't have their interests, the
12 public's interest out there as well as, as well as they should. And I know you're always
13 trying to balance these issues. You got the public on one side, you got the lawyer on the
14 other side, and it's easy to say, Well, maybe the public comes first and we should let
15 them know right away as soon as someone is charged. It just bothers me, Judge, that a
16 lawyer -- again, I'm trying to balance this for the Committee -- that a lawyer should take
17 that
18 hit as soon as there's probable cause, even keeping in mind how important it is that
19 the public be made aware for the simple reason, Judge, the damage to the lawyer, just
20 in case the matter does not resolve itself in any sanction, the damage is irreparable.
21 You're never going to be able to put the suitcase back, the pieces are not going to go
22 back, Judge.
23 So I would say, again — and I understand where you're coming from,
24 this issue of balancing — I think we have to tip it somewhat in favor of the lawyer
25 because of that reputation issue.

1 JUSTICE COZIER: Professor Wendel?
2 MR. WENDEL: I've lived in Upstate New York for 12 years and I love
3 it, but I'm not a native New Yorker like a lot of people here. I grew up in Texas. So
4 maybe you could explain to me how New York is different from the 40-plus states
5 that allow publication of attorney charges, not, not just immediately when it's filed
6 but after a finding of probable cause? The ABA has been tracking this for a long time,
7 and states like New Jersey and Illinois, which seem to be similar to New York in
8 relevant respects, have a system in which the charges are published upon a finding of
9 probable cause, and this guideline hasn't fallen. So what's different about the
10 reputational interests of attorneys in New York as compared to New
11 Jersey or Illinois or some place and, especially in light of Judge Cozier's comments
12 about the public interest, why do lawyers get more protection here than in 40-some
13 odd other states?
14 MR. DANIELS: I'm sure the attorneys' interests in the 40 other states are
15 equal to our interests here or vice versa. I just feel personally that I prefer our system as
16 opposed to the other 40 states. If that's the way it's going, well, then so be it, but it
17 doesn't mean I have to agree with it. But I -- you know, I -- I've worked in the vineyards
18 for a long time. I represented a lot of lawyers with grievance cases, represented some
19 judges from time to time. I've practiced for many, many years. I've been there, done
20 that, seen that, all that stuff. And let me tell you, I don't know about these other 40
21 states, okay? They may be doing the right thing and they may think they are, and I
22 understand where you're coming from, Professor. But I can tell you, once something
23 goes in the paper or in social media or you Google somebody about your being
24 unethical, all that time and all that money and all those efforts you put into your
25 practice to build your name, they are out that proverbial window. So we might be in the

1 minority, but in all due respect again to the Committee, I think we're
2 right, in all due respect to the 40 other states.
3 JUSTICE COZIER: Judge Lindley?
4 JUSTICE LINDLEY: Mr. Daniels, you had indicated you represented
5 a lot of attorneys on grievance matters over the years. I've certainly seen you on many
6 of those. Do you have any experience with attorneys that you represented who, while
7 the process was ongoing and the public was not privy to these charges, are you aware
8 of clients of yours who then continued on and there were additional claims against
9 them? In other words, the argument is, well, we should have disclosure to protect
10 future clients, that everyone should know so nobody else gets ripped off. Has that
11 been a problem in your experience?
12 MR. DANIELS: It's happened, Judge. It's the exception and not the
13 rule.
14 JUSTICE LINDLEY: Because I did read the — there was testimony
15 from the July 28th public hearing of this Commission, and Mr. O'Sullivan from the
16 lawyers fund for client protection, testified. I found it rather interesting that he did a
17 study on this issue of what's the cost of not disclosing it early. And he looked at 3,479
18 awards where the fund awarded clients money that were billed from attorneys to see
19 how many of those occurred while there's an ongoing grievance against that particular
20 attorney. His study showed — this went
21 back from 2009 to July 1st of this year — that .8 percent, less than one percent of the
22 victims have been victimized by an attorney who was ongoing, had a grievance going.
23 In other words, \$47 million has been paid out of this, but only \$131,000 was paid out to
24 victims who would have been saved if they had known. It seems to be a, for balancing
25 public versus lawyer's rights, that the public right, yes, it's important, but it doesn't

1 sound like it happens. According to the expert, it doesn't sound like it happens a lot.
2 MR. DANIELS: It's a small percentage, though, but still some people did
3 get hurt to the tune of $131,000. By the way, Mr. O'Sullivan, he's a great guy and I've
4 talked to him a number of times. He's very helpful and he does a terrific, terrific job.
5 Again, it may happen. But, Judge, from my experience, I don't think I can think of any
6 one specific case where that, where that scenario has occurred, but it would be a rarity.
7 But, again, reputation, when that goes, you're done.
8 JUSTICE COZIER: Mr. Zauderer?
9 MR. ZAUDERER: Listening to you and your colleagues raise very
10 thoughtful points, and it occurs to me that we may be talking about apples and oranges
11 when we talk about an open process, and when we talk on the one hand about a criminal
12 case and the other a disciplinary proceeding. The concept of openness in a criminal
13 proceeding which goes back to the beginning of the republic and the constitutional
14 provision which ensures the protection of the accused, not for the enjoyment of the
15 public. We don't have secret trials. On the other hand, when we're talking about
16 prosecution that deals with somebody's reputation, there's different considerations, so
17 I'm not sure whether the analogy is apt.
18 But in response to some of the points that have been raised about
19 balancing the public interest here, are we sort of applauding with one hand in having an
20 incomplete process if we allow the public to see a proceeding that's going on even when
21 there's been a charge which is only a charge and the reputation damage is done? Is there
22 justification for doing that and wouldn't it, wouldn't the remedy be to speed up the
23 process? Or if the Committee feels that the allegation is so serious by the nature or the
24 quantum of proof, and they have the power to do this, to suspend the lawyer rather than
25 just simply operate by letting the public know? Wouldn't that be a better process?

1 MR. DANIELS: It may. I think the process we have now is, is fine. I
2 think it, it, it meets the requirements of fairness and balance. You raise the issue of a
3 suspension. If a lawyer is suspended while the
4 proceeding is ongoing, that's public because that's a court order. That's out there. So
5 in other words, if you, if you have someone who the Committee believes is a, a
6 danger to the public, to continue in practice, like someone who can't stop taking
7 money from their trust account and who's putting money in his pocket, the Committee
8 certainly can go before the Appellate Division. I've seen it many times. And that
9 lawyer is suspended, that is public. I know where you're coming from. I understand.
10 Transparency, you can't pick up a paper today without reading about
11 transparency. They want it in government, they want it, you know, in everything.
12 They want open arguments before the United States Supreme Court. The public
13 should know of everything. Maybe I'm old school, but I strive for fairness. I just feel
14 that a lawyer's reputation and his ticket to practice are so critical, and I don't want to
15 sound like a broken record, are so critical that any sanction, no sanction should be
16 made public until the process runs its course.
17 JUSTICE COZIER: We thank you for your testimony.
18 MR. DANIELS: Thank you, Judge.
19 JUSTICE COZIER: The next witness -- and I apologize in advance if I
20 mispronounce his name -- is it
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1 Mr. Posr?
2 MR. POSR: Posr Posr.
3 JUSTICE COZIER: Posr?
4 MR. POSR: Posr. Good afternoon.
5 JUSTICE COZIER: Oh, just before you begin, because you may not
6 have been here when we commenced, your time is limited to ten minutes and when
7 you're close to that point, I will let you know if you're going over. Okay? Thank you.
8 MR. POSR: My name is Posr Posr. I am the Attorney General of the
9 Western Mohegan Tribe and Nation of New York. The boundaries are from the
10 length of the Hudson River 50 miles east and west.
11 The issue that I'm here on today, two, — one is transparency, but the
12 second more critical one is that when a lawyer's actually complained about and is
13 under indictment, the disciplinary committee doesn't proceed with procedures
14 against him. In this case I'm talking about a Barton Nachamie, a Manhattan
15 practitioner who was indicted for stealing from his own company and from two
16 clients close to $900,000. He, I'm not sure what, I know he, the district attorney told
17 me that he pled out, got 30 days in jail. He stole $900,000. This attorney was
18 complained against by Chief Ronald E. Roberts in 2002. I don't have the documents.
19 I do have the notes in my computer. We can do this part later. But the Disciplinary
20 Committee, what happened was there was a seller, there was, in bankruptcy. The, we
21 were in bankruptcy court. We couldn't make all the money in the first closing so he
22 gave them a lien to try. We don't pay by October, you take the $300,000 we gave
23 you, you take it all, here's your lien. Gave him $650,000 on October 16th, 2001. Yet
24 M. David Graubard who was the attorney for the seller, sold the lien to the
25 investment company president even though he got his $650,000. Our attorney at the

1 time, Barton Nachamie, fell into another case, actually told the seller,
2 We would like, well, the president of the investment company, not the company, just
3 the president wants insurance security for his investing in his own company. Mr.
4 Graubard transferred the lien on that basis. Tribe never signed to that.
5 When I reported this to the — as a matter of fact, now Mr. Graubard in
6 bankruptcy. In order to get out of bankruptcy, I'm sure you gentlemen know, that a
7 person has to be discharged. You have to make a disclosure statement. And I have
8 that disclosure statement right here that says the balance of $622,000 at the second
9 closing was held on October 16th. Western paid the sum. Western paid the balance of
10 $622,000 on
11 October 16th. This is the disclosure statement. And I'll hand this up to you when I'm
12 finished. However, that, before the disclosure statement, Mr. Graubard made a
13 statement in state court, Ulster County, in which he said basically to a Mr. Bernard
14 Hujda, the signor in consideration of the same $622,000 signs and sells, et cetera, to
15 Mr. Hujda. These, both of these documents are in the possession of the Disciplinary
16 Committee of the First Department.
17 How can a lawyer file one statement in one court saying we paid and
18 then file another statement in another court saying somebody else paid and the
19 Disciplinary Committee find that to be no error? I don't understand that. This is why
20 transparency is needed, because there's no, there's no, not only transparency. When a
21 lawyer gets a discipline complaint, they should — both the complainant and the
22 attorney — should come in side by side with a transcriber so that facts don't get
23 overlooked. I don't see, the Disciplinary Committee in their letter to, to me said
24 absolutely nothing, matter, Mr. Graubard in his response, I don't have it here, I'm sorry,
25 I came all the way from Delaware. Mr. Graubard in his response said, I did absolutely

1 nothing wrong in the bankruptcy case. It is exactly -- what happened in the bankruptcy
2 case was okay, but he never said what he did in the Supreme Court Ulster County,
3 which was file a document from Neil's Mazel saying that Mr. Bernard Hujda paid,
4 when, in fact, BGA Investment Company gave the money to Barton Nachamie to pay
5 on our behalf.
6 Obligations Law, I think it's 5-703 says: Before a property can be
7 conveyed, the owner of the property has to sign or his valid representative. There's no
8 signature in this case, yet the Disciplinary Committee apparently didn't even investigate
9 that, didn't call the trustee. When I called to ask why, they said, We can't tell you that.
10 No transparency whatsoever, and that's why these matters can happen as they do.
11 I'm probably getting close to my time now. I mean, I could get more
12 into the facts of it, but the basic crux is an attorney filed in one court that we paid, filed
13 in another court that someone else paid, and the Disciplinary Committee First
14 Department apparently thinks that's okay. Any questions?
15 JUSTICE COZIER: Members any? Thank you.
16 Thank you for your testimony.
17 MR. POSR: Well, then do I have a minute since there are no questions?
18 JUSTICE COZIER: If you wish to take another minute you can.
19 MR. POSR: I'll take one more minute and I'll
20 hand these documents up. I don't even have the, the the document number on them,
21 but I'm sure this will, the First Department can answer this. Not only should there be a
22 face to face with lawyer, client, transcription, but a litigant — a litigant, a
23 complainant — should be allowed to make his own tape recording or even bring a
24 transcriber. But I would personally like to be able to bring a recording to this face to
25 face, because we all know the transcriber can't talk as fast as I'm writing, or write as

1 fast as I'm talking. Might have got that mixed up. We know that happens.

2 And in conclusion, I would say the reason why we're here is because

3 the lack of transparency has not encouraged or put the fear of jail in lawyers who are

4 willing to steal from their clients and from people who are not their clients. And in

5 this case, Mr. Barton Nachamie who actually put his own company in default, his

6 own tribe, his own client in default, yet the Disciplinary Committee finds that's okay.

7 I'm just going to hand these papers up. If I may approach the bench?

8 JUSTICE COZIER: Yes, just one moment. I think Mr.

9 Zauderer has a question.

10 MR. ZAUDERER: Just for clarification and a complete record

11 here, how did you present to the Disciplinary Committee the circumstances

12 that you

13 described here? Did you write a letter? Did you call them? And in particular, did you

14 bring to their attention and how the filing that was made in the Ulster County Court and

15 how that contradicted the bankruptcy court filing?

16 MR. POSR: I did it by letter because there was no way to do it in person.

17 And one of the exhibits in the papers I just handed up was the certified docket sheet

18 from Ulster County where the lien was transferred from Mr. Hujda to Mr. Nachamie's

19 firm. And, you know, I questioned that. If there was no understanding, because as you

20 could probably tell, this case is very, you know, there are a lot of loopholes. There are a

21 lot of nooks and, but if there's something that's not understood, you know, at least in a

22 decision you get an answer, you get something that tells you how to go about correcting

23 what was happening.

24 MR. ZAUDERER: Do you have a letter and could you hand that up

25 that you got from the Committee explaining whatever they said to you?

MR. POSR: Unfortunately I don't have it. I -I -- well, I could get it to you before the close of business.

MR. ZAUDERER: Well, it could be after. You can send it to the Committee.

1 MR. POSR: And I will, but I don't even have the letter that they sent.
2 MR. ZAUDERER: That's fine.
3 MR. POSR: And I did call to find out how it was that the Committee
4 thought that he could file in one bankruptcy, file in one court that we paid and another
5 that we didn't. I asked —
6 MR. ZAUDERER: So we'll have your ultimate letter from the
7 Disciplinary Committee where they said they weren't doing anything? You can get
8 those?
9 MR. POSR: I can get those. I can get those.
10 MR. ZAUDERER: Thank you.
11 MR. POSR: Can I e-mail them to -- I don't see -- see Mr. Caher's name
12 up there.
13 MR CAHER: You can.
14 MR. POSR: Thank you.
15 JUSTICE COZIER: Thank you, sir. The next witness is Professor James
16 Milles from the University at Buffalo School of law.
17 PROFESSOR MILLES: Thank you. I realize I was a late admission to
18 the witness list so I appreciate the time. I also realize that many of you probably have
19 not had a chance to read the witness submission, so I'll try and cover my main points
20 but be very succinct with it.
21 Like Professor Wendel, I'm not from around here.
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1 I'm from Missouri and I've been in Buffalo for 15 years, teaching legal ethics
2 for the last six of those years. And I currently teach the required legal ethics course
3 at the University at Buffalo. So I basically see all of the law students that come out
4 of U.B. in my class.
5 So the concern I want to address is the issue of lack of consistent
6 sanctions across the board of departments and how that I think that appears to
7 students to, to the next, next year's lawyers. We don't talk about sanctions much in the
8 legal ethics classes. None of the case books that I've looked at spends much time on
9 it. I think there's a couple of reasons. One is that sanctions are kind of embarrassing.
10 There's such wide variation among the states and some of that can certainly be
11 justified by looking at the state variation in the rules. But the fact of — and I'm
12 drawing on Professor Gillers' article, because I'm not aware of much else in the way
13 of data on how this works in New York. But given his article, there do appear to be
14 wide variations which I think magnifies the problem when we see these variations in
15 one state under one set of ethical rules as opposed to how various states handle it.
16 Some, my concern is how does this come across to our students? What message does
17 this send to students learning ethics? And they're required to be there. They don't
18 want to be there, so
19 it's, it's a hard class to teach for many reasons. But why is it that the, the variation
20 standards, it makes the system of discipline in New York appear arbitrary, and I think
21 that undermines law students, in-coming lawyers with respect for the disciplinary
22 system and for the disciplinary rules themselves.
23 I think that although we do have a single set of disciplinary rules across
24 the state of New York, the message that, the sanctions that we impose for similar
25 infractions from downstate to upstate to Western New York send a different message. It

1 sends a message that this is a, it's a highly subjective system. I'm
2 uncomfortable by coming to talk about the way the Eighth Judicial Department works
3 and everybody knows each other and it's all a very cozy system. I'm not sure that that
4 would be a very reassuring statement to the public and I don't think it sends the right
5 message to our students. You would think that with a standard set of rules with
6 sanctions would be more or less commensurate across the state, but they don't appear to
7 be.
8 Again, drawing from Professor Gillers' data, in there, for instance,
9 misappropriating client funds is treated, may be treated more harshly in the First
10 Department than it is in the Fourth Department. And I'm not sure that that tells us that,
11 I'm not sure what that
12 tells us about the differences in nature of the practice, but I think it raises a lot of
13 questions. And I think it raises uncomfortable questions for students. When I talk
14 about sanctions in my classes, we're always somewhat dumbfounded by how
15 different what seems to be very egregious matters were treated fairly lenient.
16 Just so — I go into this in more detail in my written submission, but I
17 think Professor David McGowan has a good comment on this. He talks about the
18 difference between states and has written comments. The significant variations in
19 judicial reactions to similar conduct, students who actually throw up their hand and
20 there's a tendency toward nihilism, I think. And that's a problem. It's less — certainly
21 there are variations and sanctions in every area of the law, but in this area where we're
22 trying to teach students how they should act, not on behalf of our students, but what
23 kind of values they are meant to have when there's vast inconsistencies or appear to
24 be vast inconsistencies, I think it can breed a lack of respect for the ethical rules for a
25 disciplinary system. Thank you.

1 JUSTICE COZIER: Thank you, Professor. Yes, Judge Lindley?
2 JUSTICE LINDLEY: Thank you for your testimony, Professor. It
3 appears as though you haven't done any independent review of cases. You haven't
4 done your own research on the matter?
5 PROFESSOR MILLES: I have not.
6 JUSTICE LINDLEY: So in concluding that there are vast disparities
7 in the grievance procedures with respect to sanctions, it sounds like you're relying
8 exclusively on the law review article from Professor Gillers?
9 PROFESSOR MILLES: I'm relying on the state of New York, yes,
10 that's what I'm relying on. I'm speaking more broadly of the fact of different states
11 and similar infractions, but, yes, I am mostly relying on Professor Gillers' article.
12 JUSTICE LINDLEY: And you acknowledge, I believe, that there's
13 vast disparities in other areas of law. For example, criminal sanctions. You have
14 individuals charged with a particular crime down in Manhattan, say, or in the Bronx
15 on a drug felony is going to get a vastly different sentence than somebody, say, in
16 Ontario County up here. You have personal injury actions, lawyers here know,
17 lawyers across the state know you're going to get a lot more money downstate than
18 you will upstate for the same exact injury. Why is it more troubling that we have
19 these disparities, alleged disparities? I want to make that clear. Professor
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1 Gillers, I read very carefully his law article. I looked at a lot of the cases he cited. I'm
2 not convinced that there are significant disparities, because there are a lot we don't
3 know.
4 PROFESSOR MILLES: Absolutely.
5 JUSTICE LINDLEY: Two lawyers may engage in the same conduct,
6 but they may have different backgrounds. One may have acknowledged
7 responsibility and have taken steps to correct the problems, one may have denied
8 responsibility. One may have had prior a grievance, one may not. We just can't look
9 at what they did and then look at their sanction and say, Oh, geez, there's a problem.
10 But anyhow, why, we accept it. It's inherent in the nature of law for all the other
11 areas of law, but why is it a problem with respect to grievance? Why does it have to
12 be?
13 PROFESSOR MILLES: I think it's certainly inherent in other areas of
14 law, but I think other areas of law also breed a certain degree of cynicism in our law
15 students, and make it then so that it's all a matter of how well the lawyer argues,
16 which may or may not be true. But I think it'S, it's a different kind of problem when
17 we're looking at ethical values because I do think — I mean, I teach professional
18 responsibility, but I also try to teach ethics to some extent. And I think most of us
19 who teach — Professor Wendel, I know, also address these questions. I think we're
20 trying to infiltrate a sense of respect for the, for the disciplinary process, for the idea
21 of a self-regulating profession. And I think to the extent that there are indications that
22 the process is, is broken, then I think that makes it, it's a bad message to be sending
23 to future lawyers.
24 JUSTICE LINDLEY: So you're saying the law students will lose
25 respect for the process if a lawyer in one jurisdiction gets suspended for, say, three

1 years and then another lawyer in another jurisdiction for the same
2 kind of conduct gets suspended for two years? That somehow —
3 PROFESSOR MILLES: I think there are a lot of reasons why law
4 students may not be very respectful of legal ethics, but I think that this may be one
5 of them.
6 JUSTICE COZIER: Yes, Mr. Zauderer?
7 MR. ZAUDERER: You know, particularly I'm glad I had the
8 opportunity to put this to you as a law professor. You know, sometimes when we
9 study something and we have a predetermined conclusion or bias, we look
10 selectively at the evidence. And I think, you know, that could have some actual
11 applicability here. As one Commission member pointed out that, there could be, as
12 I think you acknowledge, many individual differences in the cases that are not
13 reported. So, you know, a law student goes in, you know, under an assignment and
14 tries to catalog, you know, all the, all the charges versus the punishments that, yours
15 doesn't take into account that data, but I suppose in contrast to that on the other side
16 you could say there's a cluster, a serious cluster that suggest differences that you
17 would expect that those differences and individual cases would fall randomly in
18 different departments, so I would acknowledge that. But when we talk about for
19 example the fact that other states do things differently, I think it was suggested for
20 example by a colleague that, you know, well, Texas does it differently than the
21 other states. Well, you know, Texas, executes a lot of people. We don't have capital
22 punishment. So, you know, I don't know whose system is better, but we have a
23 different system here. So, you know, the fact that other people do it differently,
24 maybe we do it better.
25 And, finally, let me say that the tough issue seems to me to sort this

1 out is are we really talking about disparity, you know, behind what's
2 conflated in the Gillers article, I have great respect for Professor Gillers as a
3 colleague. As you have touched upon, what you really seem to be saying is not that
4 there's a disparity, but what's troubling you is that in one instance, one local
5 jurisdiction where the punishment is severe and the other is not severe, the one that's
6 not severe should be severe. So it sounds to me like you're really criticizing the lack
7 of severity as being attached to the violation rather than the disparity.
8 PROFESSOR MILLES: Thank you for that question. I tried to make,
9 to clarify that a bit in my written submission, but I think it's not so much a matter of
10 severity. I think it's a matter of procedural justice. That the system should be
11 perceived to be fair and not arbitrary. And whether the punishments themselves are
12 severe or, or, or are less severe I think may be, it may be less significant than whether
13 sanctions are perceived as fair.
14 JUSTICE LINDLEY: Thank you.
15 MR. DOYLE: Professor, thank you very much for coming. My
16 question's following up a little bit on the prior two commissioners. When the decision
17 from the, whichever Appellate Division has come out, when they do talk about
18 weighing the possible discipline in, when they do express a standard, it's usually
19 expressed in some version of the purpose of discipline is to protect the public from
20 lawyers who are not fit to practice. So we have that on the one end, which is
21 inherently a very subjective thing and, and, and allows and requires the
22 type of consideration that Justice Lindley's talked about with what's the prior record of
23 the attorney? You know, what has been their response to this? Are there medical,
24 substance abuse, other issues that are plagued? Was there loss to the client or not? All
25 of those factors, they're subjective and very different case to case, not all of which are

1 written in the decisions, by the way, as we know. But you have that on one end. And I
2 don't know if you're advocating for this, but I get the sense when I hear what you're
3 saying is that -- that another option would be, okay, there was a violation of Rule 3.3,
4 go to a chart, you know, six-month suspension regardless of what any of the other facts
5 are. And obviously those are two, you know, very different ends of the spectrum. Am I
6 misreading what you were saying?
7 PROFESSOR MILLES: No. I certainly take the point about the
8 problems with the federal sentencing guidelines and I don't think it should be something
9 like that. However, there are ABA guidelines for sanctions which some states refer to,
10 some don't. I'm not, I don't know that New York looks at them very much at all. But it's
11 —
12 MR. DOYLE: They don't say that they do. The court
13 decisions don't talk about them very much.
14 PROFESSOR MILLES: But I don't — I haven't examined this
15 in enough detail to say that I have a recommendation
16 or solution. I think that there should be some greater guidance in sanctions so that
17 there's at least, that there's some rationale to that that is apparent to outsiders. If the
18 process, if the, if the purpose of sanctions is not punishment but deterrence, I think
19 that needs to be the, the reasoning needs to be clearer. So it may be a matter of
20 further opinions.
21 MR. DOYLE: Their opinions — and perhaps that's one of the things
22 the Commission is considering is recommending the possible adoption of advisory
23 guidelines along the lines of the ABA — that's something that you think would be
24 positive?
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1 PROFESSOR MILLES: I think it would. I do think it would. And I do
2 want to say this, that certainly, yes, I acknowledge that my data is drawn from one
3 article 'cause I'm not aware of much else.
4 MR. DOYLE: Either are we.
5 PROFESSOR MILLES: But I do hope that the perspective of law
6 students and how this appears to law students I think has not been represented, so I
7 hope just for what it's worth that my testimony is helpful.
8 MR. DOYLE: Oh, very much so. Thank you very much, Professor.
9 JUSTICE COZIER: Professor Wendel?
10 MR. WENDEL: Just a quick follow-up. Would your concerns be
11 mitigated by opinions that explain discipline in greater detail so that the factors that
12 went into the determination of sanctions would be explained? It seems to me that if
13 students could understand, and in this case, the attorney had a unblemished record
14 versus this attorney had a pattern of previous violations, that would satisfy your kind of
15 rule of law concerns, and without having to adopt something like a grid or sentencing
16 guidelines so that the problem could be addressed not by some sort of statewide
17 commission or guidelines but merely by recommending more detail in published
18 opinions, would that be enough?
19 PROFESSOR MILLES: I think that might very well be
20 enough.
21 MR. WENDEL: As compared to something like the Upstate/Downstate
22 disparity in personal injury verdicts, you really don't have any kind of explanation. Just,
23 that's the way it's done. If there's an explanation to be given, then let's put it out there.
24 JUSTICE COZIER: Yes, Mr. Guido?
25

1 MR. GUIDO: Thank you. Professor, thank you. I just want to also make
2 sure at least for myself I didn't misread what you testified to, but with respect to your
3 remark about the cozy relationship in the Eighth Department based on the testimony of
4 some of the other
5 witnesses who are respondent's counsel. I'm not sure I understood that testimony to
6 suggest there was a cozy relationship other than to say that the staff up there was
7 professional and fair in the way that they approached disclosure and how they look at
8 disclosure up there, voluntary open disclosure. And the reason I'm concerned about
9 the term or your perception of that being cozy, we had witnesses come before the
10 panel advocating open disclosure and greater disclosure, and if the perception is going
11 to be, well, that's just forcing a cozy relationship between respondent's counsel, it's
12 troubling to me as a Committee Member and how do we deal with that? I don't know
13 if, if maybe you wanted to revisit that or clarify what —
14 PROFESSOR MILLES: Well, first of all —
15 MR. GUIDO: — what your perception was?
16 PROFESSOR MILLES: — that was probably out of order. The point
17 of my testimony was just a reaction to the earlier testimony. But the, the, the at least
18 the way I interpret it, the other witnesses who — was it Mr. Daniels I believe
19 mentioned it? And I apologize if I'm misstating what he said. Just that, that there's,
20 there is something to be said for a process which is sort of low cost to the community,
21 where people know each other and people know the circumstances. But at the same
22 time
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1 it can also look like the, the odds are stacked against clients and the public. It can look
2 very protectionist I think.
3 JUSTICE COZIER: Thank you very much,
4 Professor Milles.
5 PROFESSOR MILLES: Thank you.
6 JUSTICE COZIER: Our final witness this afternoon is Chris Kochan,
7 a legal consumer from Buffalo. Mr. Kochan?
8 MR. KOCHAN: Thank you very much for allowing me to testify in
9 such a short notice. The law profession should be considered one of the most noble
10 of all professions in American society. Each lawyer, when they take on a client,
11 literally becomes responsible for the life of their client, whether it be a public
12 corporation, or a private natural person. And depending on their client's status in
13 society, that client's families, friends and society itself can be greatly affected by the
14 quality of the attorney's representation.
15 Further, when an attorney takes on a client,that is all they should have to
16 worry about. However, this is not the case. The honest attorney is bound by an
17 unwritten code of economics, that code being: Do not challenge the status quo, for if
18 you do, your career could be ruined as well as your family may suffer the
19 consequences.
20 The only example I need to point out is former Erie County Assistant
21 District Attorney Mark Sacha. The Attorney Grievance Committee has looked at
22 nothing more than the fox guarding of the hen house. What occurred in my complaint
23 is a prime example of that. Further, if you take any average citizen who has any
24 feelings with these types of oversight committees, most of them, most of them feel
25 they are ineffective and a complete waste of time. The damage from this train of

1 thought can easily be seen in the exodus of people from this state
2 which is one of the highest in the nation, not something any of us should be proud
3 about in this once great state.
4 What type of evidence must be provided and at what point should a
5 Committee member be mandated to take action against an attorney who violates the
6 laws and/or rules of professional conduct and it should be the same across all
7 departments?
8 As I've reviewed four departments and their procedures in filing the
9 complaints and what is to occur thereafter, all vary in one degree or another. As to the
10 procedures and flow for filing complaints, I have created many websites throughout
11 my career. My first one being in 1995 so I know what I'm talking about. Some of the
12 Grievance Committee pages for their
13 departments do not appear to have been updated for quite some time. For example,
14 the Third Department's page on nycourts.org reminds me of my first website I
15 designed in 1995. Of all of these departments, this one lacks the most.
16 The grievance procedures for all the departments are on the same
17 website so they should be, they should provide for a uniformed design as well as
18 procedural guidelines so the average layman can easily find and file the documents
19 needed for the Committee to review and investigate and render a proper decision.
20 Why is it called the Unified Court System if it's not unified?
21 Further, all the rights of the citizens and taxpayers, as a complainant,
22 should be clearly spelled out and easily found on the official website, as well as the
23 pages of the various committees and departments. Our rights as citizens and taxpayers
24 should not be hidden through the art of words and voluminous amounts of laws that
25 only the most skilled of researchers spending long hours on a subject have the ability

1 to uncover.
2 I can give you a recent example of the difficulty of locating these
3 rights. I only discovered last week that I, as a complainant, would have the right to a
4 copy of the response the attorney provided against my complaint pursuant to 22
5 NYCRR 1022. However, it took
6 hours to locate this right.
7 Presently, the law provides that all attorneys that have a complaint
8 filed against them are provided a copy of the complaint, and the attorney is required
9 — if the attorney is required to respond to the complaint, who for the most part to the
10 complainant — who for the most part is a citizen taxpayer, the citizen taxpayer is
11 only allowed a copy of the attorney's response upon the approval of the staff attorneys
12 of the committee. This is not fair. If a response is filed, the complainant should have
13 every right to a copy of the response if they wish. This should not be left to the
14 discretion of the staff attorneys. That can easily be seen as a conflict of interest,
15 especially when the complainant is not an attorney.
16 Another important issue this Committee needs to address is the claim
17 that the Grievance Committees do not have jurisdiction over the conduct for attorneys
18 acting in an official capacity as a DA or ADA. 22 NYCRR part 1200 does not
19 delineate between attorneys acting in a public or private capacity. Therefore, it
20 demands that all attorneys are mandated to abide by the Code of Professional
21 Conduct. Further, the American Bar Association clearly shows that all attorneys, and
22 I repeat, all attorneys, are governed by the Rules of
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1 Professional Conduct.

2 The news is full of examples of ADAs and DAs who acted in

3 questionable manners concerning questionable conduct of other public officials. This

4 inevitably leads to accusations of cover-ups. It is evident that the law is not clear on

5 whether or not a person can file a grievance against a DA or ADA. You talk, you

6 write to one public official versed in the law, their response is, yes, you can. Then you

7 talk or write to another public official versed in the law and their response is the exact

8 opposite. The most disturbing response I have received concerning this matter of

9 authority is that the Committee will not act unless there is a judicial finding of

10 professional misconduct. With this response they admit that the Committee has the

11 authority to review, investigate and act upon the complaints; however, they won't do

12 so until there has been a judicial finding of misconduct.

13 I can find no law to support this claim, and if indeed it is a

14 requirement, what is the purpose of the Committee in the first place? They should,

15 they should be, there should be more than an adequate solution to that. James I.

16 Meyerson, the attorney for the Staten Island Branch of the NAACP, wrote in a recent

17 Article 78 proceeding that there was a disturbing proposition that a

18 district attorney was free to do almost anything, maybe everything, with impunity

19 and without review or oversight of that attorney's conduct except the prosecutor

20 attorney's own self-oversight. This thought is a prime example of conflict of interest

21 and why people no longer trust the system.

22 This statement was made against the Second, 11th and 13th Judicial

23 District Committees concerning the Eric Gardner matter. These Committees claimed

24 it was not the proper forum to raise issues of misconduct. If the issue — if the issue

25 of not the proper forum is indeed fact, then the law must be changed to ensure that it

1 clearly authorizes the Committees to review and investigate DAs or
2 ADAs and to act if the evidence warrants it. And the powers of the Committees must
3 be clearly and thoroughly documented so that all can understand it, including, but not
4 limited to, the Committees themselves.
5 To this day I have not received a clear precise answer as to whether or
6 not grievance committees have jurisdictions over questions of conduct of DAs and
7 ADAs. As such, the committees now appear to actually shield DAs and ADAs from
8 such allegations as echoed in Mr. Meyerson's statement.
9 This is exactly what happened in my matter. I
10 alleged serious acts of misconduct by a DA, an ADA, and the Eighth Judicial
11 District's response was that while they didn't have the authority to act on a matter,
12 they had the authority to forward a copy of my compliant to the very DA and ADAs I
13 complained about. If this — if they don't have the jurisdiction to act upon the
14 complaints, then they should not be allowed to forward a copy of the complaint. By
15 providing a copy of the complaint to the very DA and ADAs I complained about, the
16 Committee added fuel to the fire which can easily act as a catalyst for them to, for
17 them to engage in further unethical behavior because they believe they are
18 untouchable.
19 This is especially worrisome when the same DA is presently subject to
20 a lawsuit because of substantially similar misconduct in another matter. Other
21 obvious shares, others obviously share my concerns. There appears to be a bill right
22 now pending before the state Legislature. Its purpose is for forming a committee to
23 look into prosecutorial misconduct. It did not just mysteriously appear. It is there for a
24 reason.
25

1 If the New York State Commission on Judicial Conduct can take
2 action and remove a judge from the bench for misconduct, the Attorney Grievance
3 Committee should be able to do the same for a DA or ADA. However, the Committee
4 -- if the committees do actually have the power
5 now, will they exercise the standard kitchen sink approach that the New York State
6 Commission on Judicial Conduct constantly utilizes? That approach being the officials
7 in question is immune because they have a broad range of discretion. No district
8 attorney, assistant district attorney, or judge, for that matter, has discretion that they are
9 acting outside their legal authority and/or procedural professional guidelines.
10 I will provide you with clear recent example of acting out of, of acting
11 outside of legal authority, where actions should have been taken but were not. In my
12 case, I provided a verified complaint with a corresponding evidence packet that was, in
13 the words of the chief counsel, voluminous. This is what I, what I provided.
14 In this packet, in this packet and affidavit I proved that one DA had no
15 authority to prosecute. Of the four charges, three were not verified and the fourth
16 clearly showed I was acting within my rights. That charge was obstruction of
17 governmental administration in the second degree for remaining silent. Their conduct in
18 my matter is one for the history books. One has to wonder if these three simplified
19 informations which are presently not verified well after the alleged arraignment
20 occurred will mysteriously appear in the file with signatures upon them. I will not put
21 anything past the DA or ADA in the
22 matter. I have videotaped the contents of the court file many times to ensure that if
23 this happens I have proof that they were unsigned well up to and well past the alleged
24 arraignment.
25

1 Over 40 percent of the documents I have provided in the evidence
2 packets were created by the very attorneys I filed the complaints against, or other public
3 officials involved in the matter, in their own words, sworn to in their own signatures, as
4 well as certified court transcripts and so forth. Yet I was told I did not offer any proof.
5 JUSTICE COZIER: Mr. Kochan, you'll have to wrap up your remarks.
6 MR. KOCHAN: I've got two more pages to go.
7 JUSTICE COZIER: Well, it's not a question of pages. You'll have to
8 wrap up your remarks. But you have been speaking very, very quickly which is pretty
9 taxing on the court reporter. So I'll ask you just to conclude your remarks 'cause your
10 time is up.
11 MR. KOCHAN: Okay. I'll give you one perfect example. The one
12 perfect example I was told I was no longer allowed to file any more motions because
13 the omnibus motion rule of Article 55 of the Criminal Procedure Act. This was by an
14 ADA. Article 55 of the Criminal Procedure Act does not exist. It's a complete
15 fabrication and lie. This was placed in there. The purpose I believe our best bet is to
16 fully inform, have fully informed grand juries where the citizen/complainant can go
17 in front of these grand juries and present their evidence under the powers granted to
18 the grand juries and the Article One of the New York State Constitution. This way,
19 this will help eliminate any unfounded complaints and make the system much more
20 open for the public to see and transparent.
21 JUSTICE COZIER: All right. Thank you, Mr. Kochan. Are there any
22 questions?
23 MR. KOCHAN: Yes, sir.
24 JUSTICE COZIER: Mr. Zauderer?
25

MR. ZAUDERER: Just two quick questions. See if we can focus on it. First of all, is there an extant, an existing order prohibiting from making filings of any kind? Is that —

MR. KOCHAN: That was the answer to my omnibus motion where the ADA claimed that I was not allowed to file at issue. And she swore to it under penalties of perjury, sir.

MR. ZAUDERER: And that's false?

MR. KOCHAN: I cannot find any Article 55 anywhere.

MR. ZAUDERER: So what was the essence of what

1 the DA charged you with or investigated you for that gave rise to this concern you
2 had?
3 MR. KOCHAN: Well, this was for three or four charges total, three
4 which were traffic violations, one was refusal to, refusal to blow into a Breathalyzer.
5 I was, I was handcuffed to a metal chair and knocked out by a deputy sheriff who's
6 been sued in federal court for the same thing, plus perjury.
7 MR. ZAUDERER: But refusal to take a Breathalyzer
8 test is not a crime, right?
9 MR. KOCHAN: Well, that is a civil matter, but it does have criminal
10 ramifications because you are tried for it, but also it was a DWI.
11 MR. ZAUDERER: DWI gave rise to this?
12 MR. KOCHAN: Yes, sir.
13 MR. ZAUDERER: Thank you.
14 JUSTICE COZIER: Any other questions? Thank you very much.
15 MR. KOCHAN: You're welcome.
16 JUSTICE COZIER: That concludes the testimony for today's hearing.
17 On behalf of the Chief Judge and the Commission, I want to thank everyone who has
18 joined us today, particularly the witnesses and the members of the public. And over
19 this next several weeks, the Commission will be reviewing both the oral and written
20 comments that had been submitted and take that into consideration in preparing its
21 report. Thank you. The hearing is concluded.
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I, Danielle M. Gregory Daigler, an Official Stenographic Reporter, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as recorded by me at the time and place aforementioned.

Danielle Gregory Daigler

DANIELLE M. GREGORY DAIGLER, RPR, CRR SUPREME COURT REPORTER.

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2 SUPREME COURT OF THE STATE OF NEW YORK
Ist JUDICIAL DISTRICT
3 -X
HEARING RE:
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5 COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE
6 -X
7 New York County Lawyers Association
14 Vesey Street
8 New York, New York 10007
9 August 11, 2015
10 BEFORE:
11 COMMISSION MEMBERS:
HONORABLE BARRY A. COZIER, Chair
12 HONORABLE PETER SKELOS
MARK C. ZAUDERER, ESQ.
13 ROBERT P. GUIDO, ESQ.
DEVIKA KEWALRAMANI, ESQ.
14 SEAN MORTON, ESQ.
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1 Proceedings
2 JUDGE COZIER: Good morning. Good morning and
3 welcome to the third of three public hearings scheduled
4 by the Commission on Statewide Attorney Discipline.
5 My name is Barry A. Cozier and I am JUDGE COZIER of the
6 Commission. I am currently senior counsel at LeClair
7 Ryan here in New York City and formerly served in the
8 New York State judiciary as a judge of the Family
9 Court, Justice of the Supreme Court and associate
10 justice of the Appellate Division, Second Department.
11 On behalf of Chief Judge Lippman and myself,
12 and all of the members of the Commission, I want to
13 thank each of you for taking the time this morning to
14 come before us to share your thoughts and insights
15 about the important issues the Commission is tasked
16 with addressing.
17 In February of this year, Chief Judge Lippman
18 established the Commission on Statewide Attorney
19 Discipline to conduct a comprehensive review of the
20 state's attorney disciplinary system to determine what
21 is working well, and what can work better.
22 After conducting this top to bottom review,
23 the Commission is charged with offering recommendations
24 to the chief judge, the Court of Appeals and the
25 Administrative Board of the courts about how to best
26 enhance efficiency, effectiveness and public confidence

1 Proceedings
2 in New York's attorney discipline system.
3 Among the primary issues under consideration
4 by the Commission are the following: One, whether New
5 York's departmental based system leads to regional
6 disparities in the implementation of attorney
7 discipline;
8 Two, if conversion to a statewide system is
9 desirable;
10 Three, the point at which disciplinary
11 charges or findings should be publicly revealed, and
12 Four, how to achieve dispositions more
13 quickly in an effort to provide much needed closure to
14 both clients and attorneys.
15 In recent weeks we have held hearings in
16 Albany and Buffalo, where we elicited very insightful
17 and helpful testimony from a wide range of
18 stakeholders. Looking over today's witness list I
19 know that this morning and this afternoon will be just
20 as productive and helpful as the prior hearings.
21 By holding these public hearings and also
22 accepting written testimony, we hope to hear from a
23 diverse cross section of interested individuals,
24 organizations and entities about their views on these
25 and related issues they feel are relevant to the
26 Commission's task.

1 Proceedings
2 So far we have heard from attorneys, Bar
3 Association's, consumer advocates, legal consumers,
4 academics and others. We believe that by inviting and
5 considering different viewpoints, the Commission will
6 gain a more complete understanding of the issues at
7 hand and in turn be in a better position to formulate
8 the best possible recommendations for the State of New
9 York.
10 We know that the attorney discipline process
11 has a tremendous impact, not only on attorneys subject
12 to discipline and their clients and potential clients,
13 but also on the public's trust and confidence in our
14 legal system. We want to thank you once again for
15 helping us in this important mission to carefully
16 examine the need for change in New York's disciplinary
17 system.
18 Today we have a very full agenda and we
19 received more requests to testify than we could
20 possibly entertain. We have attempted to fit in as
21 many witnesses as possible within the time allotted,
22 and in fact, we have extended the time by an hour.
23 Still, we were not able to accommodate each and every
24 request, but we will accept written testimony from any
25 one who does not have the opportunity to testify at the
26 hearing and because of time constraints, cannot be

Claudette Gumbs

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1 Proceedings
2 accommodated.
3 We have a witness list. Those persons who
4 are not on the witness list will not have an
5 opportunity to give oral testimony. Again, they may
6 submit written testimony to the Commission and it will
7 be made part of the record. We will have up to ten
8 minutes -- each of you will have up to ten minutes to
9 present your testimony and then you may be asked
10 questions by the panel. We need to strictly enforce
11 the time limit, because as I indicated, we are already
12 over extended. And therefore, I would ask for both
13 your understanding and consideration and patience. If
14 there is something you want to tell us and you run out
15 of time, you're welcome to submit a supplemental
16 written statement. Now, in fact, most of the
17 witnesses have already submitted written statements to
18 the Commission. In some instances those written
19 statements represent the testimony that they will be
20 presenting this morning. I do want to caution you
21 that to the extent that you plan to read your written
22 testimony and it exceeds ten minutes, you will not have
23 the opportunity to complete the testimony and
24 therefore, you should tailor your testimony to that
25 ten-minute period.
26 I am pleased to have a distinguished panel

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1 Proceedings
2 joining me today. Each of these professionals has
3 special experience in the disciplinary field and
4 currently service as a member of the Commission on
5 Statewide Attorney Discipline.
6 And I begin with the member to my immediate
7 right, the Honorable Peter Skelos, currently a partner
8 at Forchelli, Curto, Deegan, Schwartz Mineo and Terrano
9 and a former associate justice of the Appellate
10 Division Second Department. Judge Skelos is co-chair
11 of the Subcommittee on Enhancing Efficiency.
12 Sean Morton is to my left. Sean is the
13 deputy clerk of the Appellate Division Third Judicial
14 Department. He is a member of the Subcommittee on
15 Uniformity and Fairness.
16 Mark Zauderer to my immediate left, your
17 immediate right, partner in Flemming, Zulack,
18 Williamson and Zauderer LLP and he is on the
19 Subcommittee on Uniformity and Fairness.
20 Robert Guido, also to my left, the Executive
21 Director for Attorney Matters, the Appellate Division
22 Second Judicial Department. He is the co-chair of the
23 Subcommittee on Uniformity and Fairness.
24 To my right, Devika Kewalramani, who is a
25 partner and general counsel at Moses and Singer and the
26 chair of the New York City Bar Association's Committee

1 Proceedings
2 on Professional Discipline. She is also the co-chair
3 of our Subcommittee on Transparency and Access.
4 And to my far right, your far left, Professor
5 Stephen Gillers. Professor Gillers is the Elihu Root
6 Professor of Law at New York University School of Law.
7 He is the co-chair of the Subcommittee on Uniformity
8 and Access and the author of a recent and very in-depth
9 Law Review article on the attorney disciplinary process
10 in New York.
11 In addition, I would like to introduce to you
12 the other members of the Commission who are with us
13 this morning:
14 Glenn Lau-Kee, at the table to my far left is
15 a partner at Kee and Lau-Kee and former president of
16 the New York State Bar Association.
17 Sarah Jo Hamilton. Sarah is a partner at
18 Scalise, Hamilton and Sheridan LLP, former trial
19 counsel and First Department Deputy Chief Counsel to
20 the Departmental Disciplinary Committee of the
21 Appellate Division First Judicial Department.
22 Monica Duffy. Monica is the chief counsel
23 to the Committee on Professional Standards with the
24 Appellate Division, Third Judicial Department.
25 Donna English. Donna is not here.
26 EJ Thorsen who is with us is an associate at

1 Proceedings

2 Vishnick, McGovern and Milizio and she is vice
3 president of the Korean American Lawyers Association of
4 Greater New York and a member of the Character Fitness
5 Committee for the Second, Tenth, Eleventh and
6 Thirteenth judicial districts.
7 I am deeply grateful to the members of the
8 Commission for their hard work these past several
9 months and I want to thank every one who is able to
10 join us today.
11 I would also like to extend my thanks to New
12 York County Lawyers Association for hosting this event
13 and graciously extending the time that they were able
14 to have us utilize this room.
15 I would be remiss if I also didn't extend my
16 thanks and the thanks of the chief judge and the
17 Commission to my predecessor as chair, former Deputy
18 Chief Administrative Judge A. Gail Prudenti for her
19 stewardship of the Commission over its first four
20 months.
21 Now, I would finally ask that all of the
22 witnesses keep their voices up. We do have a court
23 reporter present taking verbatim all of the testimony
24 and I would remind the witnesses that the transcript of
25 their testimony will be posted to the Commission's web
26 page and possibly included as an appendix to our final

Claudette Gumbs

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1 Proceedings
2 report. In other words, whatever you say here today
3 at this public hearing will be available to the public.
4 Now I just have one final caution for the
5 witnesses: The Commission is a fact-finding body. It
6 is neither an investigative nor an adjudicative body
7 and therefore, it has no authority, either over the
8 disciplinary committees or the grievance committees and
9 has no authority with respect to either the
10 investigation or the adjudication of any individual
11 cases, complaints or grievances.
12 The Commission in fact is involved in making
13 recommendations to the chief judge about the
14 disciplinary process statewide, both in terms of rule
15 making and policy, so please keep that in mind as you
16 make your remarks.
17 Our first witness this morning -- our first
18 witnesses are Andrea Bonina and Pery Krinsky, New York
19 State Academy of Trial Lawyers.
20 MS. BONINA: Good morning.
21 On behalf of the New York State Academy of
22 Trial Lawyers, I would like to thank the Commission for
23 giving us the opportunity to express our views on the
24 important issue of attorney discipline in New York.
25 My name is Andrea Bonina and I am both a long time
26 Academy member and a member of the Grievance Committee

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1 Proceedings

2 of the Second, Eleventh and Thirteenth judicial
3 districts. I want to state from -- at the outset that
4 my testimony today does not reflect any point of view
5 of the Grievance Committee and rather is being given
6 solely on behalf of the New York State Academy of Trial
7 Lawyers.
8 MR. KRINSKY: Members of the committee, my
9 name is Pery Krinsky and I, too, am a long-time Academy
10 member. My practice specifically focuses on attorney,
11 judicial and law school disciplinary matters and I also
12 serve as JUDGE COZIER of the Committee on Professional
13 Discipline for the New York County Lawyers Association,
14 but again, my comments, too, are limited to those with
15 respect to the Academy.
16 We are here for very important issues and we
17 understand that these are issues that deserve serious
18 and thoughtful consideration. We all understand that
19 the goal of the disciplinary process is not punishment,
20 but rather, the protection of the public.
21 With that said, for a number of different
22 reasons it is the Academy's position that the issue of
23 escrow theft by attorneys should not be the driving
24 force behind any of the findings of this Commission.
25 The grievance and disciplinary committees throughout
26 the State of New York receive approximately 10,000

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2 disciplinary complaints each and every year and yet,
3 only a tiny fraction of those 10,000 plus disciplinary
4 complaints relate to escrow theft. Concededly, escrow
5 theft is by far perhaps the most serious offense to be
6 committed by an attorney. Lawyers themselves in this
7 regard, though, play an important role in self-policing
8 the profession. We understand that escrow theft,
9 because it is perhaps the most severe, often warrants
10 disbarment or warrants a very serious and significant
11 period of suspension. But again, this issue can be
12 combatted in other ways. We understand that not only
13 are we a self-policing profession, but there are also
14 safeguards set up in place. For example, self
15 reporting with respect to bounced checks and the idea
16 that under Part 1300, bounced check reporting rules
17 actually create an internal audit procedure in a sense
18 that again goes to the issue of how escrow theft is
19 very often determined or uncovered.
20 While it is true at times that the Appellate
21 Division may decide to impose prolonged periods of
22 suspension where an attorney has stolen escrow or
23 fiduciary funds rather than disbarring an attorney,
24 that decision typically is the result of a well thought
25 out analysis taking into account the issues,
26 aggravating and mitigating factors and indeed,

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1 Proceedings
2 disbarment still remains the default sanction in New

3 York for escrow theft.
4 Given this, respectfully, it makes little
5 sense to reconstruct or in a sense to revamp the entire
6 state's disciplinary system based on this one issue
7 alone. Accordingly, the Academy respectfully submits
8 that the matter of attorney escrow theft should not
9 drive the findings this committee.
10 MS. BONINA: With regard to the claim that
11 New York's departmental based system leads to statewide
12 disparities and sanctions, it is our opinion that any
13 disparities are reflective of the fact that each case
14 is unique and receives consideration of all mitigating
15 and aggravating factors. The fact that two lawyers
16 who are found to engage in similar attorney misconduct
17 may in some instances receive a different sanction, is
18 a result in our opinion to be applauded, not
19 criticized.
20 The Academy opposes any plan that would
21 implement mechanistic and uniformity driven rules such
22 these embedded in the United States federal sentencing
23 guidelines, these guidelines as I am sure every one
24 recalls were so widely criticized that the United
25 States Supreme Court struck them down -- struck down,
26 rather, their mandatory nature. Like in criminal

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1 Proceedings
2 cases, each attorney discipline case is separate and

3 sanctions should take into consideration all of the
4 contributions an attorney has made during his or her
5 career, as well as any and all other mitigating
6 factors. That is the system as it exists in all four
7 judicial departments today and that system works well.
8 There may appear to be unexplainable differences in the
9 level of sanctions imposed in different cases, but
10 largely that is due to the fact that certain
11 departments include more of the facts in their
12 disciplinary decisions. As with every area of law,
13 each fact pattern in a disciplinary complaint is unique
14 and the fact that each fact pattern is unique will
15 unavoidably result in individualized decisions.
16 Any concern regarding disparities in
17 decisions can be addressed by better education of the
18 bar and of the public concerning the mitigating factors
19 and the extent of the investigation.
20 MR. KRINSKY: The Academy does not believe
21 that the procedural uniformity among the four appellate
22 divisions is a key to a better disciplinary system in
23 New York. Those who argue that New York needs a
24 better disciplinary system and that the only way to
25 attain that better system is through uniformity have in
26 effect sought to lump together a number of different

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1 Proceedings
2 issues into a single basket in an attempt to argue that
3 really a better system is a one size fits all

4 disciplinary process.
5 Many of these concerns center around issues
6 of delay, plea bargaining and dissatisfaction by some
7 with respect to the private nature of the attorney
8 disciplinary process. With regard to the issue of
9 delay, for example, disciplinary cases do in fact take
10 a considerable amount of time and that is necessarily
11 so when we consider issues and safeguards such as due
12 process and other protections afforded not only to
13 lawyers, but also, to the public. Similarly, the
14 issue or the principal issue of timing is really
15 grounded not in the issue of creating a better system
16 or a different system but rather, improving upon the
17 system that we currently have, first and foremost as we
18 all know by making sure that necessary funds are in
19 place to provide the disciplinary and grievance
20 committees with the necessary resources to work within
21 the system and to improve upon it.
22 Somewhat related to this issue of delay is
23 the claim of plea bargaining would enhance the
24 disciplinary process. But simply engaging in plea
25 bargaining in a sense giving an attorney an opportunity
26 to simply pick or choose or identify which disposition

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1 Proceedings
2 he or she is interested in would not eliminate the fact
3 that a staff member of the disciplinary committee or

4 the Grievance Committee would still nonetheless be
5 required to fully investigate that matter regardless of
6 any plea bargaining. Even with minor disciplinary
7 infractions, when a grievance or disciplinary staff
8 member investigates a case and chooses to proceed one
9 way or another, whether it be informal disciplinary,
10 private disciplinary or public charges that are
11 ultimately prosecuted, nonetheless that staff member is
12 required to fully investigate every and all matters.
13 Indeed, the fact is that when it comes to disciplinary
14 matters, whether they proceed on a formal or informal
15 basis, the committee members always must take into
16 account issues of mitigating and aggravating factors,
17 therefore leaving certain at least disciplinary cases,
18 really not issues of liability but rather to mitigation
19 and aggravation which goes to the issue of sanction and
20 not liability.
21 MS. BONINA: There are some that would argue
22 that the attorney disciplinary process should be open
23 to the public at the charging stage. The Academy is
24 firm in its view that an attorney's name and reputation
25 should not be damaged or ruined unless and until the
26 Appellate Division has made a determination that

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1 Proceedings
2 serious misconduct has been committed.
3 A complaint against an attorney is -- which
4 is not proven is just that, an unsubstantiated claim.

5 To allow an attorney's reputation to be sullied based
6 on an unsubstantiated claim would simply be wrong.
7 Everyone is innocent until proven guilty. Where there
8 is theft relating to third party funds or other
9 criminal conduct by an attorney, which is clearly the
10 type of conduct that most impacts the public, law
11 enforcement is often advised at an early point in time
12 and the attorney is prosecuted promptly. In those
13 instances, it would make no difference if the
14 disciplinary process were open at the charging stage,
15 because at that point public has become aware of the
16 attorney's error.
17 Finally, uniformity of process and standards
18 among the four appellate divisions is not necessarily a
19 worthy goal in and of itself. In New York State,
20 there is a legislative and judicial recognition that
21 each Appellate Division he should control the
22 disciplinary process and the disciplinary standards
23 within its own borders and most disciplinary complaints
24 do not deal with black and white issues; most
25 complaints deal with more subtle issues than black and
26 white issues such as theft of clients' or fiduciary

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1 Proceedings
2 funds. They deal with issues such as conflict of
3 interest, client neglect, client inattention and the
4 resolution of those types of disciplinary complaints is

5 driven very much by the standard of practice of lawyers
6 in each judicial department. There is a genuine
7 benefit to local control of disciplinary conduct and
8 this can only be accomplished by a disciplinary process
9 which considers local community standards.
10 The Academy asks this Commission to exercise
11 its wisdom carefully and to recognize that
12 fundamentally, the New York State attorney disciplinary
13 system works and works well. What the disciplinary
14 system requires most is a financial commitment to
15 provide greater resources both to increased staffing
16 and for better attorney education.
17 JUDGE COZIER: Excuse me. I will interrupt you
18 because your time is up. So if you could just
19 summarize.
20 MS. BONINA: My final sentence is that
21 greater resources and not procedural fixes will improve
22 the system and make it an even better one.
23 JUDGE COZIER: Thank you.
24 Members of the committee.
25 MR. ZAUDERER: Thank you, thank you for your
26 testimony and I have read the Academy's submission and

2 I have a question for you on the issue of uniformity.
3 While we have heard from you and suggestions from
4 others as well that the disparity in severity of
5 punishment in different departments is a factor of

6 individual attention to individual cases, but it seems
7 to me if that were true, what we would see for example
8 in one department, a range of punishments and another
9 department a range of punishments and they would look
10 similar, but what we are seeing is a cluster, that in
11 one department there is a cluster of severity with
12 respect to the number of offenses and with respect to
13 the same offenses in another department, much less or
14 less severe punishment. So it would seem to me that
15 that difference cannot be accounted for by individual
16 attention to individual cases, because that would occur
17 in both departments.
18 Could you comment on that?
19 MS. BONINA: I do believe that when we have
20 complaints that are under review, there is a very
21 significant investigation. Each case is taken
22 individually. There are always mitigating factors that
23 are considered and that is something that I believe is
24 something to be applauded. I think that is something
25 that has a value, because each case is different and
26 there are cases where the substance of the complaint

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1 Proceedings
2 may be the same, but one practitioner -- there is
3 evidence that they did not work with the committee,
4 that they weren't responsive and that may lead to a
5 more harsh penalty whereas somebody comes in with

6 mitigating evidence such as that he were suffering from
7 depression or mental illness, and that could lead to a
8 less severe penalty.
9 MR. ZAUDERER: I will pass.
10 MS. KEWALRAMANI: Thank you for your
11 testimony. One of the things that you mentioned is
12 that there are benefits to local control over the
13 disciplinary system.
14 Could you please elaborate on that for us?
15 MR. KRINSKY: Sure. I think one of the
16 things, going back to your question as well and it
17 dovetails, is for example when we consider for example
18 that the Second Department accounts for approximately
19 20 to 25 percent of all attorneys in the State of New
20 York, yet the Second Department also accounts for
21 approximately 59 percent of all escrow thefts. The
22 numbers in a sense don't match and it is -- it is a
23 prime example really of why there are certain problems
24 that exist with respect to attorney conduct in certain
25 departments, or in certain geographical locations but
26 not in other departments or other areas. And it is

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1 Proceedings
2 for that very reason that the individualized attention,
3 the individualized justice in a sense that is afforded
4 to lawyers on the local level is necessary because it
5 allows disciplinary and grievance committees and the
6 Court to take into account the very specific issues

7 that exist facing lawyers within that geographic area.
8 MS. BONINA: This is not something that is
9 unique to the grievance process. If you were to
10 review values of different injuries, let's say in a
11 personal injury case, the value of a broken leg in The
12 Bronx would be quite different to the value of a broken
13 leg in Erie County. There are differences based on
14 local processes and local ideas and thoughts that do
15 change from department to department.
16 MR. GUIDO: Thank you, Ms. Bonina and Mr.
17 Krinsky. I appreciate your taking the time to come
18 down.
19 On this point, on the disparity issue, and I
20 understand the argument that many -- what is perceived
21 as disparity is really in the details of the mitigation
22 and the facts but when you have a system where it is
23 known and those of you who -- like yourself, Mr.
24 Krinsky have practiced in this field, when you advise
25 your client/respondents or client/lawyers, it is pretty
26 well understood, if you commit an escrow theft, an

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1 Proceedings
2 intentional escrow theft in the First Department they
3 virtually begin with the presumption of you work from
4 disbarment and go from there if there is sufficient
5 mitigating circumstances. That is not necessarily the
6 case elsewhere around the department. So whether

7 you're stealing escrow funds in Erie County or on Long
8 Island, it is the same act of misconduct and when you
9 have a process that the jumping off point is different,
10 wouldn't you agree there is a measure of fairness in
11 that, not only to the lawyer, the accused lawyer but
12 also to the victims and those client as to whether or
13 not every one will be treated at least from the jumping
14 off point starting the same and the corollary to that
15 is if that is the case, why is it problematic for the
16 Court's to adopt a set of guidelines or standards for
17 sanctions as is done in a majority of other states?
18 MR. KRINSKY: I think two-fold;
19 One, with respect to the beginning point or
20 the ending point, I think it is perhaps even somewhere
21 in between, I think we understand that perhaps very
22 often there is a floor and there is a ceiling and a
23 degree of discipline fits within that range, based upon
24 a set of factors such as aggravating and mitigating
25 factors. As to -- in reverse for a moment the idea of
26 creating a standardized set of guidelines in and of

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1 Proceedings
2 itself is not problematic, but I would also suggest
3 that in effect we already have those guidelines in
4 place through decisions that the four appellate
5 divisions have issued identifying very specifically
6 aggravating and mitigating factors, no different than
7 those cited by at least three out of the four appellate

8 divisions when citing to the ABA standards on the
9 imposition of discipline, both aggravating and
10 mitigating factors. So we have already in effect taken
11 those into consideration, but I think what really goes
12 to the heart of the issue is that the individualized
13 justice, if you will and imposition of discipline on
14 lawyers really must be aimed at identifying what the
15 issue is, why it came about in the first place, how we
16 insure it never happens again and when we consider all
17 of those in the context of the need for greater
18 education for lawyers, we understand why there is
19 perhaps disparity because different lawyers require
20 different degrees of sanctions or education to insure
21 that discipline or that misconduct does not occur in
22 the future.
23 (Whereupon, the following was transcribed by
24 Senior Court Reporter Monica Horvath.)
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1 Proceedings
2 JUDGE COZIER: Justice Skelos?
3 JUDGE SKELOS: Good morning.
4 I have two questions. The first one I think
5 can maybe be dealt with a yes or no answer.
6 So that question is what is the Academy's
7 position on public disclosure in the instance where

8 there has been an interim suspension, would you be
9 against that or would you be for that?
10 MR. KRINSKY: It is the Academy's position that
11 the current status of the law, Judiciary Law 90 is
12 properly in place which says that unless and until
13 public discipline is imposed the matter should not
14 become a matter of public record. Because we understand
15 that even though an interim suspension may have been
16 imposed there has not yet been a full adjudication as to
17 that lawyer's guilt or innocence. And until that
18 happens --
19 JUDGE SKELOS: There is a very high standard of
20 proof to be met for the purposes before there is going
21 to be an interim suspension, correct?
22 MR. KRINSKY: The high standard of proof -- the
23 answer is yes, but the high standard of proof is put
24 into place to specifically in a sense take a lawyer and
25 to sideline that lawyer until such time that we can make
26 a full determination as to the full scope of what is

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2 happening, including issues of guilt or innocence.
3 JUDGE SKELOS: The second question relates to the
4 question of efficiency.
5 And as a practitioner, you in particular,
6 Mr. Krinsky, where do you see the cause for delay other
7 than in the question of funding staffing?
8 MR. KRINSKY: I think it is a combination,

9 perhaps of one, lawyers not being represented by counsel
10 or not having a resource to go to to better understand
11 the disciplinary process. And I think unfortunately
12 some lawyers who find themselves facing a disciplinary
13 complaint don't understand the distinction between
14 perhaps a disciplinary complaint and a civil complaint.
15 The idea that it is not simply about admit, deny, admit,
16 deny, but rather it is about letting the committee,
17 understand the story, telling a story so that they
18 understand that either something was done properly here
19 or wasn't done properly here. But I think there is a
20 lack of understanding in and of itself within the
21 disciplinary process itself.
22 JUDGE SKELOS: So all lawyers are required to
23 attend an ethics program?
24 Do you suggest that all lawyers be required to
25 attend an ethics program that effectively goes through
26 the process so that no lawyer can say that he or she

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2 didn't understand the significance of the receipt of a
3 complaint and what needed to be done?
4 MR. KRINSKY: I think that that is part of it,
5 sure. But if someone is taking that CLE, at the
6 beginning of their career as is often the case in the
7 beginning interview there are certain programs that are
8 offered --

9 JUDGE SKELOS: Orientation?
10 MR. KRINSKY: Orientation, yes. Thank you.
11 Orientation programs. Unfortunately, for
12 better or worse it is not perhaps ten years into your
13 career where you are actually faced with that
14 disciplinary complaint.
15 And why aren't we reeducating lawyers at that
16 point and at the same time why aren't we educating
17 complainants about the proper use of the disciplinary
18 processes versus the improper use of the disciplinary
19 process.
20 JUDGE COZIER: Thank you both for your testimony.
21 MR. KRINSKY: Thank you.
22 MS. BONINA: Thank you.
23 JUDGE COZIER: Our next witness is an attorney
24 Karen Winner.
25 Miss Winner?
26 MS. WINNER: Good morning, distinguished panel

2 members, good morning, audience members.
3 My name is Karen Winner. I am a New York
4 attorney. And for years I have had a deep interest in
5 how legal consumers are effected by the secrecy
6 surrounding the discipline of lawyers.
7 Before I became a lawyer, I wrote a report more
8 than 20 years ago for the New York City Department of
9 Consumer Affairs -- Mark Green was the Commissioner --

10 "Women In Divorce, Lawyer's Ethics, Fees and Fairness,"
11 and it found that the public is not protected from
12 dangerous lawyers.
13 I drafted the Client Bill of Rights that
14 divorce lawyers are now required to give their clients.
15 For decades it has been publicly known that the
16 New York Lawyer Disciplinary System fails to protect
17 consumers from unscrupulous, or incompetent, attorneys.
18 We know that the New York system is too secret and metes
19 out inconsistent discipline due to Individual Practices.
20 And we also know that the system is being held captive
21 to vested interests of lawyers who don't want any
22 changes to the status quo.
23 Consumers have no way of knowing which lawyers
24 are being investigated for serious misconduct. This
25 secrecy leaves consumers vulnerable to financial
26 predators with law licenses.

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1 Proceedings
2 What are the ramifications to the secrecy?
3 Because the client is left in the dark about the
4 lawyer's pending disciplinary matter, the unsuspecting
5 client will go to the Office of Court Administration's,
6 web cite, look up the lawyer and see no public
7 discipline under the lawyer's name. And that client
8 then believes he or she is perfectly safe to hire that
9 attorney. The client does not know that the unscrupulous

10 lawyer can keep practicing all the way up until the very
11 end of the process. And that can take years. And that
12 whole process remains secret.
13 So what happens when a client unknowingly,
14 hires an unscrupulous attorney who has serious
15 allegations pending?
16 That unsuspecting client hires the lawyer and
17 then the trouble begins. The lawyer won't return calls,
18 or, drags out the case with unnecessary motions or,
19 won't follow the client's objectives, or, starts
20 engaging, in myriad forms of fee abuse, like fee
21 padding, where fraudulent charges are added to the bill.
22 These are real problems and they are ethics violations.
23 The client becomes concerned, starts to loose confidence
24 in the attorney and then finally the client has to
25 terminate the attorney for the client's own best
26 interest.

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1 Proceedings
2 Especially, in divorce proceedings where I'm
3 most familiar there is another ramification, changing
4 attorneys carries a stigma. The opposing lawyer will
5 invariably use it as a tactic with the judge that the
6 client who changes attorneys is a difficult client. The
7 judge has no way of knowing due to the secrecy that the
8 client was victimized and terminated the lawyer for his
9 or her own self interest. Even the judge has no way of
10 knowing that the discharged lawyer is under

11 investigation.
12 Secondly, the client who has had to terminate
13 his or her relationship with an unscrupulous lawyer has
14 wasted the client's financial investment and a new
15 lawyer has to be hired and the client has to start all
16 over again with no recompense for the lost money.
17 Why should lawyers have special protections,
18 when they are under investigation, business people
19 don't. The average citizen doesn't. If the New York
20 disciplinary system would lift the secrecy and allow the
21 public to see the complaint histories lodged against a
22 particular attorney maybe clients wouldn't need to
23 change attorneys so often because they would have the
24 attorney to be informed and know who has a record. The
25 client would know how to protect him or herself before
26 it is too late.

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2 And publishing a report of complaint histories
3 while they are pending would protect honest attorneys.
4 Because the whole system is affected. The profession is
5 being tainted and honest attorneys are being tainted.
6 Here is some solutions. There should be a
7 consumer alert to warn consumers against lawyers who are
8 under investigation for major misappropriation of funds.
9 Abolish the gag rules that prevent people from speaking
10 publicly about the complaints they have filed. Disclose

11 a lawyer's disciplinary history so the public can be
12 informed including private admonitions. Open the
13 hearings to the public just the way that they are opened
14 in criminal and civil proceedings. It will take courage
15 and leadership to institute these reforms. There are
16 powerful interests as everyone knows who will urge the
17 leaders to maintain secrecy but the public's safety
18 should come first.
19 Thank you.
20 (Applause.)
21 JUDGE COZIER: Mr. Zauderer?
22 MR. ZAUDERER: Thank you for your testimony. I
23 have two related questions on this issue of openness.
24 MS. WINNER: Yes?
25 MR. ZAUDERER: First of all, you referred to
26 criminal proceedings, the fact that they are open. May I

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2 remind you that the reason for opening criminal
3 proceedings has been for hundred of years and has been
4 in our Constitution to protect the accused person from
5 secret proceedings. So the analogy of professional
6 discipline proceedings is not exactly accurate.
7 So, relatedly, I would ask you if you are an
8 individual practitioner doing your best and practice
9 honorably and you are a very competent lawyer and as
10 often happens you have a dispute with a client and the
11 client makes a complaint to the Disciplinary Committee

12 and says things which in your judgment are either just
13 totally wrong or just totally distortional is it your
14 view that the public should have access to that
15 complaint and would you not be concerned that the lawyer
16 and the lawyer's profession is being unfairly interfered
17 with?
18 MS. WINNER: You know, there are already states
19 that do that. They already have open records.
20 I spoke to West Virginia's disciplinary
21 personnel a few days ago and they gave me the
22 statistics, showing the closed complaints. Including,
23 meritless complaints and all the others. And the
24 lawyers in West Virginia aren't having any problem with
25 it.
26 It is the same in Florida and it is the same in

2 Oregon. And, so, I think that this is like a -- I think
3 that this is a real worry of lawyers. But I think it is
4 a real worry but that is really kind of contemptuous of
5 the public. You know why? Because most people who bring
6 complaints are very serious and sincere, just like
7 people that bring allegations in Criminal Court. And to
8 separate those people and, say, oh, yeah, they are just
9 trying to retaliate because they don't like how it
10 happened, they don't like how the case turned out is
11 really not doing justice to the American people. They

12 deserve, you know, more better thinking about them.
13 (Applause.)
14 MR. ZAUDERER: Thank you.
15 MS. WINNER: You're welcome.
16 JUDGE COZIER: Justice Skelos?
17 JUDGE SKELOS: I think that you have suggested
18 that there is perhaps a pattern of recidivism that
19 happens with respect to the lawyers who are under
20 investigation. Is that a fair summary of what you are
21 saying? That a lawyer who is under investigation is more
22 likely to be one who is committing further ethical
23 violations while that attorney is under investigation,
24 is that the claim that you are making?
25 MS. WINNER: Yes. Anecdotally, I have been
26 receiving --

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2 JUDGE SKELOS: So, my question becomes --
3 MS. WINNER: Yes, yes.
4 JUDGE SKELOS: With the number of complaints that
5 we have in this state is there any empirical evidence to
6 support the fact that once an attorney has a complaint
7 filed against him or her that during the course of that
8 investigation that attorney is then committing further
9 ethical violations jeopardizing other litigants?
10 MS. WINNER: What I can tell you is that I have
11 been receiving complaints about attorneys -- I wrote a
12 book, a national expose, about this in 1996, "Divorce

13 From Justice," published by Harper Collins. And I have
14 received complaints for over 20 years about attorneys.
15 And invariably, there have always been multiple
16 complaints about certain attorneys. And when there is
17 just one complaint about an attorney, it seems like
18 aberration, but when there are multiple complaints about
19 attorneys --
20 JUDGE SKELOS: That is what I'm asking you.
21 Okay, you are sort of an academic, I will say.
22 You have written a paper and you have written a book,
23 okay, and I'm asking you in the course of your study of
24 this issue --
25 MS. WINNER: Yeah.
26 JUDGE SKELOS: Which apparently is going on

1 Proceedings
2 20 years, have you accumulated empirical data to support
3 the suggestion that while an attorney is under
4 investigation that attorney is then committing other
5 ethical violations involving other clients?
6 MS. WINNER: Well, that is a really good
7 question and I don't know if any researchers can answer
8 that empirically, because the system is secret.
9 VOICE: Yeah.
10 (Applause.)
11 JUDGE SKELOS: If the first complaint is founded
12 and another complaint is filed and that complaint is

13 founded, would you be able to match up the date of the
14 first complaint which was founded and then if the second
15 complaint or third complaint was founded you would be
16 able to match up those dates and you would be able to
17 establish that during the course of an investigation,
18 there were indeed further violations --
19 MS. WINNER: I understand.
20 JUDGE SKELOS: I'm just asking, have you done
21 that study or do you know of any such study?
22 MS. WINNER: I can't do it because it is secret.
23 We don't know about the investigations.
24 (Laughter and applause.)
25 MS. WINNER: But I can tell you something, I
26 can tell you something. Because of the way the system is

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2 set up, lawyers will, they will retire.
3 I have had situations where a complaint has
4 been made and pending that the lawyer will retire and
5 then there will be other complaints that come up but
6 then they won't be investigated because the lawyer
7 retires.
8 And I helped a family from India, recover
9 $70,000 in funds because their lawyer stole from the
10 settlement agreement when the father was killed in a
11 temple and the lawyer -- the wrongful death reward --
12 stole part of the money from the widow and the children,
13 and that lawyer retired. And there were other

14 complaints pending and they never saw the light of day.
15 And I think this is serious problem. And I don't mean
16 to sound strident.
17 (Applause.)
18 JUDGE COZIER: All right, thank you very much for
19 your testimony.
20 MS. WINNER: You're welcome.
21 VOICE: Yeah. Brilliant, brilliant.
22 (Applause.)
23 JUDGE COZIER: Now, I want to ask all of the
24 participants today to try and maintain some control. We
25 have many witnesses to hear from. This is a fact
26 gathering session so we cannot really have outbursts

2 from people who are not, you know, testifying. We have
3 to have a record here. So I'm going to ask for your
4 cooperation.
5 The next witness is Deborah Scalise, from
6 Scalise, Hamilton & Sheridan, in Scarsdale.
7 VOICE: Sir, could you maybe move your
8 microphone a little closer because we have a hard time
9 hearing back here?
10 Thank you.
11 JUDGE COZIER: Deborah Scalise.
12 VOICE: Much better. Thank you.
13 JUDGE SKELOS: Thank you and good morning.

14 My comments are limited to a very specific
15 area.
16 Some of you know me. I have been a former
17 Deputy Counsel at the Disciplinary Committee, and, now,
18 my career is on the other side. And what we do is
19 proactively and defensively, represent lawyers and
20 judges in their disciplinary issues, as well as other
21 issues. People do come to us beforehand to ensure that
22 they are in compliance.
23 These views -- first, a disclaimer -- these
24 views are my own. I belong to several Bar Associations.
25 I am on several committees. But they are not their
26 views they are mine. They are gleaned by virtue of my

Monica S. Horvath - Senior Court Reporter

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1 Proceedings
2 experiences in 25 years in this area of practice. Nor,
3 are they the view of any governmental agency that I
4 formerly worked for or my partners. They really are
5 borne of the fact of representing lawyers. And lawyers
6 are people too and they have issues too.
7 What you may not know about me is that in
8 addition to my juris doctorate, I hold a masters in
9 Forensic Psychology. And, very often, lawyers have
10 psychological or health issues too. Hence, I'm here
11 today to speak about lawyers with mental disabilities,
12 or, addiction problems from the perspective of my
13 professional experience of these past 25 years. We have
14 prosecuted and defended lawyers as well as perspective

15 lawyers with respect to admissions and disciplinary's.
16 They have been diagnosed and they have been treated.
17 And I think it is very important to understand that
18 sometimes their misconduct is not borne of the fact that
19 they are doing intentional things, but maybe they have
20 an issue that has bled over into their practice and will
21 explain things. So, over the past 25 years, I have
22 worked with both the New York State Bar and the
23 Association of the Bar of the City of New York with the
24 Lawyer's Assistance Program. And they have an
25 anniversary in the New York State Bar and I would like
26 to congratulate them on that. They have now expanded

2 their scope. Initially, they dealt with addictions. And
3 lawyers have addictions, sometimes. But, now, they deal
4 with lawyers in distress generally.
5 What types of things do lawyers experience?
6 They experience what everybody in the general
7 population, experiences but sometimes it is greater
8 because of the stress factors associated with lawyering.
9 We are the "hired guns" of our clients and sometimes we
10 have issues that would bleed over into our practice.
11 But, if left undertreated these mental health issues can
12 impact and sometimes harm clients.
13 What my goal is here today is to educate you so
14 that we could have some uniformity with respect to those

15 types of things. If these mental health issues which are
16 sometimes physical issues like a stroke are left
17 untreated and are masked they can have professional and
18 personal consequences that can be devastating. So, due
19 to my interest in this area I often teach continuing
20 legal education. And I did an informal survey and it is
21 part of the materials I gave you. Looking at the rules
22 in each department as well as the outcome there is a
23 great disparity in what happens.
24 For instance, the process has disparity, as
25 well as the rules. The facts in the reported decisions,
26 you can see that there is a difference between upstate

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2 and downstate with respect to how lawyers with mental
3 health issues are treated. And I gave you an outline
4 with respect to that.
5 Quite simply, it is not just the rules and
6 procedures that need reform and uniformity, but
7 sometimes it is reactions to and policies implemented,
8 when dealing with impaired lawyers. My informal survey
9 demonstrates that in a majority of decisions the
10 downstate courts will give you chapter and verse about a
11 lawyer's mental health issues or physical health issues.
12 And they feel it necessary to give a detailed recitation
13 of the information provided by lawyers charged with
14 misconduct who attempt to defend against or mitigate the
15 charges by offering psychological or medical evidence.

16 I am aware of several instances where such information
17 was set forth in detail in published decisions which
18 informed the world at large that the attorney had been
19 abused as a child or had other psychological issues
20 which were personal and embarrassing. Needless to say,
21 while such details should be reviewed by the factfinders
22 and the court, I believe it is unnecessary to report
23 every detail in the opinion because it appears that the
24 lawyer is being punished for having and seeking
25 treatment for such issues.
26 I hope this testimony is received in the spirit

2 that it is intended. Not to criticize, but rather to
3 further assist in educating you and the public with the
4 hope that we could have a complete picture of how a
5 lawyer with mental health issues is treated.
6 The procedures set forth in the court rule need
7 uniformity in three respects, incapacity, medical and
8 psychological evidence and diversion.
9 Take incapacity, for instance. In the First
10 and Second Department the rule is pretty uniform and I
11 set it forth for you. But even in this context there are
12 some variations and inconsistency. Harmonizing these
13 rules will provide a clearer policy and guidance with
14 respect to incapacitated lawyers.
15 In the Third Department there is a two-part

16 rule. And in the Fourth Department there are two
17 separate rules. The characterizations are different
18 though. There are references to incompetence, alleged to
19 be incapacitated, incompetency, involuntary commitment
20 or disability. And I ask you does a disability
21 constitute incapacity or incompetency?
22 What constitutes an involuntary commitment?
23 Does the Reporting Rule RPC 8.3 require a lawyer to self
24 report another lawyer who knows of a lawyer who falls
25 under one of these categories to report the impaired
26 lawyer to the court or to the Committee?

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2 I believe we need uniformity and consistency,
3 to defy the terms so that lawyers as well as counsel to
4 the Committee, the public and the courts, all understand
5 the parameters of such issues when they arise in the
6 disciplinary process. These changes will afford the
7 impaired lawyer with the necessary notice to have him
8 have due process when faced with issues of impairment,
9 whether such issues stem from or are related to physical
10 or mental disability or incapacity.
11 Now, as to medical and psychological, evidence,
12 while all four departments accept it the Second
13 Department actually has a rule that provides for what
14 you should do when you offer medical or psychological
15 testimony. It provides that counsel -- meaning, defense
16 counsel -- must give 20 days notice prior to hearing and

17 sign waivers to allow the Committee access to the
18 records of the medical or psychological professionals
19 and treatment providers. And I believe it should be
20 uniformly adopted in all departments, because it gives
21 parameters. As it stands, once such evidence is offered
22 in evidence or mitigation the attorney who put the issue
23 forward is subject to the dictate of the committees now
24 as to what records they must provide. While we
25 recognize that lawyer related -- that the lawyer raised
26 the issue and that staff is obligated to challenge the

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2 voracity of any such defense or mitigation there have
3 been instances when scepticism and lack of sensitivity
4 is disparaging. On occasion my witnesses have reported
5 some committee scepticism as to lawyer's treatment plans
6 and support system.
7 Moreover, this rule from the Second Department,
8 is a good start as to the parameters of notice and
9 waiver but needs expansion to allow for medical and
10 psychological issues as a defense and also a section
11 that allows for maintaining confidentiality and sealing
12 of such evidence in the record. This is particularly
13 important and I will explain later for reasons that I
14 will explain later.
15 Lastly, diversion. And this is a very
16 important rule as you will no doubt hear again. We have

17 diversion rules in the Second, Third and Fourth
18 Departments, but not in the First Department. And while
19 they will do that informally there is no specific rule
20 laying out what the guidelines are. And also diversion
21 is limited to treatment for addiction issues but not
22 psychological issues. So really, we have a very limited
23 rule where diversion explains if you are addicted to
24 drugs or alcohol. You can have a diverter issue and the
25 investigation while you seek treatment. It doesn't quite
26 make sense when you look at the DSM-5 which is the

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2 guideline because addiction comes under one of the
3 categories of psychological treatment. So from a
4 lawyer's assistance program they too look at the
5 psychological issues, but that does not afford lawyers
6 diversion in each of the departments. So it is my view
7 that if all departments would have a uniformed diversion
8 rule which expands to include psychological as well as
9 addiction issues that would be helpful because lawyers
10 will be informed as to what will happen if they seek
11 help.
12 Second, addictions, as they are classified
13 under mental illnesses diversion should be expanded that
14 way.
15 Lastly, my experiences. And I will relate some
16 stories to you and they are anecdotal and I think they
17 are important.

18 JUDGE COZIER: We are almost out of time.
19 MS. SCALISE: So I will just give you one
20 experience and I will wrap up.
21 There was a lawyer I was prosecuting and he was
22 hospitalized because he was bipolar. And, he called
23 me -- and we were in the middle of the proceedings and
24 they were getting ready to disbar him because he failed
25 to cooperate with the committee -- and what he said to
26 me was: "I need an adjournment from the court. And, I

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2 said: "Okay, what's going on?" And, he said: "I'm in
3 the hospital. And I said: "Well, I will inform them
4 that you are in the hospital, and, he said: "No. I
5 would rather be disbarred. I would rather be disbarred,
6 than go out on a mental health issue because I will
7 never be able to come back." What I implore you -- and,
8 you could read my comments -- is that most lawyers try
9 to do the right thing. In my practice I have seen that
10 there are about a third of lawyers that do wrong things,
11 there are about a third of lawyers who make mistakes,
12 and there are about a third of lawyers who have a mental
13 health issue or some stressor that is leaning on their
14 practice. That last third is who we should help. We
15 need uniformity. We should get them treated. And it is
16 very rewarding to work with lawyers and business
17 professionals to get people on track and let them regain

18 their careers. If we do that they could then again
19 serve the public.
20 So I'm asking again that we have a diversion
21 rule, that we have some uniformity in the medical and
22 psychological testimony that's given and that when it
23 comes to incapacity -- and this is important -- if you
24 take a look at the cases upstate, how they are reported
25 and the cases how they are reported downstate, you can
26 help people.

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2 And you should inform people when an attorney
3 has been suspended for incapacity, but do you have to
4 give every little detail? Is that fair in what we do?
5 Lawyers can get back on track. We should make sure they
6 get back on track. And I am hopeful that you will
7 consider my testimony and consider a diversion rule and
8 uniformity, with respect to medical and psychological
9 issues.
10 Thank you.
11 JUDGE COZIER: Thank you.
12 Questions?
13 MR. GUIDO: Thank you very much, Miss Scalise,
14 for appearing this morning.
15 I'm personally grateful to hear you address
16 this subject which does not have widespread discussion
17 in the hearings. Because I think it is a very important
18 component to consider in terms of conforming the process

19 and also based on my own experience we share a higher
20 regard for those individuals that serve in the Lawyer
21 Assistance Programs who address these problems.
22 But I want to ask you two specific questions
23 with respect to diversion. And I have some interest in
24 that because I served on the commission run by
25 Judge Bellicose that enacted that proposed rule which
26 was adopted in some of the departments. But, one of the

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2 underpinning -- one of the main reasons driving that
3 rule was it was intended or it was designed to have
4 early intervention with lawyers who had not crossed the
5 line yet into serious misconduct as a result of their
6 addiction or other problems. As time has gone on -- and
7 my friends in Lawyer Assistance agree -- the rule has
8 not served that purpose. We have seen relatively very,
9 very, few cases of lawyers proceeding with requests for
10 diversion. I'm interested to know from your view, based
11 on all your experience why you think that is; is there a
12 problem in the rule itself? And, if the rule is not
13 working for that intended purpose why would we expand
14 that rule and why would the courts consider expanding
15 the rule when the mental health portion of it if it is
16 not accomplished set out to do?
17 MS. SCALESI: Conversion, actually came out of
18 this Bar Association I believe and it is in our reports.

19 Conversion was really thought about for people who were
20 making minor mistakes and maybe there was something else
21 going on.
22 In our practice area we usually see it because
23 maybe there was a DWI arrest which has nothing to do
24 with the lawyer's practice but of course they are
25 lawyers and they are sworn to uphold the law and if they
26 are arrested they can be prosecuted. So having said that

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2 diversion really is for getting people back on track.
3 And whether it is psychological -- and there are
4 psychological issues that people have. For instance,
5 the person who I had prosecuted who was by bipolar, he
6 stopped taking his medication. So they have to actively
7 participate fully, the lawyers, in order to get
8 diversion. And it is vetted by both the Disciplinary
9 Committees, the Grievance Committees as well as the
10 court. So there's a whole process that is involved with
11 that. And that means that the lawyers have to do the
12 work.
13 When it comes to lawyers assistance, they don't
14 just say this is my defense take it or leave it. They
15 are monitored. They must sign a contract. They have a
16 lawyer who monitors them regularly. They usually have
17 psychological treatment. If it is an addiction, they
18 generally go through an addiction dry out program. And,
19 then they will probably participate in either Narcotics

20 Anonymous or Alcoholics Anonymous. It is a great deal of
21 work. What I will tell you is, I was skeptical too.
22 When I was a young prosecutor -- I will call myself a
23 brat, because -- I thought how could someone who is so
24 smart do something so stupid. But when someone has a
25 psychological or addiction issue they are not their
26 selves. It is something that is a pull that they don't

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2 see and they cannot self diagnose. If they are now
3 confronted by the system and there is a tool to help
4 them sometimes it helps us too as defense counsel
5 because we get someone back on track. They don't see
6 that they have an issue. They don't see that there is a
7 problem, but we recognize it from years of experience,
8 so that we can get them the help. And by getting them
9 the help they then will do the right job for their
10 clients.
11 There are certain people that are never going
12 to get the help. We understand that. But, if they are
13 willing to work -- I did have a successful case where a
14 client did do the work for two years after a DWI and now
15 we are dealing with the diversion and we got a
16 dismissal. That was important to her because she had a
17 long history and she was glad for me to relate that to
18 you in my testimony. So what I am saying to you is
19 sometimes lawyers can get back on track and we need

20 those guidelines and parameters so we can help them.
21 Because most lawyers I believe are honorable if you look
22 at the statistics. Yes, this is a disciplinary process.
23 Yes, I have been part of both sides. But there are some
24 people whose mistakes can be corrected, if we can use
25 lawyers assistance and diversion to help them.
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1 Proceedings
2 JUDGE SKELOS: Just a comment.
3 Based on your experience of the impact for
4 the funding for the lawyers' assistance program, let's
5 say over the last seven to ten years, how has it
6 changed? And the significance of that in your view.
7 MS. SCALISE: I think that they very often do
8 god's work in lawyers assistance, because they are not
9 judging lawyers, they are assisting lawyers; so they
10 listen to the problems and they have an affinity for
11 what types of stresses lawyers have.
12 I know this past year OCA saw fit, you saw
13 fit to give additional funding to lawyers assistance
14 and it is much needed. They never say no to people.
15 Pat Spataro and Eileen Travis and their team of people
16 as well as volunteers to the bar associations, they can
17 be reached day and night and will call people back. If
18 someone is in a crisis, they will help them and I think
19 that is really important to understand. We are a
20 helping profession.

21 I would ask any lawyer in this room, why did
22 you go to law school? Why did you become a lawyer?
23 To help people. And that is what lawyers assistance
24 does and we work with them and they help people regain
25 their lives and careers and I think that is something
26 that is very important and should be well funded.

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2 JUDGE SKELOS: There was a time when it was
3 defunded?
4 MS. SCALISE: It was. It was a lawyers
5 assistance trust and because the courts were lacking in
6 funds, they did away with it and it would be helpful to
7 see it come back because they were at one point
8 offering grants to different bar associations. Right
9 now it is a piecemeal process, but what they do with so
10 little is admirable and helpful to lawyers and judges
11 throughout the state.
12 JUDGE COZIER: Thank you very much for your
13 testimony.
14 (Applause.)
15 JUDGE COZIER: The next witness is Bennett
16 Gershman, a professor of law at Pace Law School.
17 Mr. Gershman.
18 Is Mr. Gershman here?
19 PROFESSOR GERSHMAN: I am Ben Gershman and I
20 just want to thank this Commission for allowing me to

21 make a few comments on a subject that might be a little
22 bit different from the subjects that you're listening
23 to today and that is the subject of discipline of
24 prosecutors. Prosecutors are lawyers, as we know and
25 they are the most powerful lawyers in our society.
26 Prosecutors have the power to take away a person's

Claudette Gumbs

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1 Proceedings
2 liberty, take away a person's life. In those
3 jurisdictions that have capital punishment, fortunately
4 New York abolished it, but prosecutors can still put
5 people in jail for the rest of their lives here and
6 destroy people's reputations.
7 And I would say that most prosecutors
8 exercise their powers with distinction, responsibly,
9 professionally, carefully, and I was a prosecutor in
10 the city and state for ten years and I can say that my
11 experience has been that most prosecutors are honorable
12 people. Same with judges. Some judges don't follow
13 the rules all the time and we hope that those judges
14 who violate the rules would be subject to some kind of
15 discipline, and they are. But really, actually,
16 prosecutors are not.
17 In point of fact, based upon my study of the
18 disciplinary system in this state and around the
19 country, one judge of the Ninth Circuit called
20 prosecutorial misconduct an epidemic and if you look at
21 the record, just this past year in the Brooklyn DA's

22 Office, 14 men were exonerated. Most of them spent
23 more than half their lifetime in jail for crimes they
24 didn't commit. And let me just say that I did a study.
25 I read those cases and other cases. Prosecutors
26 contributed to those wrongful convictions by

Claudette Gumbs

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1 Proceedings
2 misconduct. That is a fact and the National Registry
3 of Exonerations will bear me out and in fact New York
4 stands second nationally in the number of exonerations,
5 more than 192 now given the last one this last week,
6 and the only state that tops New York in terms of
7 wrongful conviction is of course Texas, and now, I --
8 my remarks will go towards hoping -- urging this
9 committee to endorse a statewide commission to
10 investigate misconduct by prosecutors.
11 The disciplinary system that we now have, and
12 I am not blaming the disciplinary system, there are all
13 sorts of reasons why the four departments don't
14 prosecute, investigate and discipline prosecutors
15 effectively. They don't. That is a fact.
16 I will not say anything more than it is
17 deficient. Some of my colleagues have used much
18 stronger language, but I think that the disciplinary
19 mechanism, they operate in good faith, but first of
20 all, the rules are very, very limited in terms of the
21 model rules that apply to prosecutors. If you use the

22 American standards, ABA standards, that would be a
23 better fit, but you don't use that.
24 Forty years ago this year the state created a
25 judicial conduct commission, in 1975. The previous
26 100 years, how many judges do you think were

Claudette Gumbs

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1 Proceedings
2 disciplined in this state? Around 20.
3 In the last 40 years, somewhere upwards of
4 900 or maybe a thousand judges were disciplined and
5 several hundred were removed from the bench.
6 Now, prosecutors are lawyers, but prosecutors
7 are different from private lawyers. Prosecutors don't
8 have a client. Most of the rules of professional
9 ethics apply to the private lawyer. We are talking
10 about fees, talking about clients, confidentiality,
11 advertising, conflicts of interest and on and on.
12 Most of those rules don't apply to prosecutors, so
13 there really is a difficulty in disciplining a
14 prosecutor who lies to a judge or suborns perjury or
15 engages in inflammatory rhetoric or hides evidence.
16 These are hard cases to investigate and discipline and
17 the disciplinary mechanism is strapped in terms of
18 resources, expertise, all sorts of reasons and so,
19 given the -- given the effect -- I think a prosecutor
20 is more like a judge. A prosecutor is considered a
21 quasi judicial official, a minister of justice. A
22 private lawyer represents a client, is not a minister

23 of justice and I think a prosecutor is more like a
24 judge.
25 So why not have a statewide commission to
26 investigate and discipline misconduct by prosecutors

Claudette Gumbs

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1 Proceedings
2 and at least weed out those prosecutors who do abuse
3 their function? And there are some that do, they do it
4 egregiously and really, I can tell you from many cases
5 that I have studied, none of the cases in Brooklyn
6 involving -- the prosecutorial misconduct, none of the
7 prosecutors was ever disciplined.
8 There is a prosecutor in New York engaged in
9 six trials who was harshly rebuked by City and state
10 judges, never disciplined, on and on and so, a uniform
11 system to review claims of misconduct by prosecutors I
12 think is a good thing. I think it will help
13 prosecutors because they will know they have a clean
14 house and they are not being sullied and their
15 reputation is not being tainted by the bad prosecutors.
16 So right now, there is legislation for a
17 prosecutor misconduct commission. Both houses have
18 reviewed it. It has gone out to committee. I would
19 just like to see this Commission say endorse the
20 concept of a prosecutor misconduct commission in the
21 same way as we have used the Judicial Conduct
22 Commission. I think it is a good thing. I think the

23 time has come and that is all I have to say.
24 JUDGE COZIER: Thank you, Professor.
25 (Applause.)
26 MS. KEWALRAMANI: Thank you. I have a

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1 Proceedings
2 comment and then I have a question. And the comment
3 is that the New York rules provide, the New York Rules
4 of Professional Conduct have very specific rules
5 regarding government lawyers which also includes
6 prosecutors and I think that is Rule 2.8.
7 One of the suggestions that you have is to
8 have a commission created that would investigate
9 prosecutorial conduct. Are you also suggesting that
10 there should be a set of ethics rules, Rules of
11 Professional Conduct that specifically apply to
12 prosecutors?
13 PROFESSOR GERSHMAN: Yes, I am. Those rules
14 should be and they are, codified in the American Bar
15 Association's standards for the prosecutor function and
16 these are hundreds of different subsection of standards
17 dealing with prosecutor ethics. I would ask that this
18 Commission adopt the ABA standards as its template in
19 doing its investigation and discipline, yes. The ABA
20 standards.
21 JUDGE COZIER: Yes, Mr. Zauderer.
22 MR. ZAUDERER: Professor, you have written
23 and spoken about this for a long time. Thank you.

24 You have studied it.
25 The premise of your presentation is that
26 somehow the committees that discipline lawyers are

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2 either unable or unwilling to apply appropriate
3 disciplinary to prosecutors, so I will give you an
4 opportunity beyond speculation about the reason, which
5 you're free to do. Do you have any evidence from your
6 long-time study that commissions are -- that is,
7 disciplinary committees are applying lesser standards?
8 Are there forces at work which you have been able to
9 identify that establish that premise?
10 And I will give you an opportunity to address
11 that because we are interested.
12 PROFESSOR GERSHMAN: I think first of all,
13 from my personal experience, knowing some of the cases
14 that have not gotten to the disciplinary boards, I can
15 simply ask why. I know that some disciplinary bodies
16 will not look at a case unless there is a complaint and
17 complaints against prosecutors sometimes are not that
18 frequent because of the kind of consequences that might
19 happen.
20 I will say one thing. Here is my -- I --
21 none of the prosecutors in Brooklyn have ever been
22 disciplined. I know anecdotally of the dearth of
23 public discipline of prosecutors in this state and

24 nationally and it has been written about a lot in terms
25 of has there been a study. There actually has been a
26 study showing that the rules, the model rules don't

Claudette Gumbs

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1 Proceedings
2 provide a lot of places where the kind of misconduct
3 that prosecutors commit are contained in those rules.
4 For example, you know there is a rule prosecutors have
5 to serve justice, but that is too nebulous. We don't
6 want prosecutors to embarrass the profession, but that
7 is also nebulous.
8 Yes, there are rules in terms of hiding
9 evidence, that is a clear rule, prosecutors hiding
10 evidence but you know, when you come to think of it, it
11 is a very difficult task for a disciplinary body to
12 investigate.
13 First of all, do they have the expertise?
14 Do they have the expertise to investigate a prosecutor
15 who hides evidence? I can tell you that you even in
16 the most egregious cases, prosecutors will say it was
17 inadvertent, it was careless, I didn't mean it, it
18 certainly was not deliberate. That is what the
19 prosecutor said in the prosecution of the late Senator
20 Ted Stevens and how do you overcome that? How do you
21 prove a prosecutor acted culpably with a deliberate
22 attempt to hide --
23 MR. ZAUDERER: Let's say a lawyer complains.
24 A lawyer tried a case against a prosecutor and thinks

25 the prosecutor is hiding evidence and makes a complaint
26 to the disciplinary committee and the committee thinks

Claudette Gumbs

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1 Proceedings
2 it worthy of investigating.
3 Do the committees have access under current
4 rules to all of the information that they need? Can
5 they, for example, subpoena witnesses in the District
6 Attorney's Office? Can they get the files? Can they
7 see what was in the prosecutor's files? Can they
8 question their comrade in the -- or colleague in the
9 office next door? You know, were you discussing this
10 evidence a month before the trial? What did the
11 prosecutor say, that we will reveal it, they weren't
12 going to reveal it? It is subject to privilege and all
13 of that but are the tools there.
14 PROFESSOR GERSHMAN: The tools are there.
15 Same way you discipline any lawyer.
16 MR. ZAUDERER: The DA says I don't give you
17 the files.
18 PROFESSOR GERSHMAN: They might plead
19 confidentiality, work product, a lot of reasons why
20 government files may be exempt from disclosure. That
21 would be something that would stymie a good faith
22 disciplinary body in seeking to conduct this
23 investigation, yes.
24 MR. ZAUDERER: So do we need to consider that

25 along with appropriate procedures?
26 PROFESSOR GERSHMAN: But in the same way the

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2 Judicial Conduct Commission in doing its work is able
3 to question witnesses, subpoena a document, the same
4 rules should apply to prosecutors.
5 MR. ZAUDERER: Thank you.
6 JUDGE SKELOS: Why do you find the potential
7 for the conflict --if there is a conflict between let's
8 say the post conviction relief that a defendant may
9 seek and the complaint before a disciplinary or an
10 investigatory disciplinary body? How do you see the
11 -- should the complaint before the investigative body
12 mean finality of some post conviction relief?
13 PROFESSOR GERSHMAN: I would say it should.
14 If there is ongoing post conviction litigation, it
15 should await the finality of that, yes.
16 JUDGE COZIER; Mr. Morton.
17 MR. MORTON: Professor, thank you for your
18 testimony. If you would share with me your thoughts
19 on the situation where a finding of prosecutorial
20 misconduct has been made by a court within the context
21 of criminal proceeding. An Appellate Division on
22 appeal finds prosecutorial misconduct or -- on a 440
23 motion before a trial court.
24 Would such a finding be entitled to some sort
25 of collateral estoppel effect before a disciplinary

26 body?

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1 Proceedings
2 PROFESSOR GERSHMAN: No, it would not. It
3 would -- it may be the precursor to a disciplinary body
4 conducting an investigation. When they are alerted to
5 a judge, a court finding misconduct, I will say this:
6 There was a recent decision by the Court of Appeals in
7 the People against Wright last month where the
8 prosecutor lied to the jury, said there was DNA
9 evidence when there wasn't. The defendant was
10 convicted of murder. The Court of Appeals reversed the
11 conviction and the prosecutor was found to have engaged
12 in egregious misconduct. We are saying there is DNA
13 evidence when there isn't.
14 How do you get around that? I will bet
15 anybody in this room that this prosecutor is never
16 disciplined -- or even though the Court of Appeals and
17 the Appellate Division said that the prosecutor
18 committed misconduct. So to me, that would alert a
19 disciplinary body to conduct an investigation however
20 limited that investigation might be and I know that
21 there are private censures of prosecutors I have seen
22 and I have talked to some disciplinary people over the
23 years and the private censure, we don't know about it,
24 but it is there for some prosecutors. They do that.
25 I mean, I would hope, I would hope that the

26 prosecutors' offices take the responsibility themselves

Claudette Gumbs

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1 Proceedings
2 of disciplining their own errant prosecutors, but they
3 do not and sadly, that is why there needs to be a
4 disciplinary mechanism to do what the prosecutors
5 themselves are not doing.
6 (Applause.)
7 JUDGE COZIER: Thank you, Professor. Thank
8 you.
9 The next witnesses are Daniel Marotta and
10 Allyn Crawford of the Richmond County Bar Association.
11 MR. MAROTTA: Good afternoon to the
12 Commission and judges and lawyers and members of the
13 public that are here on this important issue.
14 My name is Daniel Marotta. I am president of
15 the Richmond County Bar Association, an association of
16 over 500 attorneys. With me here today is our vice
17 president Allyn Crawford.
18 MR. CRAWFORD: Good afternoon.
19 MR. MAROTTA: I have been an attorney for
20 over 20 years and for 20 years I have been reading and
21 researching cases in real estate, commercial litigation
22 and state litigation in the areas that I practice and
23 it is a tough job to be an attorney, especially an
24 honest attorney. I volunteer my time for pro bono
25 efforts whenever I see a cause that is worthy and I do
26 it regularly.

1 Proceedings
2 Strict enforcement of the disciplinary rules
3 and prosecution of disciplinary charges are in the best
4 interests of honest lawyers and protect the public.
5 This is true. The integrity of the profession is at
6 stake and I can't compete with lawyers who treat escrow
7 accounts like their own personal piggy banks. This
8 escrow problem that we have heard over and over again
9 today obviously must be addressed by this Commission.
10 And I do want to say however, that we need to make sure
11 that we have a system that is fair and balanced to
12 every one involved and to increase the efficiency of
13 this system and achieve dispositions more quickly.
14 Any complaints that are false or unfounded on their
15 face must be weeded out and discouraged from clogging
16 the system. There are many complaints that come in.
17 In fact, a great majority of them are simply unfounded,
18 some of them are just simple misunderstandings between
19 client and attorney. Others are more egregious.
20 Sometimes the complainant may not have standing, and
21 matrimonial cases were mentioned before. I think that
22 is an area where this issue is particularly important.
23 Sometimes you will see a husband will file a complaint
24 against the wife's attorney. It is conduct that could
25 be described as malicious. And I have been a New
26 Yorker my whole life I don't think any one here is

1 Proceedings
2 naive to think that people will not file complaints
3 that are not true or have allegations that are just
4 false. It happens all the time. It is a real
5 problem and a lot of these complaints that come in have
6 to be dealt with administratively, the attorney must
7 answer them and so, how do we address this? Because
8 for the honest lawyer there are severe ramifications
9 and for all attorneys that are involved, and the severe
10 ramifications for a client or a complainant files a
11 complaint against a lawyer that is false, they have
12 nothing to lose. Oftentimes these statements are
13 unsworn, they are written on a letter or a napkin,
14 even. We should require the statements that are
15 submitted and answers given by lawyers must be
16 notarized sworn statements under penalty of perjury,
17 like this is a basic right that we should make sure is
18 enforced strictly.
19 We should also, in an effort to try to weed
20 out some of the unfounded complaints, have a minimum
21 filing fee, maybe $100 or something that would be an
22 exception only where the client met financial
23 eligibility requirements, in which case there would be
24 no fee or it would be waived or in cases involving
25 theft of escrow funds, in which case there would be no
26 fee. By imposing some fee, I think that a great deal

1 Proceedings
2 of these complaints that seem to have no real basis
3 would be weeded out and you would see a huge decrease
4 in them automatically.
5 Also, sometimes as we have heard over and
6 over again from our members, that the complaints are
7 often in fact used as a bargaining strategy. Legal
8 fees are outstanding, they have not been paid and
9 suddenly, instead of a phone call, you get a
10 disciplinary complaint. And the appellate divisions
11 and departments know and sometimes recognize that the
12 complaint, although it is labeled as a grievance is
13 really a fee dispute and will refer it to our fee
14 arbitration panel, but there is no way of telling when
15 it is first filed.
16 For the attorney, the ramification is your
17 reputation is at stake and your malpractice insurance
18 will increase whether the complaint was false, results
19 in disciplinary charges, totally unfounded or filed for
20 some malicious purpose. Your malpractice insurance
21 premiums will increase. I don't see how we could
22 publish this type of defamatory charges or charges
23 against an attorney where there has been no discipline
24 or finding of misconduct.
25 The medical profession does the same thing.
26 The complaints in those proceedings are not made

1 Proceedings
2 public, the information is not published and
3 republished until there is a finding of wrongdoing.
4 This again protects the honest attorney who
5 has been the subject of an unscrupulous complaint.
6 With respect to regional disparities that the
7 Commission is also looking at, and we heard the speaker
8 earlier this morning say that we have a judicial system
9 of resolving complaints among citizens and we have a
10 system for attorney discipline. Our judicial system
11 is based on the fact that there are different
12 departments and local litigants are entitled to have
13 local judges hear their complaints in the county in
14 which they reside. This is our system.
15 It is not to -- to say it is a disparity is a
16 misnomer. Each locality will have a different set of
17 concerns, a different set of issues that those persons
18 in that locality know how to deal with.
19 JUDGE COZIER: You have approximately three
20 minutes left. I am not sure whether your intention is
21 for Mr. Crawford to speak.
22 MR. MAROTTA: Mr. Crawford will add a couple
23 of statements.
24 My last statement is that I have worked for
25 the Richmond County Bar Association and for a few years
26 now we started a volunteer lawyers program and it is --

1 Proceedings
2 based on examples from our sister bar associations and
3 we attempted to protect the public from the
4 unauthorized practice of law, we have provided legal
5 services for families who can't afford them and I feel
6 that these efforts sometimes are stymied when we are
7 here to discuss issues that might be perceived as
8 attacks on lawyers.
9 While I understand there are serious and
10 egregious cases, we can't let examples of bad apples be
11 the catalyst to restructure our entire framework that
12 has worked for some time and undoubtedly could use
13 improvement.
14 Thank you.
15 MR. CRAWFORD: Thank you. I in large part
16 would be repeating Mr. Marotta's comments if I spoke at
17 length, but the real concern of our association and of
18 the lawyers that Dan and I represent is that if a
19 complaint immediately becomes public or goes into a
20 process where it is reviewed by the public, without
21 there being any controls on that to determine whether
22 there is any validity to it, to a small practitioner,
23 who -- the practitioners that we represent, I mean my
24 firm has four lawyers, Dan's firm has four or five
25 lawyers and we might have two of the bigger firms in
26 Richmond County. These are solo practitioners and

1 Proceedings
2 their real bread and butter in the community is their
3 reputation and our concern is if there is a complaint
4 that is published and it goes out there and is
5 unfounded, the lawyer, his means of making a livelihood
6 is something that is tarnished without there being any
7 control on that and it is a real concern for our
8 membership, I think it is a concern for the bar at
9 large and I think it should be a concern for this
10 committee.
11 JUDGE COZIER; thank you.
12 MR. ZAUDERER: Mr. Marotta, let me give you
13 an opportunity to address something which is kind of at
14 the heart of what you're saying.
15 Underlying the budgetary discussion about
16 attorney discipline is the premise or assumption, which
17 is often true, that the lawyer is in a position of
18 strength vis-a-vis the client and we have to guard
19 against and in appropriate cases punish appropriately
20 and severely cases where the trust in that relationship
21 has been abused, but you have been practicing for 20,
22 more than 20 years, I have been practicing for more
23 than double that and in various bar posts and talking
24 with lawyers in private practice including, I am sure
25 many on Staten Island, there is a distinction which
26 often goes undressed because the complaint never gets

2 filed, which is unfair to the lawyer as well which is
3 the fee dispute that you referred to.
4 You know, there are many clients that are
5 much more powerful than the lawyer who is representing
6 them and that is a fact, that people who are
7 well-heeled may say to a lawyer I don't want to pay the
8 bill and if you will insist on that, I will file a
9 complaint with the Disciplinary Committee and the
10 lawyer faces a situation in which the lawyer basically
11 has to give up, even though the work was earned and
12 just gives into that.
13 Because of the things that you suggested and
14 if we open up the disciplinary process fully, that
15 lawyer has to contemplate does he or she that simply
16 because they asked for payment they will have a
17 disciplinary complaint against them, and all of the
18 public things that are -- that go along with that.
19 Now, I have seen many, many cases of that and
20 I am just wanting to bring that into the discussion so
21 that we look at all aspects of this.
22 Is that something that you have encountered
23 that -- as president of your association?
24 MR. MAROTTA: Well, we have heard this over
25 and over again and as I said, the disciplinary
26 committee will refer it to the fee arbitration panel if

1 Proceedings
2 they can discern that the complaint is really about
3 money. Of course the problem is the damage is done.
4 In terms of now when you renew your malpractice
5 insurance policy, when you come to that question has --
6 has there ever been a complaint filed against you, do
7 you have any reason why a complaint would be filed
8 against you any member of your firm any firm you have
9 been prior involved with, the questions become more
10 broad and you check yes, attach an explanation page and
11 it is simply a cost that comes to the attorney.
12 And for the attorney who prides himself or
13 herself on their reputation it is devastating, just
14 devastating. Especially in a community like Staten
15 Island where there are 500 attorneys, it is not that
16 many.
17 MR. ZAUDERER: Does the mechanism of the fee
18 dispute resolution preclude the complainant from making
19 complaint that is of record in the disciplinary
20 committee?
21 MR. CRAWFORD: No, I don't believe it does
22 but it provides the client with a venue in which they
23 can arbitrate or try to facilitate a resolution of that
24 claim. I think that is something -- in my
25 understanding there is a lot of times if a complaint
26 comes into the Appellate Division on an attorney and it

1 Proceedings
2 is reviewed by Appellate Division staff now, rather
3 than publish it as we think we might do, send it out to
4 the local -- or local bar Grievance Committee and then
5 that grievance committee will attempt to resolve the
6 issue between the litigant and the lawyer and they are
7 successful whether through fee arbitration or something
8 else, so I think that is incredibly helpful to the bar
9 and to the people we serve and it avoids what we are
10 looking to avoid.
11 (Whereupon, the following was transcribed by
12 Senior Court Reporter Monica Horvath.)
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1 Proceedings
2 JUDGE COZIER: Yes?
3 MS. KEWALRAMANI: Mr. Marotta and Mr. Crawford,
4 in your view should the attorney's hearings be opened at
5 all and if so at what stage?
6 MR. MAROTTA: At the stage when there has been a
7 finding of misconduct against the attorney that results
8 in the imposition of discipline against that attorney.
9 MS. KEWALRAMANI: So, in other words, when the
10 Appellate Division imposes some form of punishment, is
11 that your view?
12 MR. MAROTTA: Yes. The same as the medical
13 profession.
14 MR. GUIDO: Thank you gentlemen, for your
15 testimony.
16 I just want to address your association's
17 recommendation that we impose a $100 fee upon filing a
18 complaint. I want to give you the opportunity to address
19 that because one of the things that we would do as a
20 body making recommendations, one of the things that any
21 rule making body does when they are considering changing
22 the rules is they have to ask themselves who benefits
23 from the rule change and who suffers detriment.
24 I would be interested from your point of view,
25 if they are imposing a $100 fee on complainants who is
26 benefitting, and who is suffering detriment, and have

1 Proceedings
2 you considered the possibility that the $100 fee could
3 chill the filing of legitimate complaints?
4 MR. MAROTTA: Yes, I did.
5 As I said, if the complaint was screened for
6 financial eligibility the fee could be waived.
7 The imposition of the fee would serve
8 everyone's interest. The imposition of the fee, I do not
9 believe would chill the legitimate complaints.
10 A legitimate serious complaint against an
11 attorney, I don't think would be chilled, by a
12 requirement that a fee of $100 be paid. A requirement of
13 this fee I believe benefits everyone.
14 I believe it benefits the attorney that is
15 being charged with a serious matter. I think it kind of
16 imposes some seriousness to the proceeding.
17 And I also have heard that many complainants do
18 not cooperate very well in the disciplinary committee,
19 when it comes to scheduling and rescheduling and meeting
20 deadlines. So I think the imposition of the fee will, if
21 you will, put some "skin" in the game for the
22 complainant.
23 And, again, if it is someone that can't afford
24 it then we can address that. And if it involves escrow
25 theft, this escrow theft must be dealt with strictly.
26 And I believe there should be an exemption for

2 complaints that involve escrow complaints.
3 JUDGE COZIER: Thank you very much for your
4 testimony.
5 MR. MAROTTA: Thank you.
6 JUDGE COZIER: Our next witness is
7 Robert Tembeckjian, the Administrator and Counsel to the
8 New York State Commission on Judicial conduct.
9 MR. TEMBECKJIAN: Thank you Justice Cozier and
10 members of the panel.
11 I will summarize the statement which I believe
12 was distributed to you yesterday and certainly answer
13 any --
14 VOICE: Please use your mic.
15 MR. TEMBECKJIAN: My apologies.
16 I will summarize the statement that I submitted
17 to you yesterday and obviously answer whatever questions
18 you might have.
19 According to the American Bar Association,
20 New York is the only state that has a multi-part
21 attorney disciplinary system in the country, similar to
22 the way we disciplined judges prior to the advent of the
23 Commission on Judicial Conduct in its present form back
24 in 1978 where there were five different entities
25 responsible for investigating judges.
26 You have heard other speakers, who have

2 promoted the commission as a model for you to consider
3 recommending. It is the model on which the legislation
4 for the Commission on Prosecutorial Misconduct is based.
5 Let me just suggest that there are any number
6 of ways in which the current multi-part system is
7 disparate, not only in result but in rule and in effect.
8 In the First Department, for example, a lawyer
9 who was suspended for noncooperation, would be disbarred
10 after six months for not cooperating with the
11 proceeding. That is not so in the First and Second
12 Department.
13 In the First and Second Department, every time
14 an attorney re-registers, he or she, must certify to
15 having read and abiding by the escrow rules and those
16 departments can conduct random audits of attorney's
17 finances. Third and Fourth, not the case.
18 The First and Second Appellate Divisions have
19 adopted separate rules for courtroom demeanor for
20 attorneys, which the others have not.
21 In the Second, Third and Fourth Departments,
22 one can be confidentially cautioned for misconduct that
23 doesn't rise to the level of public discipline. In the
24 First Department, that is not the case.
25 In the Third, there is a very valuable letter
26 of education which the other departments do not have.

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2 We have heard from numerous speakers about the
3 disparities, in discipline that is imposed not only for
4 theft but for others. Frankly, it is incomprehensible,
5 to me that an attorney who is advertently, stealing
6 funds of a client should not be disbarred. It seems to
7 me it should be automatic.
8 In the 35 years that the Commission on Judicial
9 Conduct has been investigating judges for financial
10 related misconduct, there has never been an instant --
11 or, I should put it differently, any judge who has been
12 found advertently purposely to have misappropriated,
13 public funds has been removed or has resigned from
14 office in a public fashion. It seems to me that
15 underscoring, and enhancing, public confidences in the
16 legal profession and judiciary, would require no less.
17 The disparate system that we have in the
18 various departments, might very well have explanations
19 and four different traditions, that led to the
20 disparities, in the way the rules require that a
21 grievance committee process complaints and the
22 dispositions that are ultimately imposed.
23 But while there may be explanations, there
24 doesn't seem to me to be any discernable rationale for a
25 four-part system, but the solutions, I believe, are
26 relatively simple, although, they might require some

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2 political will.

3 For example, you have got eight different
4 offices throughout the state handling disciplinary
5 complaints against judges. I would not close a single
6 one of them, but I would recommend imposing an overview,
7 a statewide disciplinary counsel chosen by the
8 administrative board of the court which appropriated, to
9 this task is divided up by four Appellate Divisions and
10 the Chief Judge to provide some continuity, coordination
11 and similarity, in the way the grievance entities do
12 their jobs.
13 I would recommend the Administrative Board to
14 put together a Task Force to recommend one set of rules,
15 procedural rules taking the best from all four
16 departments, into a common set of rules which makes it
17 much more logical both for attorneys and their
18 defenders, in disciplinary proceedings to practical
19 cross jurisdictions, to know what the basic rules of the
20 game are. And they are not different. It makes no
21 sense to treat a complaint differently because the
22 lawyer committed the conduct in Manhattan as opposed to
23 Brooklyn, or, Westchester, as opposed to Buffalo or
24 Albany.
25 I would ask this Task Force to essentially
26 start from scratch. Write the best set of rules

2 substantively and procedurally as you may taking the

3 best of what there is. And to ensure a mechanism,
4 consistent with our administration of justice for there
5 to be uniformity.
6 In result, I would propose that the Court of
7 Appeals be given discretionary authority, to review the
8 discipline imposed or forgone by any of the Appellate
9 Divisions. In the same way that the Court of Appeals,
10 will resolve different ways on substantive law and
11 procedural law among the four departments, where there
12 might be disputes it seems to me that the best way to
13 say, for example, that any lawyer who stole money should
14 be disbarred, is for the state's highest court to say,
15 that's what we would do and that's the standard and to
16 give them the discretion to take the suspension or
17 censure, from the First or the Second or Third or Fourth
18 Department and say we would do it differently, I think
19 is a way of under the due process of law imposing some
20 uniformity, from where it ought to come which is the
21 state's highest court.
22 I also believe that there is a lot that the
23 current disciplinary structure can do presently to make
24 it's procedures, and process more understandable, and
25 available to the public.
26 If you look on the web sites of the four

2 department's disciplinary committees you will see a wide
3 range and not an especially detailed informative,

4 explanation, description, or, history of what they do.
5 Every single disciplinary complaint from whatever
6 department should be on the web site of that department.
7 And there ought to be an index as we have on the
8 judicial conduct web site of substantive explanation or
9 description, of the kind of misconduct and a breakdown,
10 of the judge, the court and the county so that it is
11 relatively easy for us to determine as I think
12 Mr. Zauderer, appropriately pointed out in various
13 clusters, of behavior, that is treated differently,
14 among the departments, in a way that would make sense
15 and inform the public.
16 One reason why we can't answer a question about
17 whether there is or isn't discipline of prosecutors,
18 because even if there is it is hard to find it. You have
19 to search for key words through Lexis, or Nexis, and
20 maybe you will get lucky and hit a few. But it ought to
21 be on the web site of the disciplinary committees, that
22 are charged with making this information available and
23 promoting to the public a greater understanding of how
24 the process works. And to that effect I would say there
25 is a place for public disciplinary proceedings at a
26 certain point.

1 Proceedings
2 We have long recommended and in New York it
3 used to be the case until 1978 for the judiciary, as I

4 would suggest ought to be the case for attorneys. At the
5 point that a duly constituted body and that would be a
6 Grievance Committee has found probable cause that
7 misconduct may have occurred and formal charges are
8 preferred against the attorney that is the point at
9 which the proceedings ought to be made public. Not at
10 the point of inception, not during investigation.
11 I don't think we ought to be inhibiting people
12 from making complaints. I think making complaints,
13 public at the point of inception, would be unfair to the
14 lawyer who is not going to be disciplined, and the vast
15 majority, has not, as with the case of the judicial
16 system.
17 We get 1,800 complaints, a year. We
18 investigate about 200 of those. And about 20 judges at
19 most are going to be publicly disciplined, and we might
20 have 30 or 35 cautions. The same percentages, are very
21 likely true among the bar. But when a formal body of
22 sophisticated attorneys has made a finding or a probable
23 cause determination that there is misconduct, that ought
24 to be public. Because the license to practice law is
25 not just a privilege it is a public trust. And I
26 believe that the public has a right to know when a

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1 Proceedings
2 grievance entity has decided beyond the investigative
3 stage to formerly institute charges.
4 And I would say that there is a lot that could

5 currently be done to expedite proceedings. For example,
6 the Judicial Disciplinary System has an instrument
7 called the "agreed statement of facts," where the judge
8 and I, as the person representing the Commission in the
9 equivalent of the prosecutor may very well agree without
10 a hearing, that would take up time and great expense
11 both to the state and to the respondent that there is no
12 dispute as to the facts. Where in many of our cases,
13 the judge is acknowledging having engaged in misconduct,
14 and will stipulate to it and the Commission on Judicial
15 Conduct has the opportunity and the authority either to
16 accept it or reject it in toto. If they reject, it, it
17 goes to a hearing before a referee. If they accept it,
18 we have saved, nine to 12 months of time and expense and
19 the public is informed at a much earlier stage as to
20 what the appropriate discipline is, because without --
21 by delaying the proceedings and without properly and
22 adequately funding the disciplinary process. And I
23 think that is also an issue which I have got to look at.
24 Because over the last ten years the overall funding has
25 declined in terms of staff presently doing the job of
26 disciplining lawyers.

Monica S. Horvath - Senior Court Reporter

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1 Proceedings
2 JUDGE COZIER: Mr. Tembeckjian, your time is just
3 about over.
4 MR. TEMBECKJIAN: I would wrap up with one

5 thought in this regard. A process that takes too long is
6 unfair to the public and to the lawyer. No lawyer and no
7 judge for that matter should be under the anxiety, the
8 stress and the opprobrium, of having charges hanging
9 over them that are ultimately going to be dismissed.
10 And the public should not have to wait an undue period
11 of time for the lawyer or judge that has been engaged in
12 misconduct to be appropriately punished for that
13 behavior.
14 So it seems to me that opening up the process
15 at an appropriate point using some of the tools that are
16 available now to make the process more explainable, and
17 understandable and accessible, to the public and
18 layering, some of these other procedural changes through
19 the Administrative Board or the courts is in my view
20 compelling.
21 JUDGE COZIER: Thank you.
22 Yes, Professor Gillers?
23 PROFESSOR GILLERS: Thank you for that.
24 Let me pose a question from the outfield that
25 draws on your experience in professional discipline.
26 MR. TEMBECKJIAN: The outfield is usually where

1 Proceedings
2 I feel in any gathering of judges and lawyers panel.
3 PROFESSOR GILLERS: It seems to me that any
4 disciplinary system has limited utility in protecting
5 the public. First of all, it is after the fact.

6 MR. TEMBECKJIAN: Correct.
7 PROFESSOR GILLERS: It is not before the fact.
8 So, something bad has happened already. And
9 even if the best system is to be imperfect, we should
10 try to be as good as we can. But there's a limit to
11 what a post hoc, system, can do.
12 Now, what that suggests is that the best way
13 for a prospective client to protect himself or herself,
14 is to chose the right lawyer at the outset. And the way
15 people have traditionally done that or should do that as
16 with other professionals is through word of mouth,
17 talking to friends and acquaintances, about their
18 experience with lawyer Smith or Dr. Jones.
19 Now, it seems to me at an internet age,
20 exchanging that kind of information, about lawyers
21 should be much easier. And, so, what I'm asking you is,
22 do you see any way of creating a functional, equivalent,
23 of a Trip Advisor, for lawyers? You could look up the
24 hotel, you could look up the restaurant, you could look
25 up many businesses that provide services.
26 If the exchange of information among other

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1 Proceedings
2 consumers is really in the end the best way to protect
3 yourself as a consumer of legal services should not we
4 make it easier, for prospective clients to hear about
5 the experience of others through an exchange of Internet

6 information?
7 MR. TEMBECKJIAN: Well, that is the kind of
8 recommendation I might make in a second career after I
9 have retired from the practice of law. I do think there
10 is some merit to it, but I'm not sure that it is the
11 role of the state or the Grievance Committees, to
12 provide the "Yelp" like review. I don't think there is
13 anything that we could do to stop it.
14 Frankly, Professor, having heard you make the
15 suggestion I'm surprised it hasn't happened already in
16 the Internet, market place. There are certain things
17 that I think that the grievance structure can do and I
18 have hoped to have outlined, some of those.
19 The most effective and simplest of which is to
20 put every public discipline of an attorney that they
21 have rendered on the web site so that people have access
22 at least to those who have been adjudicated to have
23 engaged in misconduct.
24 I'm not sure to the degree that I would trust a
25 system of "Yep" like ratings of attorneys which can be
26 skewed positively by the attorney by his or her friends,

2 or, negatively, by the one person out of a thousand that
3 might have had a bad experience with that particular
4 attorney.
5 I think it is worth studying, and it is
6 intriguing. I'm not prepared at this moment to

7 recommend it though.
8 JUDGE SKELOS: Mr. Zauderer?
9 MR. ZAUDERER: I know that your long time
10 professional work deals with judges, not lawyers who are
11 not judges. But let me draw on your experience as it
12 relates to those.
13 MR. TEMBECKJIAN: Sure.
14 MR. ZAUDERER: Let's not talk about the very
15 obvious severe offenses such as escrow funds or
16 stealing, which are very serious offenses, but things
17 that are the meat and potatoes, at disciplinary
18 hearings, a conflict of interest.
19 A lawyer is disqualified in a case because he
20 acted in an arguable situation adverse to a client's
21 interest. Now, there would be regional differences and
22 cultural differences in large firms versus small firms.
23 The federal and state courts have different approaches
24 to "walling" off lawyers. For example, when a lawyer
25 represented a client and now that lawyer is adverse to
26 that client and those really are because of different

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2 outlooks and cultural differences. You know, the
3 environment, which a lawyer practices in Glens Falls,
4 who missed a court date maybe because his car broke
5 down, may be different than someone from practices in
6 New York City in a large firm where there are resources

7 to deal with it.
8 So, isn't there a value in keeping local
9 knowledge an irrelevant factor? Having four Disciplinary
10 Committees, who know the people -- and, I don't mean in
11 an intimate way that would preclude them from judging a
12 case, but -- who know the culture, know the practice,
13 when they hear the testimony, just as local juries are
14 called upon to hear testimony knowing the community,
15 maybe not friendly with a particular defendant, isn't
16 there a value in that that we should respect?
17 MR. TEMBECKJIAN: Well, I think that there is.
18 And I think that whether it is a statewide application
19 or a regional application any entity of responsible
20 people can make reasonable determinations as to what is
21 appropriate and what is not and what ought to be
22 publicly, or privately disciplined.
23 I will give you an example from my own
24 experience. In a sparse county, single judge county
25 upstate, where within walking distance of the court
26 house there may be one or two places to have lunch, it

2 is not uncommon, for us to get a complaint that might
3 say the judge was eating with the jury in the local
4 diner, and shouldn't have. And upon investigation, of
5 the facts, we determine there is only one or two places
6 you can go and, no, the judge wasn't sitting down with
7 the jury but they happened to be in the same restaurant

8 at the same time, that is not going to result in
9 discipline because a reasonable application of the rules
10 to those facts. And I would say that that might be true
11 in Brooklyn as it might be in Franklin County.
12 MR. ZAUDERER: But a statewide, body, might not
13 be in the same position to evaluate and understand that
14 as an Appellate Division with four different bodies.
15 MR. TEMBECKJIAN: Well, that's right. But I'm
16 not proposing a statewide body. I'm proposing, a
17 statewide, coordinated, disciplinary committee system,
18 that would still put before it its recommendations to
19 the Appellate Division, but it is not an authority I
20 would expect it to grant very often or to exercise often
21 to have the Court of Appeals with the discretion to
22 review what an Appellate Division has done in discipline
23 to determine whether or not they got it right or wrong.
24 I'm not promoting, at all supplanting, the
25 Appellate Divisions. I would think 99.9 percent of the
26 decisions would still be rendered by the Appellate

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2 Division. But in that rare occasion where the Court of
3 Appeals might disagree and doesn't have the mechanism,
4 to do so now, I think as the state's highest court on
5 the ultimate authority for ensuring public confidence in
6 the rules of the administration of justice they ought
7 to.

8 JUDGE COZIER: Justice Skelos?
9 JUDGE SKELOS: Gentlemen, good afternoon.
10 MR. TEMBECKJIAN: Hi. Nice to see you again.
11 Which I should say is only because you were a witness in
12 one of my proceedings many years ago in which the judge,
13 waived confidentiality. By the way, one that was very
14 few.
15 JUDGE SKELOS: So, Mr. Tembeckjian, before, you
16 mentioned the letter of education. You cited to one of
17 the departments, and I forget which.
18 MR. TEMBECKJIAN: The Third.
19 JUDGE SKELOS: Okay.
20 But in the Second Department, you had a letter
21 of admonition. How is that different?
22 I'm not familiar with the term "letter of
23 admonition," so how is the letter of admonition,
24 different from the letter of education?
25 MR. TEMBECKJIAN: I believe, an admonition, is a
26 discipline, that the respondent has the ability to

2 challenge. But it's a discipline as opposed, to a
3 confidential suggestion or recommendation, which is not
4 disciplinary.
5 JUDGE SKELOS: We also have a letter of caution,
6 which is in the hierarchy.
7 MR. TEMBECKJIAN: Right.
8 JUDGE SKELOS: Which is below the letter of

9 admonition.

10 MR. TEMBECKJIAN: Right. Which you do, but the

11 First Department, does not.

12 What I like about the letter of education, is

13 that it's title essentially, describes it. So, if you

14 get a letter of education I think you know what you have

15 gotten. You haven't been punished but you have been

16 advised on a way to amend your behavior to avoid

17 problems in the future.

18 Whatever we call them --

19 JUDGE SKELOS: Should we change the title of

20 letter of caution to letter of education?

21 MR. TEMBECKJIAN: Well, the Third Department,

22 has a letter of caution and a letter of education. And

23 the point I'm trying to suggest is that there is no

24 reason for there to be four different sets of

25 nomenclature among the departments.

26 Everybody should have a caution, everybody

2 should have an admonition, everybody should have a

3 letter of education. As well as, the public

4 disciplines.

5 JUDGE COZIER: Mr. Morton?

6 MR. MORTON: Thank you.

7 I would like to get back to something that my

8 colleague Mr. Zauderer, was talking about and it is on

9 the statewide system.
10 Thank you for your testimony. You bring a
11 unique perspective overseeing a body like you do.
12 Just to be clear, you are not suggesting that
13 we should recommend blowing up the existing system --
14 MR. TEMBECKJIAN: Correct. Not at all.
15 MR. MORTON: And creating a whole new commission
16 on attorney conduct, for lack of a better word.
17 MR. TEMBECKJIAN: I would agree.
18 I think that the current system fundamentally,
19 is sound. But that it is so confusing and somewhat
20 disparate in its various approaches that an overall
21 uniformity, in the way proceedings are brought and cases
22 are investigated among the departments, would make, I
23 believe, a brave new uniformity by the Appellate
24 Division, in rendering decisions more than likely. The
25 same set of rules, the same set of substantive
26 requirements and uniformity, in the way that they are

2 prosecuted.
3 MR. MORTON: You know, just to follow-up, I
4 think harmonization of the various Appellate Division
5 Rules is something that this commission is looking into
6 very seriously. But you also suggested a discretionary
7 review by the Court of Appeals.
8 MR. TEMBECKJIAN: Right.
9 MR. MORTON: That would essentially, give the

10 Court of Appeals, a factual degree of power within the
11 judiciary content. Do you think that would require
12 constitutional amendment to accomplish that or would
13 that be really statutory?
14 MR. TEMBECKJIAN: Well, I'm not sure.
15 I think any conferring of new jurisdiction on
16 the Court of Appeals, I think would have to be
17 constitutional.
18 MR. MORTON: Right.
19 MR. TEMBECKJIAN: Whether we began by giving
20 them essentially, administrative review authority, which
21 would be, you know, similar to the way it might review
22 decisions of an administrative agency or an Article 78,
23 is possible.
24 Likely, a constitutional amendment, if this is
25 viewed as conferring new authority on the court.
26 In commission disciplinary cases, it is

2 constitutional because the court does have the novo
3 review power and there are occasions where they would,
4 they may disagree with the facts as found by the
5 commission. Although, typically, in the vast number of
6 cases, which we have nearly 100 reviews in 35 years by
7 the Court of Appeals, the facts have been accepted and
8 it was the ultimate discipline on which the court may
9 have disagreed with the commission.

10 I think in about 75 to 78 percent of our cases,
11 they agreed with both the facts and the discipline, and
12 in the rest they agreed with the facts but disagreed
13 with the discipline. Sometimes, raising it. Sometimes,
14 reducing it.
15 I wouldn't be afraid of recommending a
16 constitutional amendment, because I do think ultimately
17 putting the Court of Appeals on top of the system where
18 it belongs is the appropriate way to go.
19 Again, I don't think they would exercise that
20 authority very often, but were it necessary they should.
21 MR. MORTON: Thank you.
22 JUDGE COZIER: Thank you very much,
23 Mr. Tembeckjian.
24 MR. TEMBECKJIAN: Nice to see you too,
25 Judge Cozier, and the commission.
26 JUDGE COZIER: Our next witness is Andrea Composto,

1 Proceedings
2 representing the Women's Bar Association of the State of
3 New York.
4 MS. COMPOSTO: Good afternoon, Your Honor,
5 members of the committee of the Commission. My name is
6 Andrea Composto. I am the President of the Women's Bar
7 Association of the State of New York. WBASNY is a
8 statewide organization, statewide bar association
9 comprised of over 4,300 members, from eighteen chapters
10 throughout the State of New York. Today's testimony

11 reflects the comments from WBASNY's members. We have
12 reflected upon whether New York's departmental-based
13 system leads to regional disparities in the
14 implementation of discipline; if conversion to a
15 statewide system is desirable; and how to achieve
16 dispositions more quickly.
17 Based on the feedback received from our
18 members, WBASNY, has certain concerns about the
19 implementation of a statewide Attorney Disciplinary
20 System. We have centered our comments to the areas of
21 uniformity, efficiency, and transparency.
22 Uniformity. Is the current Appellate Division
23 based disciplinary process inherently unfair due to the
24 disparate sanction between the Departments.
25 Well, first obviously, are there disparities,
26 and do they exist? Yes.

1 Proceedings
2 We have heard testimony about that today. But,
3 are the disparities gross disparities that warrant a
4 complete separate disciplinary system than the current
5 departmental basis that we have now? The women of
6 WBASNY, do not believe this to be so. There are
7 benefits to our current system that justify maintaining
8 our system while additions can be made to enhance our
9 current system. To justify a completely separate system
10 long-spanning research into the disparities would be

11 necessary. One suggestion that might be considered is
12 that the Commission recommend a comprehensive overview
13 of ten years of disciplinary cases by the four law
14 reviews, one in each Department. Then, the Commission
15 would have a much more complete review upon which to
16 base a meaningful decision of whether a completely new
17 system is warranted.
18 What are the benefits to our current
19 departmental based system?
20 Judges decide cases on the facts presented in
21 each case. And unique facts lead to disparate results.
22 That is the nature of our adjudicatory process.
23 Disparities that exist are likely justified by the
24 regional differences in the practice of law. The
25 practice of law here in Manhattan is different from the
26 practice of law in Malone. Paralleling, this then the

1 Proceedings
2 current Appellate Division-based system in which the
3 Committees of local practitioners assess attorney
4 conduct in the first instance, is cognizant of the
5 regional differences in the manner of practice. Of
6 course, gross misconduct (intentional conversion of a
7 client's funds) you have been hearing about that all
8 morning today, should not be easily forgiven in one
9 Department and harshly prosecuted in another. But, the
10 current system appropriately takes into account the
11 realties of local practice in assessing attorney

12 conduct. Thus, finding a rational basis for the
13 disparities.
14 But, what enhancements can we make to our
15 current system? A suggestion that WBASNY members have
16 provided is the implementation of uniform rules and
17 procedures to help combat these differences that exist
18 between the procedural and substantive rules of the
19 various Departments.
20 Currently, some Departments have types of
21 private discipline that do not exist in other
22 Departments. The First Department has hearing panels
23 that review the findings of a referee before the matter
24 is presented to the Court; no other Department does
25 this. Oral argument is permitted in the Third and
26 Fourth Departments but not permitted downstate. If

2 these differences in procedure were eliminated and
3 uniform rules of procedure were implemented, fair and
4 just outcomes would be achieved.
5 The Commission could strongly recommend that
6 the four Departments harmonize their rules, so that
7 disciplinary rules and procedures are uniform statewide.
8 This will enable the Commission to maintain the current
9 departmental-based system that we have yet create
10 precedent throughout the state.
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1 Proceedings
2 MS. COMPOSTO: Moving on to efficiency:
3 Efforts can always be made in assessing ways in which
4 attorney disciplinary matters could be resolved more
5 expeditiously and WBASNY has no objection toss working
6 towards a means to help resolve the disciplinary
7 proceedings in a more efficient manner. We have
8 received feedback from some of the chapters of WBASNY
9 who propose the consideration for setting up a system
10 of negotiated dispositions or plea bargains.
11 Unlike other states, the rules in New York
12 provide no means by which an attorney under

13 investigation can admit to certain misconduct in
14 exchange for an agreed upon disposition. Obviously,
15 enabling or -- enabling such an outcome would resolve
16 some cases more expeditiously than the current full
17 hearing in every case basis.
18 It has been suggested that a speedy trial
19 provision be enacted for attorney disciplinary cases.
20 WBASNY has serious reservations regarding this idea.
21 Attorney discipline is about protecting the public.
22 The public and aggrieved clients are not necessarily
23 well served by a speedy trial provision that would
24 potentially short circuit an adjudication on the
25 merits.
26 The staff of the various grievance committees

Claudette Gumbs

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1 Proceedings
2 are tremendously overworked. Over 100 -- 160 open
3 files per staff attorney and a speedy trial provision
4 could result in more dismissals, but not more
5 expeditious dispositions.
6 So correspondingly, any enactment of a speedy
7 trial rule would have to be accompanied by increased
8 funding or staffing for the Grievance Committee from
9 the Office of Court Administration.
10 Transparency. In studying ways to make the
11 attorney disciplinary system more transparent, one can
12 presume that a more open and public disciplinary system

13 will be more trusted by the general public. However,
14 this may not be the case. Once a petition of charges
15 is filed with the court, the whole file becomes public.
16 The file would be accessible by the press and the
17 public and arguments before the court would likewise be
18 open. The thinking here is that the grievance
19 committee acts as a grand jury and approving a petition
20 of charges has essentially concluded that probable
21 cause for a finding of misconduct has been found.
22 The vast majority of grievances filed against
23 attorneys are disposed of either as frivolous or
24 unfounded, or are resolved before ever reaching the
25 Appellate Division. Making these often unmeritorious
26 or unsubstantiated charges public at such an early

Claudette Gumbs

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1 Proceedings
2 stage without the appropriate investigation or factual
3 findings would do serious and irreparable damage to an
4 attorney's reputation, particularly considering how
5 easy it would be to make them available on the
6 Internet.
7 Attorneys have no recourse when mere charges
8 are made public. The Appellate Division is currently
9 free to send cases back to the grievance committees for
10 the imposition of private discipline. Still, other
11 cases are dismissed outright and in these instances the
12 public would already have been made aware of the
13 charges against the attorney and although the attorney

14 maybe ultimately vindicated or lightly disciplined,
15 this will be of little solace when the attorney finds
16 herself clientless due to the salacious charges
17 repeated in the local newspapers.
18 Making charges public upon filing would hold
19 attorneys to a different standard than other
20 professionals. Currently, disciplinary proceedings
21 against doctors, accountants, architects and even
22 judges are completely confidential until resolved in an
23 order of public discipline. What is the rationale for
24 treating lawyers differently from other professionals?
25 JUDGE COZIER: Excuse me, Ms. Composto. You
26 have just about 30 seconds left.

Claudette Gumbs

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1 Proceedings
2 MS. COMPOSTO: Perfect timing, as I am
3 concluding.
4 So in the area of transparency, it is with a
5 resounding voice that our members of WBASNY feel that
6 charges or filings of grievances should not be made
7 public.
8 On behalf of WBASNY, I thank you for this
9 opportunity to speak before the Commission and as
10 always, we welcome the opportunity to further discuss
11 this subject matter with Chief Judge Lippman and the
12 Commission.
13 Thank you.

14 JUDGE COZIER: Thank you.
15 Questions? Yes. Mr. Zauderer.
16 MR. ZAUDERER: One thing -- thank you. One
17 thing that you just touched on was that there are many
18 or most complaints are dismissed as frivolous and you
19 know, that is a very -- can be a very troubling
20 circumstance if it is substantiated and maybe we should
21 get statistics on it. Maybe could you help us with it,
22 in weighing the -- whether the closed nature of the
23 proceedings should be changed, because if you said --
24 for example, if most complaints statistically were
25 dismissed and you just would have openness at the very
26 filing stage, maybe the charges are filed, that is

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1 Proceedings
2 another thing, but that is something I think that has
3 to be weighed in the balance here in terms of whether
4 this is something that has to be changed and if you
5 could help us with any statistics, I for one would be
6 interested.
7 MS. COPOSTO: Currently I don't have the
8 statistics in front of me to present to you, but it is
9 very troubling and I think what the members of WBASNY,
10 what their concern was, especially being that we come
11 from 18 different chapters throughout the State of New
12 York, but you know, in the beginning we thought maybe
13 the smaller chapters would feel this way but it was a
14 resounding agreement that all of our members felt this

15 way, different chapters, that there is such great
16 concern about the reputation of the attorney being
17 sullied for these grievances that were found to be
18 unmeritorious or frivolous and what does that local
19 practitioner do when -- if at such an early stage that
20 information has been made public and so, that is
21 something that WBASNY feels we should not -- the
22 Commission should take a direction -- should move in
23 this direction.
24 MR. ZAUDERER: Thank you.
25 JUDGE COZIER: Thank you. Thank you very much.
26 MS. COMPOSTO: Thank you very much, your

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1 Proceedings
2 Honor.
3 JUDGE COZIER: At this point we are going to
4 take a ten-minute recess and then resume with the
5 additional witnesses. We still have a number of
6 witnesses to testify.
7 (Pause in proceedings.)
8 JUDGE COZIER: The next witness is Carol Sigmond
9 representing the New York County Lawyers Bar
10 Association.
11 MS. SIGMOND: Good afternoon, members of the
12 Commission. I am the president of the New York County
13 Lawyers Association and I am here to address the
14 Commission on behalf of NYCLA and thank for you

15 granting us the privilege of addressing you on this
16 very most important issue and by the way, you're most
17 welcome here.
18 Due to time constraints I am only going to
19 give a very short version of our testimony which was
20 submitted in writing previously. I want to cut to the
21 chase and address what I consider to be the five
22 critical issues:
23 The first issue is, does New York's
24 department-based system lead to regional disparities in
25 the implementation of discipline? And the answer is
26 obviously, it does.

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1 Proceedings
2 The question is, how significant is that and
3 what should we do about it? NYCLA believes there
4 should be a move to procedural uniformity, but that
5 move to procedural uniformity should be guided by the
6 geographic and population differences in the
7 departments. The First and Second departments are
8 densely populated and relatively small in comparison to
9 the Third and Fourth departments and we see some of the
10 departmental differences as a result of these
11 geographic and population differences. We have an
12 extensive report on these issues on our website should
13 you require any further detail.
14 We also believe there should be a move to
15 uniformity on the issues of letters of caution, letters

16 of education and letters of admonition. Whatever
17 policy there is should be the same in all four
18 departments and we would urge the Commission to move in
19 that direction.
20 Having said that, we concur with the first
21 witnesses who pointed out that there is extensive
22 precedential value in the departments on specific
23 fact-based cases, and for this reason we reject any
24 move to mandatory guidelines or any kind of sentencing
25 guidelines.
26 The second question is, is there -- is a

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2 statewide system desirable? And in our view, the
3 answer is no. We believe the statewide system would be
4 more costly and introduce more delays.
5 We also think a statewide system would
6 undercut the precedential value of the existing fact
7 based decisions and I cannot emphasize enough to you
8 our view that these decisions are frequently very fact
9 based and in that regard, I would echo Ms. Scalise'
10 testimony on that point.
11 The third question is -- on everyone's mind
12 is, how will the disciplinary committee achieve
13 decisions more quickly and there are two simple
14 answers; one is more resources and the second is plea
15 bargaining. There has not been much discussion of

16 that, but maybe there should be. In the First
17 Department there are cases where the parties come
18 quickly to the conclusion of what should happen and
19 then they go through a three-stage process to finally
20 reach the decision that they have already figured out
21 in advance. It is not something that has been
22 discussed, but it is something that should be
23 considered.
24 The fourth issue is the question of public
25 disclosure of the process. We oppose any disclosure
26 prior to the imposition of formal discipline. Any

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1 Proceedings
2 other result would undercut the letters of education
3 and caution that are issued in some of the departments.
4 We think on balance, balancing the public interest and
5 the interests of the counties, that is the right
6 balance and it is currently the statutory balance.
7 Finally, an issue that has not gotten enough
8 attention maybe because it doesn't really belong here
9 and that is the question of discovery response for
10 attorneys. We support discovery for attorneys and
11 support the six recommendations of the committee on
12 discipline.
13 That concludes my oral statement.
14 Thank you.
15 JUDGE COZIER: Thank you.
16 Yes.

17 MR. GUIDO: Thank you.
18 One question that I wanted to ask you about
19 is the -- First Department generally, if we move
20 towards uniformity of process, one of the issues on the
21 table with that would be how formal proceedings are
22 conducted statewide. Given that the First Department,
23 the -- in the First Department they are the only
24 jurisdiction that uses hearing panels as an
25 intermediate step between the report of the referee and
26 the matter being presented to the court, does your

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1 Proceedings
2 organization have a view as to whether or not the
3 hearing panel should be eliminated?
4 MS. SIGMOND: Generally speaking, we think
5 that the referee system is more efficient. We think
6 it is more cost efficient for the respondent/attorney,
7 and we think it would reduce some of the delays.
8 I would say that we do see some value in the
9 bifurcation of holding a two-stage hearing. But I
10 think the referee system would look like it should work
11 efficiently.
12 MS. KEWALRAMANI: Thank you for your
13 testimony.
14 What are your views on opening up the
15 disciplinary process?
16 MS. SIGMOND: We oppose it. In this age of

17 the Internet -- well let me say one thing. We do
18 support the development of a central registry, so that
19 the public can go to one location and find the
20 disciplinary history of every attorney, but that is
21 only after it had been imposed by the Appellate
22 Division. So we do not support any earlier opening.
23 I understand the issue of opening it at the point of
24 charges, but I think on balance, that does more harm
25 than good and frankly, if there is someone whose
26 behavior is so bad that it is -- needs immediate

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1 Proceedings
2 action, the Appellate Division has the power to suspend
3 prior to the formal hearings so the public can be
4 protected without damaging the attorney's reputation
5 until the attorney has had an opportunity to defend
6 himself.
7 JUDGE COZIER: Thank you very much.
8 MS. SIGMOND: Thank you.
9 (Applause.)
10 THE COURT: The next witness is Paula Edgar
11 --
12 A VOICE: I am supposed to be at 12:45. The
13 person who went at 12:15 already went, so I have to
14 believe somehow I was omitted. My name is Janice
15 Lintz.
16 JUDGE COZIER: Your name is?
17 A VOICE: Janice Lintz.

18 JUDGE COZIER: There are several people ahead of
19 you on the witness list. We are running behind
20 schedule.
21 A VOICE: Am I on the list?
22 JUDGE COZIER: Yes, you are.
23 We will move on then to J. Richard Supple
24 Junior from the New York City Bar Association.
25 MR. SUPPLE: Thank you, members of the
26 Commission. I am testifying today on behalf of the

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1 Proceedings
2 Committee on Professional Discipline of the New York
3 City Bar Association, of which I am a member. We are
4 pleased that the Commission is undertaking a
5 comprehensive review of New York's attorney discipline
6 system. We urge you to focus particular attention on
7 the following three areas where we believe improvement
8 in the disciplinary system is needed most.
9 Some of what I will say is going to echo some
10 of the other witnesses that you heard earlier.
11 First, attorney discipline procedural rules
12 we believe should be uniform across the four
13 departments in New York State. Only the First
14 Department has at present detailed rules governing the
15 procedure.
16 The Second, Third and Fourth departments
17 have few rules and moreover, the rules that do exist

18 demonstrate substantially different practices. For
19 example, unlike many professionals subjected to
20 discipline, an attorney/respondent has no opportunity
21 to appear personally before the Court in the First and
22 Second departments before he is censured, suspended or
23 disbarred but in the Third and Fourth departments by
24 contrast, oral argument is available.
25 Another example is diversion of an attorney's
26 case where alcohol or drug abuse is a causative factor.

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1 Proceedings
2 The Second, Third and Fourth Departments can issue
3 non-disciplinary letters of caution, although they are
4 not used, but the First Department, however, does not
5 and while the Second and Fourth departments can issue
6 non disciplinary letters of caution to address poor
7 attorney conduct, in the Third Department there are
8 several non-disciplinary cautionary tools, including
9 the letter of education that had been spoken about
10 earlier. The First Department allows only for
11 dismissal or discipline, although it recently
12 promulgated a new rule somewhat similar to a letter of
13 education permitting dismissal with cautionary
14 guidance.
15 Different procedural opportunities and
16 different nomenclature portend different outcomes. For
17 purposes of evaluating and prosecuting, it should not
18 matter whether an attorney practices in Buffalo or

19 Brooklyn.
20 Second. As the New York State Bar
21 Association and the City Bar have both recently
22 proposed and just mentioned by the last speaker, we
23 believe fairness in the discipline process would be
24 improved by adopting new rules similar to rules already
25 existing in most jurisdictions across the United
26 States, permitting a respondent access to

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1 Proceedings
2 non-privileged materials in the prosecutor's file and
3 also, permitting limited discovery following service of
4 formal charging.
5 And to this end, we recommend the following
6 five new rules:
7 First, after a complaint is filed, and
8 without having to make a formal request, respondents
9 should be given copies of the complaint and any reply
10 filed by complainant.
11 At present, some but not all staff counsel
12 refuse to provide or refrain from automatically
13 providing a respondent with a complaint from a member
14 of the judiciary for example, while most but not all
15 staff counsel will forward a copy of a complainant's
16 reply submission.
17 Second: After a complaint is filed, the
18 Respondent should automatically have access to

19 exculpatory materials in a staff counsel's file.
20 Again, most prosecutors provide such access, but others
21 do not.
22 Third. After charges are filed, a respondent
23 should have the ability to request documents before
24 hearing from third parties via so ordered subpoenas.
25 At present respondents may only subpoena third parties
26 to appear with documents at a hearing.

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1 Proceedings
2 Fourth. After staff counsel's investigation
3 is completed and charges are filed, a respondent should
4 be granted access to non privileged materials in staff
5 counsel's file.
6 And Fifth, after charges are filed, a
7 respondent should be allowed to take depositions of the
8 complainant and any witness that staff counsel intends
9 to call at a hearing, provided that respondent makes a
10 clear showing that a proposed deposition is likely to
11 adduce evidence on a disputed issue of material fact
12 that is important to an element of a charge.
13 While such a standard would not favor
14 depositions in most cases, in these limited
15 circumstances a deposition will be useful to clarify
16 and particularize the factual dispute at hand or
17 alternatively, to confirm or refute a factual claim.
18 We believe this last proposed rule would not
19 adversely impact the speed and efficiency of a

20 disciplinary system because it will be invoked
21 relatively rarely and may contribute to efficiencies by
22 clarifying facts in a way that encourages and
23 facilitates the kinds of agreed proposed dispositions
24 that I will discuss in a moment and then -- that other
25 witnesses have discussed before me.
26 Third. Disciplinary complaints take too long

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1 Proceedings
2 to be addressed. Many witnesses have already
3 discussed that. In the First Department, up to two
4 years can pass before disciplinary staff counsel makes
5 any follow-up inquiry or takes action regarding
6 following receipt of a respondent/attorney's answer to
7 a complaint. This delay can occur even in cases where
8 the attorney is alleged to have mishandled or
9 misappropriated client funds. Not often, but it can
10 happen. And substantial delays also plague the other
11 departments.
12 Lengthy delays can prejudice both the
13 prosecution and defense for obvious reasons; including
14 because witness memories fail or erode or because
15 evidence is disregarded or destroyed. Protracted
16 delays also act as a disincentive to bringing
17 complaints in the first place.
18 In addition, during the long period that
19 complaints are pending, attorneys maybe burdened by

20 unnecessarily increased malpractice insurance premiums,
21 or prevented as a practical matter from moving between
22 law firms. In all such instances public confidence in
23 the system is undermined.
24 The City Bar is well aware that a principal
25 cause of delays is reduced state funding for the state
26 attorney disciplinary system. Several budgets have

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2 resulted in too few procedures to handle the
3 persistently high numbers of complaints filed each
4 year. However, because it is unrealistic to expect in
5 our view that the Legislature will fully fund the
6 attorney discipline system, as it has never done that
7 before even in prosperous times, we believe that the
8 following four changes could speed up the process by
9 which disciplinary matters are evaluated and resolved
10 without sacrificing the quality of justice:
11 First, we believe there is a possibility or a
12 process that could be employed to better triage
13 complaints when they come in. Disciplinary
14 prosecutors currently open matters for investigation
15 even where there is only the remotest possibility that
16 discipline will be imposed. We believe the system
17 would be more efficient if senior disciplinary
18 committee members took a hard look, harder than they do
19 today, at the viability of complaints during a second
20 screening process of a receiving an attorney's answer

21 and a reply from any complainant.
22 Greater winnowing of complaints will prevent
23 many matters from languishing on uselessly for months
24 and years and will allow for more focused and quicker
25 attention to serious matters.
26 Second. We urge more use of mediation. The

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1 Proceedings
2 City Bar and other bar associations have rosters of
3 trained lawyers qualified to mediate disputes between
4 attorneys and clients. Mediation is especially
5 valuable where the attorney and complainant still have
6 an attorney/client relationship and the gravamen of the
7 complaint is a failure of effective or timely
8 communication. The disciplinary committees across the
9 different departments tend to use mediation
10 infrequently and inconsistently. More consistent use
11 of mediation will result in a quicker resolution of
12 referred matters while freeing up staff again to
13 concentrate on more serious cases.
14 Third. We believe that there could be a
15 process by which agreed resolutions could be promoted.
16 Unlike many jurisdictions, New York disciplinary
17 procedural rules do not permit staff counsel and
18 attorneys to agree to a proposed resolution of a
19 disciplinary matter subject to approval from the court.
20 In many, if not most instances, the facts relevant to a

21 complaint are not in sharp dispute.
22 Correspondingly, where staff counsel and a
23 respondent can't agree on facts and agree that the law
24 suggests a particular outcome in the respondent's
25 disciplinary case, it makes no sense in our view to
26 hold hearings before a referee and a hearing panel.

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2 Instead, staff and the respondent could stipulate to
3 the relevant facts and the relevant mitigating and
4 aggravating evidence and propose a resolution for the
5 court to support or reject at its discretion.
6 JUDGE COZIER: Excuse me. You have one minute.
7 MR. SUPPLE: I am just about finished. Thank
8 you.
9 Such negotiated regulations will not only
10 result in faster disposition preventing an attorney
11 from continuing to practice because of the overly
12 protracted delays, it would also save staff counsel
13 substantial time and effort, freeing him or her up to
14 handle more serious matters.
15 And finally and lastly, we believe there
16 should be a better streamlining of jurisdiction. As
17 disciplinary procedural rules read today, a
18 disciplinary or grievance committee may investigate a
19 lawyer admitted or officed in its department as well as
20 for conduct occurring in its department. Many times,
21 particularly when attorneys are residing or practicing

22 out of state and they are involved in the disciplinary
23 process, it is unclear which grievance committee should
24 take responsibility in a particular matter. As a
25 result, cases could be treated like footballs passed
26 back and forth before any committee decides to take

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2 charge and this process can take years. To minimize
3 confusion, jurisdictional rules should be reformulated
4 to make clear which department should assume
5 responsibility for a given matter and in this respect,
6 we believe that the greatest weight should be accorded
7 to the location of the attorney's office unless the
8 attorney resides out of state, in which event,
9 jurisdiction should lie in the department where the
10 attorney was originally admitted.
11 Thank you.
12 JUDGE COZIER: Thank you. Questions.
13 JUDGE SKELOS: The same question I asked before
14 and it references your last statement that there is
15 passing around of the football, okay?
16 What empirical evidence do you have to
17 suggest that that happens with such regularity that it
18 impairs the administration of justice? I mean, when
19 people come here and suggest anecdotally that things
20 like this happen, I am not sure that it really adds to
21 the discourse.

22 If there is empirical evidence that this is
23 something that is impairing the process, then I think
24 every member of this Commission would be interested in
25 hearing it.
26 But where it becomes anecdotal, I am not sure

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1 Proceedings
2 how that answers the questions that we are asking.
3 (Whereupon, the following was transcribed by
4 Senior Court Reporter Monica Horvath.)
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Claudette Gumbs

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1 Proceedings

2 MR. SUPPLE: Thank you, Judge Skelos.

3 And because that was discussed earlier on the

4 rule it is very difficult to get statistics in a mostly

5 privately closed system that discussed things across the

6 state.

7 I do practice in this area and have done so for

8 quite a number of years and have handled many cases

9 where this has occurred. So I can say from my own

10 personal observation that it has happened. Again, you

11 know, it doesn't happen all the --

12 JUDGE SKELOS: What is the percentage of the cases

13 that you have handled where you have encountered this as

14 a problem?

15 I sat on the Appellate Division for 11 years.

16 I hardly saw a case where something like this happened.

17 MR. SUPPLE: I have one quite notably egregious,

18 case now.

19 JUDGE SKELOS: Again, counsel, that is anecdotal.

20 MR. SUPPLE: I understand, Your Honor.

21 And I will say that it does not because of the

22 circumstances. Clearly, in most instances the

23 jurisdiction is clear. But this is a simple re-write of
24 rules to just make clear what the priority of
25 jurisdiction is.
26 When you read the rules as they are now they

2 provide a laundry list of jurisdictional opportunities
3 that basically open the system up to anybody's
4 interpretation.
5 And, yes, while it is true that it doesn't
6 happen all the time because the circumstances by which
7 the political football, by which the case football,
8 would get passed back and forth, it is not going to
9 happen all that often numerically. It is an easy fix.
10 And when it does happen it can result in years and years
11 of delay.
12 Including a case I have now, which is four
13 years delayed. So I think it is a fairly simple and
14 straightforward proposal and I'm not sure why it would
15 be so strongly resisted. Simply to prioritize and make
16 clear who should take the case in the first instance. It
17 would give the complainant greater clarity as to where
18 the complaint should be filed and it would give the
19 prosecutors an easier reference as to who should be
20 taking control of the matter.
21 JUDGE COZIER: Yes, Mr. Guido?
22 MR. GUIDO: Two questions.
23 I was troubled, to hear you say on a few

24 occasions staff counsel refused to give you a copy of
25 the complaint.
26 MR. SUPPLE: No. I don't believe I said a copy

Monica S. Horvath - Senior Court Reporter

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1 Proceedings
2 of the complaint. I said a copy of the complaint and
3 reply. Because I always get a copy of the complaint.
4 MR. GUIDO: But not from judges sometimes.
5 MR. SUPPLE: That was information provided to me
6 through some of the members from our Committee. I have
7 not personally experienced this. But this was a
8 consensus of the Committee that I am testifying. But
9 that has happened in instances where there are sue
10 sponte investigations and instead of providing whatever
11 transmittal letter came from the judge to the
12 Disciplinary Committee or Grievance Committee itself,
13 there would be a different communication that would go
14 out to the court.
15 MR. GUIDO: I want to ask you the same question
16 I asked Miss Sigmond. Does your organization, have a
17 view assuming we recommend and move towards a unified
18 process rules as to whether or not the hearing panels
19 should be eliminated to achieve that uniformity?
20 MR. SUPPLE: Speaking for myself, because I
21 haven't been instructed by my Committee as to how to
22 respond to that particular question, I don't believe
23 that the hearing panels in a typical case where there is

24 an original referee review of facts add a whole lot to
25 delay the process.
26 Hearing panels, however, can offer in the First

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1 Proceedings
2 Department where they exist can be substantially
3 valuable in matters such as reinstatement matters and
4 things of that sort where it is useful to have a variety
5 of people hear the evidence, presentation-wise. And it
6 is a fairly simple presentation that can be done one
7 time.
8 Hearing panels are hard to convene and have for
9 lengthy processes because there are so many members and
10 it just makes scheduling things difficult and again
11 delays the process.
12 JUDGE COZIER: Thank you, Mr. Supple.
13 MR. SUPPLE: Thank you.
14 JUDGE COZIER: The next witness is
15 Professor Caprice Alves.
16 MS. ALVES: Hi. Thank you.
17 So I am here to speak I guess on behalf of
18 consumers like from a consumer's perspective and to the
19 point at which disciplinary charges, or findings should
20 be publicly revealed. I believe that complaints
21 themselves -- maybe I agree with Professor Gillers,
22 where he said as soon as there was probable cause for a
23 complaint to be processed it should be publicized.
24 I know that Judge Skelos, has said that

25 anecdotal testimony is not really valuable, but I'm
26 going to give a few examples and then say that those

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1 Proceedings
2 things do speak to the process. They do speak to the
3 structure of things and how the structure of things is
4 flawed and hurts consumers.
5 One example is -- well, all three examples
6 involve lawyers. So shall I name the lawyers and give
7 you the specific examples?
8 JUDGE COZIER: No. I prefer you not name lawyers,
9 please.
10 MS. ALVES: Okay.
11 One particular lawyer was brought to the
12 attention of the First Department Grievance Committee
13 for bad deeds. Just unethical behavior with real estate
14 and things liked that. He was actually my lawyer and I
15 made a complaint against him for things that he was
16 doing. And he actually tried to take my apartment
17 somehow that I owned and he said he was going to make me
18 an investor and different things. I brought the bad
19 behavior of this person to the Disciplinary Committee,
20 and they didn't act on the complaint that I submitted.
21 After three years of me trying to get this
22 person -- the complaint processed against this person
23 they got tired of me and dismissed the complaint all
24 together. Three weeks after the complaint was dismissed

25 he got arrested by the FBI.
26 I did a doctorate, and I just defended it last

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2 year, actually. And the title of my dissertation, is:
3 "An Analysis Of the Perception of the Legal Profession
4 Through The Eyes Of Dissatisfied Consumers of Legal
5 Services in Manhattan, New York." An interpretative and
6 analogical analysis.
7 While I was doing my case studies, my
8 comprehensive exams, I decided to do it on this
9 particular lawyer and the situation with the First
10 Department. As I was looking up things and doing my
11 research for that case study, I found out that he was
12 breaking the law for the whole three years that the
13 Disciplinary Committee had his complaint.
14 In Florida, he had someone sitting in prison
15 while he robbed the family. He told the person to plead
16 guilty, then he went against them and he took the house,
17 the rings, the cars, and everything from the family. He
18 was rearrested, shipped back to Florida to face charges
19 where he was practicing in Federal Court, where he
20 didn't have a license. And now he is in prison for
21 seven years.
22 The second example is a gentleman, an attorney,
23 a Brooklyn attorney, who represented an elderly, Harlem
24 woman with a property that she owned and bought I think
25 in 1956 or something like that. The property she paid

26 about $190,000, for it and it is worth four million

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1 Proceedings
2 dollars now. She asked him to manage the building for
3 her and he did. He represented her. And first he would
4 keep the money from the tenants and not return it to
5 her, and then he got tired of that slow process so he
6 just marched into the building and stole the whole
7 thing. When a news reporter got wind of the story and
8 the things that he was doing previously they made a
9 report.
10 They did a report on this particular lawyer and
11 all of the outrageous bad deeds that he was committing,
12 so he sued the reporter for defamation, to stop the
13 reporter from publishing this information.
14 Long story short that person is now in prison
15 for six years in federal prison. And for the past year,
16 although he has been in prison for a year now, the
17 lawyer's cite AVO and the court system's web cite said
18 that he was a lawyer in good standing with no
19 disciplinary records to be found.
20 The third example is a lawyer who represented
21 me. I have a high-end co-op in Manhattan and all we do
22 is disagree. So, I decided to go to court one year and I
23 hired a lawyer and I guess he felt liked he was in a
24 win/win situation, I have this apartment, we have the
25 building, he can't loose, so, he was excessively,

26 billing me and doing bad things. And then because I was

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1 Proceedings
2 challenging his behavior he just decided to quit, but he
3 kept all of the money that I gave him.
4 After submitting these people to the
5 Disciplinary Committee, all of the complaints that I
6 submitted were dismissed. They would call each other and
7 say not to represent me, the next lawyers and things
8 like that. All of the complaints were dismissed. So
9 the only thing that I had at my disposal was the
10 opportunity to submit a consumer review. Which, I did.
11 I put a report of him on-line and stated exactly what he
12 did. For the last three years and two months he has been
13 suing me for defamation frivolously, because he says
14 that my complaint, my consumer review is not true and I
15 am saying that it is true.
16 We are now on the fourth judge because they
17 keep quitting. The judge's don't want to be bothered.
18 And they have been doing improper things causing one
19 judge to quit on the record and stated that they were
20 sending him things improperly and all of these things.
21 But, either way, we are on the fourth judge, three years
22 and two months later. There is no end in sight. I'm
23 fighting back against him and his frivolous claims.
24 Which I don't think he expected. But this is what is
25 happening.
26 So, anecdotes aside the First Department

1 Proceedings
2 receives 3,300, complaints a year. Out of the 3,300,
3 complaints that they receive they dismiss over
4 98 percent of them. The confidentiality laws don't allow
5 consumers to know that certain lawyers are capable of
6 certain behaviors. If you don't know that these
7 lawyers, particular lawyers would be capable of
8 particular behaviors there is no way in the world that
9 you could be an informed consumer. You are susceptible
10 to the experiences of the three lawyers that I outlined.
11 That particular lawyer that is suing me has
12 actually been in litigation and is still in litigation,
13 with some of them 26 clients that he is either suing or
14 are suing him for excessive legal fees.
15 So, that is what I'm speaking to today. The
16 fact that the complaints should be public as soon as
17 there is probable cause or else consumers are not
18 protected from the egregious offenses of bad apples.
19 MR. : Thank you for your testimony.
20 MS. ALVES: Thank you.
21 (Applause.)
22 MR. ZAUDERER: If I understood you correctly,
23 you had perhaps three complaints that were filed and
24 they were dismissed?
25 MS. ALVES: More than three. But, yes.
26 MR. ZAUDERER: More than three.

1 Proceedings
2 MS. ALVES: They were all dismissed.
3 One last point. The cases are dismissed with
4 no proper explanation.
5 MR. ZAUDERER: That is what I was going to ask
6 you.
7 MS. ALVES: Right.
8 The dismissal is just stayed. "We went through
9 this process" -- and they spell out the process -- "we
10 sent it to this committee and that committee and there
11 was no finding of wrongdoing," and the consumer has -- I
12 have a Doctorate degree. I have no way of understanding
13 what that means or how to protect myself or other people
14 in the future.
15 MR. ZAUDERER: So let me ask you about that.
16 Did you ask the staff in the Disciplinary
17 Committee for an oral explanation, or a written one and
18 did they give you either?
19 MS. ALVES: Yes, sir. I did ask, many times.
20 MR. ZAUDERER: Tell me what the response was.
21 MS. ALVES: The response is always that they can
22 not talk to you and tell you certain things because of
23 confidentiality laws.
24 The written complaints were never anymore than,
25 "we did an investigation and we didn't find wrongdoing."
26 And, that is about it.

1 Proceedings
2 In fact, I was told at one point that the
3 consumers are not entitled by -- consumers don't have
4 the write to the Disciplinary Committee. That the
5 Disciplinary Committee is sort of a luxury or just -- I
6 can't think of the word to use -- just sort of a luxury,
7 that is in place but consumers are not entitled to it.
8 Therefore they don't give out their e-mail addresses and
9 give you complete access to the Disciplinary Committee
10 people.
11 MR. ZAUDERER: Thank you.
12 JUDGE COZIER: Thank you, Ms. Alves.
13 MS. ALVES: Thank you.
14 JUDGE COZIER: The next witness is Janice Lintz.
15 MS. LINTZ: Good evening. My name is Janice
16 Schacter Lintz. I am a retired attorney who has
17 testified on these issues before Congress and the
18 Moreland Commission.
19 Attorney discipline should be consolidated.
20 Geographic disparities should be eliminated. There
21 needs to be uniformity across the state. Out-of-state
22 attorneys shouldn't be able to enter our jurisdiction
23 without being subject to our state's rules. We don't
24 need more rules. We just need the rules we have
25 enforced.
26 The perfect example of this is self

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1 Proceedings
2 certification of paying child support where every
3 attorney must sign before they are readmitted to the bar
4 every year. If an attorney does not pay child support,
5 you can't go to the Bar Association and say, they lied.
6 VOICE: Adjust your mic. We cannot hear you.
7 JUDGE COZIER: One moment.
8 We will not encounter any disruptions. Please
9 observe the courtesy of allowing the witness to testify.
10 VOICE: We are trying. We could not hear.
11 JUDGE COZIER: If you are not on the witness list
12 you should not comment.
13 VOICE: They were saying they could not hear
14 you.
15 MS. LINTZ: Sorry.
16 Okay, can you hear me now?
17 VOICE: Yeah.
18 MS. LINTZ: Great.
19 So, if an attorney, for example, self certify,
20 every year that they pay child support and you go to the
21 Bar Association and say no they haven't, the Bar
22 Association can't do anything because you are not a
23 client.
24 The dismissal of so many cases is concerning.
25 Contrary, to self serving statements in the Law Journal
26 and the CJC by Mr. Tembeckjian, it is not a positive

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1 Proceedings
2 experience. Otherwise, Judge Laura Drager, would be
3 removed from the bench. The CJC, should not be used as
4 a model of excellence. The CJC, should do a similar
5 hearing but they wouldn't dare.
6 The matrimonial part has become pay to play and
7 it is a money making operation for key individuals.
8 Ethics, are irrelevant. Part of the problem is the
9 judges don't follow the rules and enforce their own
10 orders. Hence, Judge Heitler is being investigated. How
11 could she oversee the judges in her court when she is
12 allegedly "dirty"? This trickles down to the lawyers
13 appearing before the judges who know the judges are
14 corrupt. The lawyers are running ramshackle through our
15 system. A centralized system would permit greater
16 oversight.
17 There needs to be greater transparency and
18 accountability for attorneys. The public is clueless
19 when they retain an attorney. A government controlled
20 "Yelp-like" page with index numbers, to insure accuracy
21 would help overcome the issues that were mentioned
22 before. This way complaints could be corralled and
23 people could see who they are hiring. As I have since
24 said an informed consumer is our best customer.
25 Having one system will prevent attorneys from
26 currying favors with judges and the local oversight

1 Proceedings
2 committees at bar related events. Attorneys in the
3 matrimonial bar size you up financially by looking at
4 your Net Worth Statements. They throw gasoline on the
5 fire and have no incentive to stop until you run out of
6 money. One attorney told me they will get paid before my
7 children eat. The judges encourage this and ensure the
8 attorneys are paid to prevent appeals and complaints
9 against them. This is no different than a syndicate.
10 This is the "matrimonial mafia".
11 (Applause.)
12 A centralized discipline system will help eliminate the
13 collusion.
14 Attorney's interest rates need to shift the
15 market and/or be eliminated. Attorneys are making more
16 money from interest than from fees. Why make a motion
17 to get paid when you can make more money from interest?
18 My attorney said it was the best investment he ever
19 made. He made more money from interest than he did from
20 the case.
21 The billing practices need to be codified with
22 strict censure if an attorney fails to bill. My attorney
23 failed to bill me for a year-and-a-half. There was
24 nothing I could do. If I filed a complaint he would
25 quit. Since I was an un-monied spouse I would be truly
26 unrepresented but I already was.

1 Proceedings
2 Attorneys are no longer receiving bags of money
3 but receive career enhancing favors including but not
4 limited to contributing quotes to books, as my
5 ex-husband's attorney did, receiving speaking
6 engagements and/or free passes to conferences. This
7 "income" should be disclosed each year on a state
8 controlled form including who provided the benefit
9 similar to how politicians are supposed to report such
10 benefits.
11 Patterns of currying favor need to be disclosed
12 and posted on-line for all to see. In my opinion and
13 upon information and belief, attorneys use their books
14 to curry favors with key people who participate in the
15 legal process, including but not limited to law
16 guardians who contributed to my ex-husband's attorney's
17 book at around the time she represented my children and
18 he represented my husband who was awarded most decision
19 making and no one disclosed.
20 Judge's law clerks should be required to
21 "garden". They she should not be permitted to work for
22 a firm that appears before the judge where they
23 previously worked for a year. Again, my husband's
24 attorney hired the law clerk from our judge while we
25 were still before the judge.
26 VOICE: Wow.

1 Proceedings
2 MS. LINTZ: It is concerning how he received all
3 parenting decision making.
4 The state needs a more centralized oversight
5 for the law guardians and the assignments should be
6 randomly assigned similar to judge assignments. A law
7 guardians entire case work should flow from this random
8 assignment to prevent case referrals by parties. Again,
9 my ex-husband told me he frequently referred cases to
10 her.
11 The role of the law guardian must be clearly
12 defined and informed and grievances are unable to be
13 reported unless the party pays their bill. But this may
14 be the person in the case who is being accused of abuse.
15 My daughter wrote an article and filed her own
16 appeal against her law guardian at age 17. Her article
17 appeared in the Huff Post. Not all kids are capable of
18 doing that.
19 The law guardians are terrorizing their young
20 clients. They bill with abandon, fail to act in their
21 client's best interests.
22 Lack of oversight permits them to curry favor
23 with the judges including issuing reports the judges
24 desire so they are reappointed. Some of them hang
25 around the hallways, and I can tell you who, looking for
26 cases like ambulance chasers.

1 Proceedings
2 Lawyers should be required to sign a statement
3 disclosing all conflicts of interest. Failure to
4 disclose should mean censure. A lawyer with a second
5 violation should lose their license. Lawyers are
6 colluding. And this is no different than a RICO
7 violation. There were multiple lawyers in my case who
8 had worked on multiple cases together including the
9 infamous Soft Split case.
10 Attorneys should not be required to make a
11 motion for fees when a party is a non-monied spouse. It
12 consumes their fee award. My attorney refused to make a
13 motion for fees and I had no ability to force her to
14 make a motion.
15 It is also ridiculous that criminal charges
16 need to be filed for the Bar Association to reprimand an
17 attorney who enters a client's home without their
18 permission. My attorney entered my home to appraise it
19 for a Heloc without my knowledge or consent while I was
20 in Thailand. The Heloc was to pay her fees violating the
21 SCRR. A complaint was filed and the Bar Association did
22 nothing. I had missed the criminal SOL since I was pro
23 se. Had I filed a complaint, I would lose my attorney.
24 I have the letter with me. I don't understand how any
25 attorney can enter my home without my knowledge or
26 permission and the Bar Association does not find that a

1 Proceedings
2 problem. That is so disturbing it goes beyond common
3 sense.
4 Attorneys who view misconduct in court should
5 be required to report it and failure to do that should
6 require immediate censure.
7 The New York City Bar Association, also needs
8 to be investigated. It is concerning that committee
9 appointments are apparently made at the "unfettered
10 discretion of the New York City Bar President." Sitting
11 Judge Evans was meeting with "invited" attorneys on
12 select committees. I have that letter too. The bar is
13 giving certain attorneys preferential access to sitting
14 judges.
15 The e-mail I received -- because I am a retired
16 attorney I asked to be appointed to the Matrimonial Bar
17 Committee:
18 "We have received your application to join the
19 City Bar Committee with accompanying materials. As you
20 know, not all association members are appointed to a
21 committee. Committee membership is made only by the
22 appointment of the President, whose decisions are left
23 to the unfettered discretion of the President. I am
24 writing to advise you that your application for
25 committee membership has been denied."
26 I walked into a meeting and saw a sitting judge

1 Proceedings
2 with certain key matrimonial attorneys. I can't even
3 believe that that could be ethical. I must have missed
4 that class in my Ethics class.
5 VOICE: I missed it too.
6 MS. LINTZ: Ethics Committees are packed with
7 "besties" overseeing their friends. The Ethics
8 Committees need to be transparent and the sessions need
9 to be public to avoid any appearance of helping out a
10 friend. The public is subject to open courtrooms
11 without controls and subject to the same tarnish and
12 potential media's presence. I know, my case has been
13 all over the Post and the Daily News and so should
14 attorneys. Bill Cosby's victims came out when the
15 issues are disclosed and the same will happen with
16 attorneys and then you will have your empirical
17 evidence.
18 The process needs to be decentralized to avoid
19 favoritism. Different locations have different rules.
20 We are a state with one set of laws. There needs to be
21 uniform behavior by attorneys.
22 Attorneys who are part of matrimonial actions
23 should be subject to the bar's code of ethics. My
24 ex-husband is a partner at Cadwalader.
25 JUDGE COZIER: You have about one minute.
26 MS. LINTZ: I understand. But I had a problem

2 dealing with the microphone so I get one extra minute.
3 JUDGE COZIER: No, you don't get an extra minute.
4 VOICE: Awwww.
5 MS. LINTZ: My ex-husband, a partner at
6 Cadwalader, routinely violates court orders including
7 nonpayment of support, paying it late, taking
8 unauthorized deductions, cursing me on the phone and in
9 e-mails -- I have those -- chest bumping me in court and
10 I am dependent for the judge for sanctions solely
11 because I was once married and not a client. He uses
12 this loophole to further abuse me. I should not be a
13 client for bar ethics to apply. My ex-husband is acting
14 as his attorney and his behavior is unbecoming to an
15 attorney and this loophole needs to be closed.
16 Attorneys coming into our jurisdiction and fail
17 to maintain an office it should be directly enforced.
18 The attorney representing my husband knowingly and
19 intentionally misleads the court, violates court orders
20 and there is nothing I can do because --
21 JUDGE COZIER: Thank you very much.
22 MS. LINTZ: Because New York State does not have
23 oversight over him.
24 THE VOICE: Thank you very much.
25 MS. LINTZ: Who do I give the rest of my
26 testimony to?

2 JUDGE COZIER: You can give it to Mr. Caher.
3 MS. LINTZ: Thank you.
4 MR. ZAUDERER: Good afternoon.
5 What you have submitted for the public record
6 here is mostly directed at a particular judge --
7 MS. LINTZ: No. That is not just about -- that
8 is not just about a particular judge.
9 There is about a judge but I know you don't
10 have oversight over a judge.
11 MR. ZAUDERER: Let me just finish my question,
12 please.
13 MS. LINTZ: Sorry.
14 MR. ZAUDERER: Thank you.
15 You complained a lot about this judge,
16 Judge Drager. And you say in your submission, among
17 other things, quote: "She placed me in handcuffs three
18 times and told me I was going to Rikers for 20 days."
19 Did that get carried out and did you file by
20 any chance a complaint with the Judicial Conduct
21 Commission, and if so, was it addressed?
22 MS. LINTZ: It was not addressed.
23 MR. ZAUDERER: Did you file it?
24 MS. LINTZ: Oh, most certainly.
25 I took photographs. I had bruises all over my
26 hands. I had a huge bruise on my neck from crying so

2 hard, because I was so terrified, you can not even
3 fathom.
4 No, I was not sent to -- she uses it as a
5 terrorizing technique. I have been placed in handcuffs
6 three times. I don't even have a jay walking ticket. I
7 think in total in my life I have gotten two parking
8 tickets. It is unfathomable to me.
9 And the reason I was placed in handcuffs is
10 because she was creating a record where she was lying
11 and I prevented her from doing that so I could appeal.
12 MR. ZAUDERER: I think you answered my question.
13 Thank you very much.
14 MS. LINTZ: Thank you.
15 Any other questions?
16 VOICE: Oh, come on. Somebody ask another
17 question.
18 MS. LINTZ: I would like to now have the same
19 questions directed to me as a former attorney as you
20 have had to the other people. Because, otherwise, it is
21 giving the impression that our opinions don't really
22 count or matter.
23 VOICE: Yes, yes. That is true.
24 VOICE: Come on, ask a question.
25 WOMAN'S VOICE: You go girl.
26 JUDGE COZIER: Let me explain the difference

2 between your testimony and some of the earlier

3 testimony.
4 Your testimony focused on your case, your
5 circumstances.
6 MS. LINTZ: No, actually it didn't.
7 JUDGE COZIER: But you didn't address the issues --
8 you did mention the uniformed rules, a couple of things,
9 but we understand the testimony, so if we don't have any
10 further questions --
11 MS. LINTZ: You know what, I am actually
12 somebody who sits on federal, state and city committees,
13 in my work arena and write public policy. All the air
14 samples you see around the city for people with hearing
15 loss, that is my work.
16 So, while I gave you empirical evidence because
17 that is what I can, the issues if you look at them are
18 the same across the state. And there are women all
19 across the state that are having the same issues, but
20 the problem is there aren't people like us on the
21 committees and we file the complaints. So I have the
22 complaints, but they are always dismissed.
23 And, so, if the committee doesn't ever do
24 anything and then says but look at the number of
25 complaints that are dismissed it becomes self serving
26 because it is a committee not taking. And if we

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2 developed a pattern and looked at the number of people

3 filing complaints against the same attorneys over and
4 over. So, maybe as pro se clients, we may not be the
5 best people filing complaints, but, then, you know,
6 where there is smoke there is fire. It is the same
7 attorneys that are constantly complained against. You
8 have to wonder. Because I kept an Excel spread sheet
9 and I can tell you the pattern of five attorneys in the
10 matrimonial part. It is the same issues over and over.
11 And then the question is why isn't the Committee doing
12 anything?
13 JUDGE COZIER: Thank you very much.
14 VOICE: Yes. Yes.
15 VOICE: A benevolent dictator, would do a better
16 job. We must look in the mirror.
17 JUDGE COZIER: Sir, I will ask you to refrain or
18 you must step out.
19 MS. OXMAN: I am giving you this because I
20 believe you asked for some statistics.
21 (Whereupon, witness hands to the panel.)
22 MR. ZAUDERER: Give it to Mr. Caher in the back.
23 MS. OXMAN: No problem. Thank you. Thank you
24 very much.
25 My name is Ellen Oxman.
26 Ladies and gentlemen, kindly allow me to read

1 Proceedings
2 the pivotal sentence from this Commission's
3 March 30, 2015, press release in it's official mission

4 statement:
5 "Among the issues to be studied by the
6 Commission on statewide attorney discipline are whether
7 New York's departmental-based system leads to regional
8 disparities in the implementation of discipline; if
9 conversion to a statewide system is desirable; and how
10 to achieve dispositions more quickly in an effort to
11 provide much-needed closure to both clients and
12 attorneys."
13 Ladies and gentlemen, there is an elephant in
14 the room today. And that elephant, is this, you can
15 make the rules uniform across the state, you can dispose
16 of complaints quicker, you can tweak the rules all you
17 want, but if the rules are not followed it won't solve
18 the problem.
19 VOICE: Here, here.
20 MS. OXMAN: The problem, and let's state it
21 clearly, is that there is no oversight of the Attorney
22 Disciplinary Committees, nor, of the Commission on
23 Judicial Conduct. And this has led to well documented
24 corruption. In fact, overwhelming evidence of
25 corruption. They simply don't follow the rules when they
26 don't want to and there is nothing to be done about it.

1 Proceedings
2 It is an open secret that these offices have
3 been run in a rogue manner to target or protect select

4 attorneys. The documentation starts at least as early
5 as the Murphy Report in 1989 when Judge Murphy, the
6 Chief Judge of the First Department at that time fired
7 two top Disciplinary Committee executives for among
8 other charges falsifying timesheet's, whitewashing well
9 substantiated claims against favored attorneys,
10 targeting out of attorneys, warehousing complaints
11 instead of addressing them and using quota systems to
12 arbitrarily close cases to the detriment of
13 complainants, and justice. This kind of corruption
14 continues today and is much worse.
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1 Proceedings
2 MS. OXMAN: And as much worse. Twenty years
3 later we heard the same types of stories at Senator
4 Samson's 2009 hearings. Although consumers, attorneys

5 and judges traveled from near and far to testify about
6 corruption in these offices, I being one at that time,
7 the hearings were halted without explanation. The
8 verbal testimony relegated to You Tube, the submitted
9 documentation warehoused or simply discarded. No
10 report was ever generated by the Senate Judiciary
11 Committee who heard the testimony. The judiciary
12 committee's 2009 annual report makes no mention of the
13 hearings having even taken place. Dead silence in
14 response to overwhelming evidence of corruption.
15 These two offices, the attorney disciplinary
16 committees, the subject of today's hearings, and its
17 counterpart the Committee on Judicial Conduct are
18 quietly the two most powerful offices in the entire
19 court system. If they are honest and function
20 correctly, they are powerful guiding forces to keep the
21 court system fair, above board and respected by the
22 public. But if they are corrupted and are used to
23 target or protect attorneys and judges, the court
24 system then and is now a tool of criminals. Let's
25 face it. You can make all of the laws you want, just
26 you know, against looting, you can make them -- laws

Claudette Gumbs

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1 Proceedings
2 uniform across the state, but if the police, and that
3 is you, turn the lights off and lock the precinct
4 doors, there will be looting on the streets and that is

5 what you're seeing.
6 The time is now, because what you have is
7 probably the most corrupt court system in the United
8 States --
9 (Applause.)
10 -- with the most corrupt attorneys in the
11 history of this country who go blithely unpunished and
12 are fully protected by those who are charged with
13 exposing them.
14 We now know what Senator Sampson knew in 2009
15 as he sat listening to our testimony; that he was a
16 criminal who was facing substantial jail time if
17 caught. Now he is a convicted criminal and yet to my
18 knowledge he has not been disbarred or suspended from
19 practicing law in New York by the disciplinary
20 committee.
21 Judge Gonzales, the current chief judge of
22 the First Department, admitted to substantial untruths
23 on a mortgage application and to engaging in nepotism,
24 hiring family members to do court related jobs that in
25 some cases they weren't qualified to even do. The
26 report exonerating the judge conspicuously neglected to

Claudette Gumbs

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1 Proceedings
2 mention his background was as a housing court judge and
3 therefore, someone who should be conversant with
4 mortgage fraud.
5 To my knowledge, he, too, has received no

6 discipline whatsoever. Yet Judge Gonzales has been
7 left at the helm of the First Department overseeing its
8 disciplinary committee and even as the head of the
9 Appellate Division, determining which lawyers should
10 escape discipline and which should be punished. This
11 in a word -- that is outrageous. Judge Lippman knew
12 about Sampson's hearings on allegations of corruption.
13 He knew that the hearings were abruptly dropped, the
14 testimony orphaned. He received countless pleas from
15 me, being one of them -- from legal consumers,
16 professional organizations. Judge Lippman was in a
17 position to do something about it as the Chief Judge of
18 the First Department and now as the Chief Judge of New
19 York State, but instead, your mission statement
20 entirely sidesteps the question of corruption.
21 So here we are again today, pretending there
22 is no corruption. That we need to improve the rules.
23 I personally over the course of eight long
24 years have submitted clear and convincing evidence
25 uncovering more and more in my own case alone, on how
26 this office is run to target and protect, to enable

Claudette Gumbs

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2 misconduct and in my case, to enable crimes across
3 state lines and worse. You owe it to the American
4 public to squarely address the elephant in the room.
5 You owe it to the public to address the corruption

6 within these offices, a corruption that I have been
7 forced to endure at deep expense to my children and
8 myself. It crosses state lines, involves forgery,
9 fake documents, fraud upon the court, a cornucopia of
10 corruption that is flourishing and not being stopped at
11 all. The standard is so low that forum shopping for
12 the easily available corrupt lawyers in Manhattan
13 Supreme Court alone is now a known at traction for big
14 law from other states and countries, where we even see
15 what was once the most prestigious law firm Dewey
16 Ballantine corrupted and bankrupted because there is
17 zero accountability by these lawyers and these judges.
18 Where is the Attorney Disciplinary Committee
19 and its counterpart, the Committee on Judicial Conduct?
20 Where are they? The lights are out. They are not in
21 their offices. The looting of the courts by corrupt
22 attorneys and corrupt judges is on their watch. As we
23 speak, it continues apace, legally destroying our court
24 system. Right now, that is your terrible legacy and
25 instead of addressing it, you mock the public. We
26 don't want to be mocked any longer in the public realm.

Claudette Gumbs

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1 Proceedings
2 In my response --
3 JUDGE COZIER: Ms. Oxman, you have about a
4 minute.
5 MS. OXMAN: I will just state then that I am
6 a victim of domestic violence. I have many documents

7 going back to 2007 about the lawyers in my case who
8 were never let out of my case. Her name is Pamela
9 Sloan from Sloan, Robarge and Herman. Never let out of
10 my case. I am a musician, I am not a lawyer. I had
11 no idea that a lawyer has to make a motion to be let
12 out of the case. They are still the attorney of record
13 for my litigation.
14 My husband is a famous lawyer. His brothers
15 went to law school with Bill and Hillary Clinton.
16 These are people who are powerful, who understand the
17 system and they are connected. I am not.
18 When my husband threw me against the wall in
19 my building, Chris Wasserstein, who is Bruce
20 Wasserstein and Wendy Wasserstein's relative wrote an
21 affidavit on behalf of getting me a temporary order of
22 protection which Judge Evans turned down. I had to go
23 to Family Court to find out I was divorced in front of
24 Robert Stolz because the NYPD sent me to Family Court
25 to get an order of protection for myself. At that
26 Family Court hearing I found out I was divorced. What

Claudette Gumbs

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1 Proceedings
2 country am I in?
3 JUDGE COZIER: Ms. Oxman, thank you.
4 JUDGE COZIER: The next witness is Alton Maddox.
5 MR. MADDOX: Thank you very much. At the
6 outset I want to assure any and everybody on this panel

7 that I am not here as an individual grievant. I am
8 here because I am the leading voice in the black
9 community and I am speaking for the black community.
10 I don't think anybody would quarrel with that.
11 I would like to give thanks to attorney Grant
12 Victor for giving me notice of this hearing on attorney
13 discipline. I am JUDGE COZIER man of the United African
14 Movement, which has the rich history of being involved
15 in the criminal justice system, especially as a
16 consumer watchdog.
17 The consumer class in New York is
18 disproportionately persons of African ancestry and they
19 also include black lawyers as well. This has been a
20 very interesting day, interesting because so many
21 things that we have talked about in the black community
22 seem to transcend the black community. It seems as
23 though there are people throughout this state who are
24 adversely effected, despite their backgrounds or their
25 color or class.
26 I invite this panel to engage in a give and

Claudette Gumbs

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1 Proceedings
2 take with me. I don't want anybody to back down.
3 But while you are thinking about whether you should or
4 not, I would like to point out some things that were
5 mentioned earlier in this hearing.
6 One is that there is a concern about
7 prosecutors. And my comment is that I am the only

8 lawyer in this nation, the only lawyer in this nation
9 who has ever been involved in two special prosecutions,
10 one in Howard Beach and the other one in the Tawana
11 Brawley case.
12 Secondly, while we are contemplating whether
13 I should be quizzed or not, I will bring out some
14 matters on secrecy. I am the only lawyer ever in the
15 history of New York who demanded and obtained a full
16 public hearing on disciplining lawyers. Ever in the
17 history of the state. So I think I have a few things
18 to say if questioned about secrecy, if that is our
19 concern.
20 The third problem that I find here is one of
21 what I call judicial gerrymandering. There has been
22 much discussion today about people being treated
23 differently in the various departments. Well, the
24 department that I am concerned about is the First and
25 Second, because most blacks in New York live within the
26 confines of New York City or its suburbs. The problem

Claudette Gumbs

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1 Proceedings
2 is that most of us like Eric Garner, like Sean Bell,
3 like Tim Stansbury and so many others live in the
4 Second Department where this department has been
5 gerrymandered so it has packed all blacks in the
6 judicial district so they could be wholesale
7 discriminated against like in the case of John White

8 out in Suffolk County who sought to defend his family,
9 but was told by the Second Department that Negroes have
10 no rights that a white man is bound to respect. And
11 this is the policy in the Second Department, and this
12 is the reason why there are so many people coming here
13 complaining they might not be able to understand the
14 terminology that is applicable, but this is the
15 situation and since -- it is a historical problem and
16 it is such a historical problem that I have been all my
17 life involved in the civil rights movement, from the
18 time that I was in high school and that has been quite
19 some time ago and so, I know very well about the issue
20 of racism and I know very well about the problems that
21 black people have confronted and had to confront all of
22 their lives.
23 And so, after the New York State Commission
24 on Judicial Minorities in 1991 said that New York was
25 infested with racism, infested, this is not somebody
26 from the hood talking, these are the most advanced

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2 whites that we have in New York, the privileged class,
3 and they assembled and in 1991 they said New York is
4 infested with racism. This is such a deplorable
5 condition, this should not be summarized in a summary
6 hearing. There should be a plenary hearing. The mere
7 fact that we are here in a summary hearing giving
8 people only ten minutes to testify and then have no

9 questions asked is in itself a miscarriage of justice.
10 Rosa Parks is not here. Dr. Martin Luther
11 King Junior is is not here. But if they were here,
12 they would do what I am calling for now and as I have
13 called for in the New York Amsterdam News this week:
14 Blacks must boycott New York courts now. It makes no
15 sense for another black defendant to go into a racist
16 courtroom and expect justice. That makes no sense.
17 At all. It has to come to an end.
18 I am not here to ask you or beg you or plead
19 with you, because I never believed in plea bargaining.
20 A client came to my office, I said three things to
21 black people. One, I will never ask you what
22 happened, because you don't understand the language.
23 I am not going to ever ask you to take the witness
24 stand because you may get tripped up. And I am never
25 going to ask you to plead guilty because I don't know
26 what that is.

2 The only thing I know to do in a courtroom is
3 to knock the door down and whip some butt. That is
4 the only thing I do know and the only thing that I will
5 ever know and that is why nobody will ever get me back
6 in a courtroom again, because they don't want any more
7 butt whippings.
8 I am here saying that blacks must boycott New

9 York courts now. I also -- and that is in the New York
10 Amsterdam News this week. I also say that this is
11 gerrymandering, apartheid justice and that is what we
12 are talking about, judicial gerrymandering and
13 apartheid justice and it doesn't relate to black
14 people, it relates obviously to everybody. And then
15 everybody wants to sit there and don't want to ask any
16 questions as the lady asked sometime ago and said will
17 you please ask me a question? And nobody said a word
18 other than ten minutes is up and so before you, Mr.
19 Cozier get a chance to tell me to sit down, I will take
20 the liberty of doing it myself so you won't have the
21 pleasure of asking Alton Maddox to sit down.
22 Thank you very much.
23 (Applause.)
24 MS. KEWALRAMANI: Mr. Maddox, thank you for
25 your testimony.
26 MR. MADDOX: You're welcome.

Claudette Gumbs

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1 Proceedings
2 MS. KEWALRAMANI: What are your views on
3 opening up the disciplinary process?
4 MR. MADDOX: I believe that any secrecy
5 involved in the discipline of lawyers is in violation
6 of the Fourteenth Amendment, and -- if lawyers are
7 treated differently than the average common thief. I
8 find no reason why there should be any secrecy or any
9 veiled secrecy around lawyers, it doesn't happen

10 anywhere else and so when these bogus charges were
11 brought against me, I said I won't do anything but the
12 only thing I will demand is to let the public know.
13 That is how you educate the public, by letting them
14 know. I don't have anything to hide. I never had
15 anything to hide on any issue all right? And so
16 therefore, I will be treated like any other person. I
17 don't want to have the privilege of being a lawyer
18 elevating me above the common people. That is not my
19 thing, that is not my interest and I will continue to
20 fight until the very end for the injustices that are
21 putting millions of blacks and Latinos behind bars.
22 (Applause.)
23 JUDGE COZIER: The next speaker is Elena
24 Sassower.
25 MS. SASSOWER: If I may --
26 JUDGE COZIER: We are not accepting submissions

Claudette Gumbs

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1 Proceedings
2 here, Ms. Sassower. You made a submission to us.
3 MS. SASSOWER: -- I am presenting you with
4 statistics and other information that will make the
5 testimony --
6 JUDGE COZIER: The information you submitted
7 before will be made part of the record.
8 MS. SASSOWER: My name is Elena Sassower. I
9 am Director and Co-founder of the Center for Judicial

10 Accountable Inc, a non partisan nonprofit citizens
11 organization that for more than a quarter of a century
12 has documented the corruption of judicial selection,
13 judicial discipline and the judicial process itself.
14 This includes the judiciary's corruption of
15 the system of attorney discipline, all aspects of which
16 it controls and which it uses to protect and insulate
17 from accountability the politically connected attorneys
18 and to retaliate against judicial whistleblowing ones.
19 I am also privileged to be the daughter of
20 two such judicial whistleblowing attorneys. My
21 father, George Sasssower, was disbarred by a
22 February 23, 1987, order of the Appellate Division,
23 Second Department, for violating court orders requiring
24 him to acquiesce to the court's cover up of lawyer
25 larceny of assets of an involuntarily dissolved
26 corporation, assets which have yet to be accounted for

Claudette Gumbs

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1 Proceedings
2 by the Court nearly 30 years later.
3 My mother, Doris L. Sassower, was indefinitely
4 suspended by a June 14, 1991 so-called interim order of
5 the Appellate Division Second Department, without
6 reasons, without findings unsupported by a petition or
7 by any hearing as to which to date, nearly 25 years
8 later, there have been no findings, no hearing, no
9 appellate review.
10 New York's court controlled system of

11 attorney discipline as it currently exists is 35 years
12 old. And it has survived because no one in a position
13 of power or influence has confronted the proof of its
14 dysfunction, corruption and politicization. It is
15 because I knew and understand that the attorney
16 disciplinary system cannot survive an evidentiary
17 presentation that I contacted the Office of Court
18 Administration to find out whether hearings would be
19 held -- public hearings, because this Commission, the
20 Commission on Statewide Attorney Discipline was until
21 the third week of June, inaccessible. It had no phone
22 number, no website, no way for the public to contact it
23 with the information born of direct personal experience
24 and to furnish it with the documentation that it would
25 need if it was going to conduct a legitimate, honest
26 review.

Claudette Gumbs

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1 Proceedings
2 It is to the credit of Chair Cozier and prior
3 thereto, Chair Prudenti that in response to my
4 inquiries on the subject, that they threw up a website
5 and announced these public hearings.
6 I have handed up and I ask you to open the
7 file folders so that we can examine together what I
8 think Mr. Zauderer identified as something of concern
9 to him and that was the statistics. So the very first
10 page are statistics. Now, I will tell you that the

11 Office of Court Administration does not make these
12 readily available. They are not on its website, they
13 are not really anywhere, and to the extent that you can
14 find anything, you can get from the Fourth Department
15 its statistics which are part of its annual report and
16 the First Department has its statistics in its annual
17 report at the back.
18 I have given you the page from the New York
19 State Bar Association's annual report that is put out
20 by its Committee on Professional Discipline and this is
21 the most recent for 2012.
22 Let's just take a look at matters disposed
23 of, okay? For 2012. All right. Now, we talk about
24 the grievance committees but the fact of the matter is,
25 the grievance committees are sham entities, not -- they
26 don't really exist, don't operate as committees with

Claudette Gumbs

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1 Proceedings
2 all of their membership because most of the complaints
3 that are filed with the committees are going out at a
4 stage where none of the committee members have ever
5 seen those complaints. They are being processed by
6 staff. All right.
7 Now, if you look at the statistics here you
8 will see -- and because of lack of time, I -- I don't
9 want to dwell on it, but if you see that the three,
10 departments, the Second, Third and Fourth departments
11 are dismissing between 45 and 52 percent of complaints

12 they receive -- are rejected by them as failing to
13 state complaint which means of course that they are
14 purporting that the allegations, if true, would not be
15 misconduct. All right.
16 But look at the First Department. It is
17 only 11 percent. That is too great a range. There is
18 something wrong. How do you account for that
19 difference?
20 Now, look at the next category. Dismissed
21 or withdrawn. First of all, that category makes no
22 sense, correct? Because a complaint that is dismissed
23 is very different from a complaint that is withdrawn.
24 They should be in separate categories. But they are
25 bunched together. Okay. But if you add up those two
26 categories and what you see in the First Department is

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1 Proceedings
2 that it makes up for the statistical difference by
3 dismissing 63 percent of complaints for -- it doesn't
4 identify the reason but -- that they are being
5 dismissed, plus the 11. The cumulative statistic is
6 that between 74 percent in the First Department,
7 63 percent in the Second Department, 69 percent in the
8 Third Department and 75 percent in the Fourth
9 Department are being dismissed at the outset.
10 And the truth of it is that those dismissals
11 are not being made by the committee. You can talk

12 about the presence of non lawyers on the committee, no
13 non-lawyers and actually, it would appear that with the
14 exception of possibly the First Department, all of
15 these dismissals at outset are not seen by a single
16 committee member, lawyer or lay.
17 In the First Department, these dismissals
18 possibly and it is not clear from a reading of the
19 rules, are with the acquiescence of a single lawyer
20 member. Okay. So the lion's share of complaints --
21 and how many are we talking about? Well, we are
22 talking about matters disposed of -- well, you have
23 thousands and thousands -- matters disposed of here.
24 It is 11,661. Okay.
25 (Whereupon, the following was transcribed by
26 Senior Court Reporter Monica Horvath.)

Claudette Gumbs

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1 Proceedings
2 Now, what can we tell from statistics?
3 Well, the statistics, are very limited because the
4 question is are those dismissals appropriate, are they
5 correct? And to make that evaluation, you need to see the
6 complaints. You need to see the complaints, and you need to
7 compare them with the dismissal letters. And what do the
8 dismissal letters say about the complaints, and is it
9 consistent?
10 JUDGE COZIER: Miss Sassower, you have about one minute
11 remaining.
12 MS. SASSOWER: Oh, dear.
13 So let me very quickly tell you.

14 In 1989 the State Comptroller tried to do an audit
15 on the Commission of Judicial Conduct which wouldn't allow
16 the Comptroller to its files. The Comptroller knew that
17 without access to the record of complaints and dismissals he
18 could make no assessment as to the legitimacy of the
19 dismissals of complaints. The Commission wouldn't give
20 access so he wrote a report called "Not Accountable to the
21 Public".
22 You have no auditing. In all these years there has
23 never been an independent auditing of the complaints filed
24 with the Grievance Committee. You are not in a position to
25 do an independent audit, but I will, since my time is up, I
26 I want to just leave this with you.

1 Proceedings
2 (Whereupon, the witness approaches the panel
3 and distributes packet.)
4 All those who have testified should be providing
5 you with their complaints.
6 I have brought here a sample, an illustrative
7 sample of let's see five -- here, five.
8 JUDGE COZIER: Those can all be given to Mr. Kohler.
9 MS. SASSOWER: And I have additionally -- excuse me.
10 I want to say that the important law review of
11 Professor Gillers, which really gave rise to this Commission
12 as powerful as it is, it is flawed. Why? Because it never
13 goes beneath the surface of the judicial decisions. And the
14 judicial decisions over and again like the dismissals of
15 complaints they are not really by the Grievance Committee

16 but by the staff are frauds.
17 JUDGE COZIER: Your time is up.
18 MS. SASSOWER: And you can discern them by examining
19 the case files.
20 JUDGE COZIER: Thank you, Miss Sassower.
21 MS. SASSOWER: Here are the case files as to the
22 unconstitutionality of the New York Attorney Disciplinary
23 Law.
24 (Whereupon, the witness leaves a cart full of
25 files in front of the panel.)
26 MS. SASSOWER: You may be sure --

1 Proceedings
2 JUDGE COZIER: Miss Sassower, thank you very much.
3 VOICE: Do you have any questions?
4 JUDGE COZIER: Thank you very much.
5 MS. SASSOWER: I have a few things, because
6 Mr. Zauderer, asked another very important question at the
7 Albany hearing.
8 JUDGE COZIER: Your time is up.
9 VOICE: Let her finish.
10 MS. SASSOWER: Would you repeat the question to me
11 that you asked the state bar?
12 MR. ZAUDERER: Sorry, I don't remember what you are
13 referring to.
14 MS. SASSOWER: May I remind you?
15 MR. ZAUDERER: Go ahead.
16 JUDGE COZIER: Miss Sassower?
17 MS. SASSOWER: He asked me to remind him. He asked
18 me to remind him. Thank you.

19 Liked to Professor Gillers --
20 JUDGE COZIER: Miss Sassower, please.
21 MS. SASSOWER: Mr. Zauderer asked the President of
22 the state bar who spoke up --
23 JUDGE COZIER: Miss Sassower, your time is up.
24 VOICE: Let her talk. Let her talk.
25 MS. SASSOWER: No, no. He asked me to respond to
26 the question that he asked the President of the State Bar in

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1 Proceedings
2 Albany at the first hearing. Because the President of the
3 State Bar had testified about introducing discovery into the
4 attorney disciplinary proceedings. And the State Bar has
5 issued a report and Mr. Zauderer -- because discovery is
6 such a fundamental thing it is a matter of due process,
7 confrontation rights, and -- Mr. Zauderer, asked the
8 intelligent question, "Well, what is the opposition; what
9 could be the opposition to discovery?" And, believe it or
10 not, the President of the State Bar fumbled and was not
11 really able to answer that question. And, I said -- I tried
12 at the end -- I said, "I have the answer," and, so, now, I
13 will give you the answer.
14 JUDGE COZIER: Briefly.
15 MS. SASSOWER: The answer is that in all the decades
16 that we have had this attorney disciplinary regime, you may
17 be sure that prosecuted attorneys have made motions and
18 sought appeals and have raised the constitutional issue
19 among others of their entitlement to discovery. They have
20 raised it before the Appellate Division. They have raised it

21 before the Court of Appeals.
22 If you look in the records, the files, case files,
23 and of course the case files, once an attorney is publicly
24 disciplined, disbarred or suspended those files are all open
25 to you, okay. You have no bar. What you will see is they
26 make the constitutional legal arguments and the response

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1 Proceedings
2 from the court: "Denied".
3 There is no discussion. No elucidation. There is
4 nothing. And that is why there is no case law. And if you
5 look at the report of the State Bar Association, too, on the
6 issue of discovery it is in a vacuum, just like Professor
7 Giller's article.
8 JUDGE COZIER: Ms. Sassower, I think you have said
9 enough.
10 MS. SASSOWER: Don't you think attorneys have raised
11 the equal protection invidiousness that is affected by your
12 article? Of course, they have. And what has been the
13 response? "Denied".
14 VOICE: Yeah. Yeah.
15 VOICE: Here, here.
16 (Applause.)
17 MS. SASSOWER: Oh, oh, one other thing.
18 WOMEN'S VOICE: Let's get the job done.
19 VOICE: Let's get the job done.
20 MS. SASSOWER: The judiciary has consistently not
21 requested funding for the Attorney Disciplinary System with
22 consistency. In fact, the funding has gone down.
23 The funding has gone down even as they were

24 clamoring for judicial pay raises which they secured. The
25 annual budgeting, for the Attorney Disciplinary System is
26 $15 million.

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1 Proceedings
2 VOICE: What?
3 MS. SASSOWER: The judicial pay raises paid out
4 since 2012 are at least $150 million and $50 million each
5 and every year.
6 JUDGE COZIER: Today's testimony is concluded.
7 * * *
8 THE ABOVE IS CERTIFIED TO BE
A TRUE AND ACCURATE TRANSCRIPT
9 OF THE PROCEEDING RECORDED BY ME
10
11 MONICA HORVATH
SENIOR COURT REPORTER
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