SUPREME COURT OF THE STATE OF NEW YORK
Ist JUDICIAL DISTRICT
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HEARING RE:

COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

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New York County Lawyers Association
14 Vesey Street
New York, New York 10007

August 11, 2015

BEFORE:

COMMISSION MEMBERS:
HONORABLE BARRY A. COZIER, Chair
HONORABLE PETER SKELOS
MARK C. ZAUDERER, ESQ.
ROBERT P. GUIDO, ESQ.
DEVIKA KEWALRAMANI, ESQ.
SEAN MORTON, ESQ.

Claudette Gumbs, Official Court Reporter
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JUDGE COZIER: Good morning. Good morning and welcome to the third of three public hearings scheduled by the Commission on Statewide Attorney Discipline. My name is Barry A. Cozier and I am JUDGE COZIER of the Commission. I am currently senior counsel at LeClair Ryan here in New York City and formerly served in the New York State judiciary as a judge of the Family Court, Justice of the Supreme Court and associate justice of the Appellate Division, Second Department.

On behalf of Chief Judge Lippman and myself, and all of the members of the Commission, I want to thank each of you for taking the time this morning to come before us to share your thoughts and insights about the important issues the Commission is tasked with addressing.

In February of this year, Chief Judge Lippman established the Commission on Statewide Attorney Discipline to conduct a comprehensive review of the state's attorney disciplinary system to determine what is working well, and what can work better.

After conducting this top to bottom review, the Commission is charged with offering recommendations to the chief judge, the Court of Appeals and the Administrative Board of the courts about how to best enhance efficiency, effectiveness and public confidence

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in New York's attorney discipline system.

Among the primary issues under consideration by the Commission are the following: One, whether New York's departmental based system leads to regional disparities in the implementation of attorney discipline;

Two, if conversion to a statewide system is desirable;

Three, the point at which disciplinary charges or findings should be publicly revealed, and

Four, how to achieve dispositions more quickly in an effort to provide much needed closure to both clients and attorneys.

In recent weeks we have held hearings in Albany and Buffalo, where we elicited very insightful and helpful testimony from a wide range of stakeholders. Looking over today's witness list I know that this morning and this afternoon will be just as productive and helpful as the prior hearings.

By holding these public hearings and also accepting written testimony, we hope to hear from a diverse cross section of interested individuals, organizations and entities about their views on these and related issues they feel are relevant to the Commission's task.

Claudette Gumbs

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So far we have heard from attorneys, Bar Association's, consumer advocates, legal consumers, academics and others. We believe that by inviting and considering different viewpoints, the Commission will gain a more complete understanding of the issues at hand and in turn be in a better position to formulate the best possible recommendations for the State of New York.

We know that the attorney discipline process has a tremendous impact, not only on attorneys subject to discipline and their clients and potential clients, but also on the public's trust and confidence in our legal system. We want to thank you once again for helping us in this important mission to carefully examine the need for change in New York's disciplinary system.

Today we have a very full agenda and we received more requests to testify than we could possibly entertain. We have attempted to fit in as many witnesses as possible within the time allotted, and in fact, we have extended the time by an hour. Still, we were not able to accommodate each and every request, but we will accept written testimony from any one who does not have the opportunity to testify at the hearing and because of time constraints, cannot be

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accommodated.

We have a witness list. Those persons who are not on the witness list will not have an opportunity to give oral testimony. Again, they may submit written testimony to the Commission and it will be made part of the record. We will have up to ten minutes -- each of you will have up to ten minutes to present your testimony and then you may be asked questions by the panel. We need to strictly enforce the time limit, because as I indicated, we are already over extended. And therefore, I would ask for both your understanding and consideration and patience. If there is something you want to tell us and you run out of time, you're welcome to submit a supplemental written statement. Now, in fact, most of the witnesses have already submitted written statements to the Commission. In some instances those written statements represent the testimony that they will be presenting this morning. I do want to caution you that to the extent that you plan to read your written testimony and it exceeds ten minutes, you will not have the opportunity to complete the testimony and therefore, you should tailor your testimony to that ten-minute period.

I am pleased to have a distinguished panel

Claudette Gumbs

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joining me today. Each of these professionals has special experience in the disciplinary field and currently service as a member of the Commission on Statewide Attorney Discipline.

And I begin with the member to my immediate right, the Honorable Peter Skelos, currently a partner at Forchelli, Curto, Deegan, Schwartz Mineo and Terrano and a former associate justice of the Appellate Division Second Department. Judge Skelos is co-chair of the Subcommittee on Enhancing Efficiency.

sean Morton is to my left. sean is the deputy clerk of the Appellate Division Third Judicial Department. He is a member of the Subcommittee on Uniformity and Fairness.

Mark Zauderer to my immediate left, your immediate right, partner in Flemming, Zulack, Williamson and Zauderer LLP and he is on the Subcommittee on Uniformity and Fairness.

Robert Guido, also to my left, the Executive Director for Attorney Matters, the Appellate Division Second Judicial Department. He is the co-chair of the Subcommittee on Uniformity and Fairness.

To my right, Devika Kewalramani, who is a partner and general counsel at Moses and Singer and the chair of the New York City Bar Association's Committee

on Professional Discipline. She is also the co-chair of our Subcommittee on Transparency and Access.

And to my far right, your far left, Professor Stephen Gillers. Professor Gillers is the Elihu Root Professor of Law at New York University School of Law. He is the co-chair of the Subcommittee on Uniformity and Access and the author of a recent and very in-depth Law Review article on the attorney disciplinary process in New York.

In addition, I would like to introduce to you the other members of the Commission who are with us this morning:

Glenn Lau-Kee, at the table to my far left is a partner at Kee and Lau-Kee and former president of the New York State Bar Association.

Sarah Jo Hamilton. Sarah is a partner at Scalise, Hamilton and Sheridan LLP, former trial counsel and First Department Deputy Chief Counsel to the Departmental Disciplinary Committee of the Appellate Division First Judicial Department.

Monica Duffy. Monica is the chief counsel to the Committee on Professional Standards with the Appellate Division, Third Judicial Department.

Donna English. Donna is not here.

EJ Thorsen who is with us is an associate at

Vishnick, McGovern and Milizio and she is vice president of the Korean American Lawyers Association of Greater New York and a member of the Character Fitness Committee for the Second, Tenth, Eleventh and Thirteenth judicial districts.

I am deeply grateful to the members of the Commission for their hard work these past several months and I want to thank every one who is able to join us today.

I would also like to extend my thanks to New York County Lawyers Association for hosting this event and graciously extending the time that they were able to have us utilize this room.

I would be remiss if I also didn't extend my thanks and the thanks of the chief judge and the Commission to my predecessor as chair, former Deputy Chief Administrative Judge A. Gail Prudenti for her stewardship of the Commission over its first four months.

Now, I would finally ask that all of the witnesses keep their voices up. We do have a court reporter present taking verbatim all of the testimony and I would remind the witnesses that the transcript of their testimony will be posted to the Commission's web page and possibly included as an appendix to our final

report. In other words, whatever you say here today at this public hearing will be available to the public.

Now I just have one final caution for the witnesses: The Commission is a fact-finding body. It is neither an investigative nor an adjudicative body and therefore, it has no authority, either over the disciplinary committees or the grievance committees and has no authority with respect to either the investigation or the adjudication of any individual cases, complaints or grievances.

The Commission in fact is involved in making recommendations to the chief judge about the disciplinary process statewide, both in terms of rule making and policy, so please keep that in mind as you make your remarks.

Our first witness this morning -- our first witnesses are Andrea Bonina and Pery Krinsky, New York State Academy of Trial Lawyers.

MS. BONINA: Good morning.

On behalf of the New York State Academy of Trial Lawyers, I would like to thank the Commission for giving us the opportunity to express our views on the important issue of attorney discipline in New York. My name is Andrea Bonina and I am both a long time Academy member and a member of the Grievance Committee

of the Second, Eleventh and Thirteenth judicial districts. I want to state from -- at the outset that my testimony today does not reflect any point of view of the Grievance Committee and rather is being given solely on behalf of the New York State Academy of Trial Lawyers.

MR. KRINSKY: Members of the committee, my name is Pery Krinsky and I, too, am a long-time Academy member. My practice specifically focuses on attorney, judicial and law school disciplinary matters and I also serve as JUDGE COZIER of the Committee on Professional Discipline for the New York County Lawyers Association, but again, my comments, too, are limited to those with respect to the Academy.

We are here for very important issues and we understand that these are issues that deserve serious and thoughtful consideration. We all understand that the goal of the disciplinary process is not punishment, but rather, the protection of the public.

With that said, for a number of different reasons it is the Academy's position that the issue of escrow theft by attorneys should not be the driving force behind any of the findings of this Commission. The grievance and disciplinary committees throughout the State of New York receive approximately 10,000

disciplinary complaints each and every year and yet, only a tiny fraction of those 10,000 plus disciplinary complaints relate to escrow theft. Concededly, escrow theft is by far perhaps the most serious offense to be committed by an attorney. Lawyers themselves in this regard, though, play an important role in self-policing the profession. We understand that escrow theft, because it is perhaps the most severe, often warrants disbarment or warrants a very serious and significant period of suspension. But again, this issue can be combatted in other ways. We understand that not only are we a self-policing profession, but there are also safeguards set up in place. For example, self reporting with respect to bounced checks and the idea that under Part 1300, bounced check reporting rules actually create an internal audit procedure in a sense that again goes to the issue of how escrow theft is very often determined or uncovered.

While it is true at times that the Appellate Division may decide to impose prolonged periods of suspension where an attorney has stolen escrow or fiduciary funds rather than disbarring an attorney, that decision typically is the result of a well thought out analysis taking into account the issues, aggravating and mitigating factors and indeed,

York for escrow theft.

Given this, respectfully, it makes little sense to reconstruct or in a sense to revamp the entire state's disciplinary system based on this one issue alone. Accordingly, the Academy respectfully submits that the matter of attorney escrow theft should not drive the findings this committee.

MS. BONINA: With regard to the claim that New York's departmental based system leads to statewide disparities and sanctions, it is our opinion that any disparities are reflective of the fact that each case is unique and receives consideration of all mitigating and aggravating factors. The fact that two lawyers who are found to engage in similar attorney misconduct may in some instances receive a different sanction, is a result in our opinion to be applauded, not criticized.

The Academy opposes any plan that would implement mechanistic and uniformity driven rules such these embedded in the United States federal sentencing guidelines, these guidelines as I am sure every one recalls were so widely criticized that the United States Supreme Court struck them down -- struck down, rather, their mandatory nature. Like in criminal

sanctions should take into consideration all of the contributions an attorney has made during his or her career, as well as any and all other mitigating factors. That is the system as it exists in all four judicial departments today and that system works well. There may appear to be unexplainable differences in the level of sanctions imposed in different cases, but largely that is due to the fact that certain departments include more of the facts in their disciplinary decisions. As with every area of law, each fact pattern in a disciplinary complaint is unique and the fact that each fact pattern is unique will unavoidably result in individualized decisions.

Any concern regarding disparities in decisions can be addressed by better education of the bar and of the public concerning the mitigating factors and the extent of the investigation.

MR. KRINSKY: The Academy does not believe that the procedural uniformity among the four appellate divisions is a key to a better disciplinary system in New York. Those who argue that New York needs a better disciplinary system and that the only way to attain that better system is through uniformity have in effect sought to lump together a number of different

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

disciplinary process.

Many of these concerns center around issues of delay, plea bargaining and dissatisfaction by some with respect to the private nature of the attorney disciplinary process. With regard to the issue of delay, for example, disciplinary cases do in fact take a considerable amount of time and that is necessarily so when we consider issues and safeguards such as due process and other protections afforded not only to lawyers, but also, to the public. Similarly, the issue or the principal issue of timing is really grounded not in the issue of creating a better system or a different system but rather, improving upon the system that we currently have, first and foremost as we all know by making sure that necessary funds are in place to provide the disciplinary and grievance committees with the necessary resources to work within the system and to improve upon it.

Somewhat related to this issue of delay is the claim of plea bargaining would enhance the disciplinary process. But simply engaging in plea bargaining in a sense giving an attorney an opportunity to simply pick or choose or identify which disposition

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

the Grievance Committee would still nonetheless be required to fully investigate that matter regardless of any plea bargaining. Even with minor disciplinary infractions, when a grievance or disciplinary staff member investigates a case and chooses to proceed one way or another, whether it be informal disciplinary, private disciplinary or public charges that are ultimately prosecuted, nonetheless that staff member is required to fully investigate every and all matters. Indeed, the fact is that when it comes to disciplinary matters, whether they proceed on a formal or informal basis, the committee members always must take into account issues of mitigating and aggravating factors, therefore leaving certain at least disciplinary cases, really not issues of liability but rather to mitigation and aggravation which goes to the issue of sanction and not liability.

MS. BONINA: There are some that would argue that the attorney disciplinary process should be open to the public at the charging stage. The Academy is firm in its view that an attorney's name and reputation should not be damaged or ruined unless and until the Appellate Division has made a determination that

serious misconduct has been committed.

A complaint against an attorney is -- which is not proven is just that, an unsubstantiated claim.

To allow an attorney's reputation to be sullied based on an unsubstantiated claim would simply be wrong. Everyone is innocent until proven guilty. Where there is theft relating to third party funds or other criminal conduct by an attorney, which is clearly the type of conduct that most impacts the public, law enforcement is often advised at an early point in time and the attorney is prosecuted promptly. In those instances, it would make no difference if the disciplinary process were open at the charging stage, because at that point public has become aware of the attorney's error.

Finally, uniformity of process and standards among the four appellate divisions is not necessarily a worthy goal in and of itself. In New York State, there is a legislative and judicial recognition that each Appellate Division he should control the disciplinary process and the disciplinary standards within its own borders and most disciplinary complaints do not deal with black and white issues; most complaints deal with more subtle issues than black and white issues such as theft of clients' or fiduciary

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

driven very much by the standard of practice of lawyers in each judicial department. There is a genuine benefit to local control of disciplinary conduct and this can only be accomplished by a disciplinary process which considers local community standards.

The Academy asks this Commission to exercise its wisdom carefully and to recognize that fundamentally, the New York State attorney disciplinary system works and works well. What the disciplinary system requires most is a financial commitment to provide greater resources both to increased staffing and for better attorney education.

JUDGE COZIER: Excuse me. I will interrupt you because your time is up. So if you could just summarize.

MS. BONINA: My final sentence is that greater resources and not procedural fixes will improve the system and make it an even better one.

JUDGE COZIER: Thank you.

Members of the committee.

MR. ZAUDERER: Thank you, thank you for your testimony and I have read the Academy's submission and

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

individual attention to individual cases, but it seems to me if that were true, what we would see for example in one department, a range of punishments and another department a range of punishments and they would look similar, but what we are seeing is a cluster, that in one department there is a cluster of severity with respect to the number of offenses and with respect to the same offenses in another department, much less or less severe punishment. So it would seem to me that that difference cannot be accounted for by individual attention to individual cases, because that would occur in both departments.

Could you comment on that?

MS. BONINA: I do believe that when we have complaints that are under review, there is a very significant investigation. Each case is taken individually. There are always mitigating factors that are considered and that is something that I believe is something to be applauded. I think that is something that has a value, because each case is different and there are cases where the substance of the complaint

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

mitigating evidence such as that he were suffering from depression or mental illness, and that could lead to a less severe penalty.

MR. ZAUDERER: I will pass.

MS. KEWALRAMANI: Thank you for your testimony. One of the things that you mentioned is that there are benefits to local control over the disciplinary system.

Could you please elaborate on that for us?

MR. KRINSKY: Sure. I think one of the things, going back to your question as well and it dovetails, is for example when we consider for example that the Second Department accounts for approximately 20 to 25 percent of all attorneys in the State of New York, yet the Second Department also accounts for approximately 59 percent of all escrow thefts. The numbers in a sense don't match and it is -- it is a prime example really of why there are certain problems that exist with respect to attorney conduct in certain departments, or in certain geographical locations but not in other departments or other areas. And it is

that exist facing lawyers within that geographic area.

MS. BONINA: This is not something that is unique to the grievance process. If you were to review values of different injuries, let's say in a personal injury case, the value of a broken leg in The Bronx would be quite different to the value of a broken leg in Erie County. There are differences based on local processes and local ideas and thoughts that do change from department to department.

MR. GUIDO: Thank you, Ms. Bonina and Mr. Krinsky. I appreciate your taking the time to come down.

On this point, on the disparity issue, and I understand the argument that many -- what is perceived as disparity is really in the details of the mitigation and the facts but when you have a system where it is known and those of you who -- like yourself, Mr. Krinsky have practiced in this field, when you advise your client/respondents or client/lawyers, it is pretty well understood, if you commit an escrow theft, an

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

you're stealing escrow funds in Erie County or on Long Island, it is the same act of misconduct and when you have a process that the jumping off point is different, wouldn't you agree there is a measure of fairness in that, not only to the lawyer, the accused lawyer but also to the victims and those client as to whether or not every one will be treated at least from the jumping off point starting the same and the corollary to that is if that is the case, why is it problematic for the Court's to adopt a set of guidelines or standards for sanctions as is done in a majority of other states?

MR. KRINSKY: I think two-fold;

One, with respect to the beginning point or the ending point, I think it is perhaps even somewhere in between, I think we understand that perhaps very often there is a floor and there is a ceiling and a degree of discipline fits within that range, based upon a set of factors such as aggravating and mitigating factors. As to -- in reverse for a moment the idea of creating a standardized set of guidelines in and of

divisions when citing to the ABA standards on the imposition of discipline, both aggravating and mitigating factors. So we have already in effect taken those into consideration, but I think what really goes to the heart of the issue is that the individualized justice, if you will and imposition of discipline on lawyers really must be aimed at identifying what the issue is, why it came about in the first place, how we insure it never happens again and when we consider all of those in the context of the need for greater education for lawyers, we understand why there is perhaps disparity because different lawyers require different degrees of sanctions or education to insure that discipline or that misconduct does not occur in the future.

(Whereupon, the following was transcribed by Senior Court Reporter Monica Horvath.)

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JUDGE COZIER: Justice Skelos?

JUDGE SKELOS: Good morning.

I have two questions. The first one I think can maybe be dealt with a yes or no answer.

So that question is what is the Academy's position on public disclosure in the instance where

there has been an interim suspension, would you be against that or would you be for that?

MR. KRINSKY: It is the Academy's position that the current status of the law, Judiciary Law 90 is properly in place which says that unless and until public discipline is imposed the matter should not become a matter of public record. Because we understand that even though an interim suspension may have been imposed there has not yet been a full adjudication as to that lawyer's guilt or innocence. And until that happens --

JUDGE SKELOS: There is a very high standard of proof to be met for the purposes before there is going to be an interim suspension, correct?

MR. KRINSKY: The high standard of proof -- the answer is yes, but the high standard of proof is put into place to specifically in a sense take a lawyer and to sideline that lawyer until such time that we can make a full determination as to the full scope of what is

happening, including issues of guilt or innocence.

JUDGE SKELOS: The second question relates to the question of efficiency.

And as a practitioner, you in particular, Mr. Krinsky, where do you see the cause for delay other than in the question of funding staffing?

MR. KRINSKY: I think it is a combination,

perhaps of one, lawyers not being represented by counsel or not having a resource to go to to better understand the disciplinary process. And I think unfortunately some lawyers who find themselves facing a disciplinary complaint don't understand the distinction between perhaps a disciplinary complaint and a civil complaint. The idea that it is not simply about admit, deny, admit, deny, but rather it is about letting the committee, understand the story, telling a story so that they understand that either something was done properly here or wasn't done properly here. But I think there is a lack of understanding in and of itself within the disciplinary process itself.

JUDGE SKELOS: So all lawyers are required to attend an ethics program?

Do you suggest that all lawyers be required to attend an ethics program that effectively goes through the process so that no lawyer can say that he or she

didn't understand the significance of the receipt of a complaint and what needed to be done?

MR. KRINSKY: I think that that is part of it, sure. But if someone is taking that CLE, at the beginning of their career as is often the case in the beginning interview there are certain programs that are offered --

JUDGE SKELOS: Orientation?

MR. KRINSKY: Orientation, yes. Thank you.

Orientation programs. Unfortunately, for better or worse it is not perhaps ten years into your career where you are actually faced with that disciplinary complaint.

And why aren't we reeducating lawyers at that point and at the same time why aren't we educating complainants about the proper use of the disciplinary processes versus the improper use of the disciplinary process.

JUDGE COZIER: Thank you both for your testimony.

MR. KRINSKY: Thank you.

MS. BONINA: Thank you.

JUDGE COZIER: Our next witness is an attorney Karen Winner.

Miss Winner?

MS. WINNER: Good morning, distinguished panel

members, good morning, audience members.

My name is Karen Winner. I am a New York attorney. And for years I have had a deep interest in how legal consumers are effected by the secrecy surrounding the discipline of lawyers.

Before I became a lawyer, I wrote a report more than 20 years ago for the New York City Department of Consumer Affairs -- Mark Green was the Commissioner --

"Women In Divorce, Lawyer's Ethics, Fees and Fairness," and it found that the public is not protected from dangerous lawyers.

I drafted the Client Bill of Rights that divorce lawyers are now required to give their clients.

For decades it has been publicly known that the New York Lawyer Disciplinary System fails to protect consumers from unscrupulous, or incompetent, attorneys. We know that the New York system is too secret and metes out inconsistent discipline due to Individual Practices. And we also know that the system is being held captive to vested interests of lawyers who don't want any changes to the status quo.

Consumers have no way of knowing which lawyers are being investigated for serious misconduct. This secrecy leaves consumers vulnerable to financial predators with law licenses.

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

lawyer can keep practicing all the way up until the very end of the process. And that can take years. And that whole process remains secret.

So what happens when a client unknowingly, hires an unscrupulous attorney who has serious allegations pending?

That unsuspecting client hires the lawyer and then the trouble begins. The lawyer won't return calls, or, drags out the case with unnecessary motions or, won't follow the client's objectives, or, starts engaging, in myriad forms of fee abuse, like fee padding, where fraudulent charges are added to the bill. These are real problems and they are ethics violations. The client becomes concerned, starts to loose confidence in the attorney and then finally the client has to terminate the attorney for the client's own best interest.

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

investigation.

Secondly, the client who has had to terminate his or her relationship with an unscrupulous lawyer has wasted the client's financial investment and a new lawyer has to be hired and the client has to start all over again with no recompense for the lost money.

Why should lawyers have special protections, when they are under investigation, business people don't. The average citizen doesn't. If the New York disciplinary system would lift the secrecy and allow the public to see the complaint histories lodged against a particular attorney maybe clients wouldn't need to change attorneys so often because they would have the attorney to be informed and know who has a record. The client would know how to protect him or herself before it is too late.

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And publishing a report of complaint histories while they are pending would protect honest attorneys. Because the whole system is affected. The profession is being tainted and honest attorneys are being tainted.

Here is some solutions. There should be a consumer alert to warn consumers against lawyers who are under investigation for major misappropriation of funds. Abolish the gag rules that prevent people from speaking publicly about the complaints they have filed. Disclose

a lawyer's disciplinary history so the public can be informed including private admonitions. Open the hearings to the public just the way that they are opened in criminal and civil proceedings. It will take courage and leadership to institute these reforms. There are powerful interests as everyone knows who will urge the leaders to maintain secrecy but the public's safety should come first.

Thank you.

(Applause.)

JUDGE COZIER: Mr. Zauderer?

MR. ZAUDERER: Thank you for your testimony. I have two related questions on this issue of openness.

MS. WINNER: Yes?

MR. ZAUDERER: First of all, you referred to criminal proceedings, the fact that they are open. May I

remind you that the reason for opening criminal proceedings has been for hundred of years and has been in our Constitution to protect the accused person from secret proceedings. So the analogy of professional discipline proceedings is not exactly accurate.

So, relatedly, I would ask you if you are an individual practitioner doing your best and practice honorably and you are a very competent lawyer and as often happens you have a dispute with a client and the client makes a complaint to the Disciplinary Committee

and says things which in your judgment are either just totally wrong or just totally distortional is it your view that the public should have access to that complaint and would you not be concerned that the lawyer and the lawyer's profession is being unfairly interfered with?

MS. WINNER: You know, there are already states that do that. They already have open records.

I spoke to West Virginia's disciplinary personnel a few days ago and they gave me the statistics, showing the closed complaints. Including, meritless complaints and all the others. And the lawyers in West Virginia aren't having any problem with it.

It is the same in Florida and it is the same in

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

deserve, you know, more better thinking about them.

(Applause.)

MR. ZAUDERER: Thank you.

MS. WINNER: You're welcome.

JUDGE COZIER: Justice Skelos?

JUDGE SKELOS: I think that you have suggested that there is perhaps a pattern of recidivism that happens with respect to the lawyers who are under investigation. Is that a fair summary of what you are saying? That a lawyer who is under investigation is more likely to be one who is committing further ethical violations while that attorney is under investigation, is that the claim that you are making?

MS. WINNER: Yes. Anecdotally, I have been receiving --

JUDGE SKELOS: So, my question becomes --

MS. WINNER: Yes, yes.

JUDGE SKELOS: With the number of complaints that we have in this state is there any empirical evidence to support the fact that once an attorney has a complaint filed against him or her that during the course of that investigation that attorney is then committing further ethical violations jeopardizing other litigants?

MS. WINNER: What I can tell you is that I have been receiving complaints about attorneys -- I wrote a book, a national expose, about this in 1996, "Divorce

From Justice," published by Harper Collins. And I have received complaints for over 20 years about attorneys. And invariably, there have always been multiple complaints about certain attorneys. And when there is just one complaint about an attorney, it seems like aberration, but when there are multiple complaints about attorneys --

JUDGE SKELOS: That is what I'm asking you.

Okay, you are sort of an academic, I will say. You have written a paper and you have written a book, okay, and I'm asking you in the course of your study of this issue --

MS. WINNER: Yeah.

JUDGE SKELOS: Which apparently is going on

20 years, have you accumulated empirical data to support the suggestion that while an attorney is under investigation that attorney is then committing other ethical violations involving other clients?

MS. WINNER: Well, that is a really good question and I don't know if any researchers can answer that empirically, because the system is secret.

VOICE: Yeah.

(Applause.)

JUDGE SKELOS: If the first complaint is founded and another complaint is filed and that complaint is

founded, would you be able to match up the date of the first complaint which was founded and then if the second complaint or third complaint was founded you would be able to match up those dates and you would be able to establish that during the course of an investigation, there were indeed further violations --

MS. WINNER: I understand.

JUDGE SKELOS: I'm just asking, have you done that study or do you know of any such study?

MS. WINNER: I can't do it because it is secret. We don't know about the investigations.

(Laughter and applause.)

MS. WINNER: But I can tell you something, I can tell you something. Because of the way the system is

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set up, lawyers will, they will retire.

I have had situations where a complaint has been made and pending that the lawyer will retire and then there will be other complaints that come up but then they won't be investigated because the lawyer retires.

And I helped a family from India, recover $70,000 in funds because their lawyer stole from the settlement agreement when the father was killed in a temple and the lawyer -- the wrongful death reward -- stole part of the money from the widow and the children, and that lawyer retired. And there were other

complaints pending and they never saw the light of day. And I think this is serious problem. And I don't mean to sound strident.

(Applause.)

JUDGE COZIER: All right, thank you very much for your testimony.

MS. WINNER: You're welcome.

VOICE: Yeah. Brilliant, brilliant.

(Applause.)

JUDGE COZIER: Now, I want to ask all of the participants today to try and maintain some control. We have many witnesses to hear from. This is a fact gathering session so we cannot really have outbursts

from people who are not, you know, testifying. We have to have a record here. So I'm going to ask for your cooperation.

The next witness is Deborah Scalise, from Scalise, Hamilton & Sheridan, in Scarsdale.

VOICE: Sir, could you maybe move your microphone a little closer because we have a hard time hearing back here?

Thank you.

JUDGE COZIER: Deborah Scalise.

VOICE: Much better. Thank you.

JUDGE SKELOS: Thank you and good morning.

My comments are limited to a very specific area.

Some of you know me. I have been a former Deputy Counsel at the Disciplinary Committee, and, now, my career is on the other side. And what we do is proactively and defensively, represent lawyers and judges in their disciplinary issues, as well as other issues. People do come to us beforehand to ensure that they are in compliance.

These views -- first, a disclaimer -- these views are my own. I belong to several Bar Associations. I am on several committees. But they are not their views they are mine. They are gleaned by virtue of my

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experiences in 25 years in this area of practice. Nor, are they the view of any governmental agency that I formerly worked for or my partners. They really are borne of the fact of representing lawyers. And lawyers are people too and they have issues too.

What you may not know about me is that in addition to my juris doctorate, I hold a masters in Forensic Psychology. And, very often, lawyers have psychological or health issues too. Hence, I'm here today to speak about lawyers with mental disabilities, or, addiction problems from the perspective of my professional experience of these past 25 years. We have prosecuted and defended lawyers as well as perspective

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

their scope. Initially, they dealt with addictions. And lawyers have addictions, sometimes. But, now, they deal with lawyers in distress generally.

What types of things do lawyers experience? They experience what everybody in the general population, experiences but sometimes it is greater because of the stress factors associated with lawyering. We are the "hired guns" of our clients and sometimes we have issues that would bleed over into our practice. But, if left undertreated these mental health issues can impact and sometimes harm clients.

What my goal is here today is to educate you so that we could have some uniformity with respect to those

types of things. If these mental health issues which are sometimes physical issues like a stroke are left untreated and are masked they can have professional and personal consequences that can be devastating. So, due to my interest in this area I often teach continuing legal education. And I did an informal survey and it is part of the materials I gave you. Looking at the rules in each department as well as the outcome there is a great disparity in what happens.

For instance, the process has disparity, as well as the rules. The facts in the reported decisions, you can see that there is a difference between upstate

and downstate with respect to how lawyers with mental health issues are treated. And I gave you an outline with respect to that.

Quite simply, it is not just the rules and procedures that need reform and uniformity, but sometimes it is reactions to and policies implemented, when dealing with impaired lawyers. My informal survey demonstrates that in a majority of decisions the downstate courts will give you chapter and verse about a lawyer's mental health issues or physical health issues. And they feel it necessary to give a detailed recitation of the information provided by lawyers charged with misconduct who attempt to defend against or mitigate the charges by offering psychological or medical evidence.

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

I hope this testimony is received in the spirit

that it is intended. Not to criticize, but rather to further assist in educating you and the public with the hope that we could have a complete picture of how a lawyer with mental health issues is treated.

The procedures set forth in the court rule need uniformity in three respects, incapacity, medical and psychological evidence and diversion.

Take incapacity, for instance. In the First and Second Department the rule is pretty uniform and I set it forth for you. But even in this context there are some variations and inconsistency. Harmonizing these rules will provide a clearer policy and guidance with respect to incapacitated lawyers.

In the Third Department there is a two-part

rule. And in the Fourth Department there are two separate rules. The characterizations are different though. There are references to incompetence, alleged to be incapacitated, incompetency, involuntary commitment or disability. And I ask you does a disability constitute incapacity or incompetency?

What constitutes an involuntary commitment? Does the Reporting Rule RPC 8.3 require a lawyer to self report another lawyer who knows of a lawyer who falls under one of these categories to report the impaired lawyer to the court or to the Committee?

I believe we need uniformity and consistency, to defy the terms so that lawyers as well as counsel to the Committee, the public and the courts, all understand the parameters of such issues when they arise in the disciplinary process. These changes will afford the impaired lawyer with the necessary notice to have him have due process when faced with issues of impairment, whether such issues stem from or are related to physical or mental disability or incapacity.

Now, as to medical and psychological, evidence, while all four departments accept it the Second Department actually has a rule that provides for what you should do when you offer medical or psychological testimony. It provides that counsel -- meaning, defense counsel -- must give 20 days notice prior to hearing and

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

voracity of any such defense or mitigation there have been instances when scepticism and lack of sensitivity is disparaging. On occasion my witnesses have reported some committee scepticism as to lawyer's treatment plans and support system.

Moreover, this rule from the Second Department, is a good start as to the parameters of notice and waiver but needs expansion to allow for medical and psychological issues as a defense and also a section that allows for maintaining confidentiality and sealing of such evidence in the record. This is particularly important and I will explain later for reasons that I will explain later.

Lastly, diversion. And this is a very important rule as you will no doubt hear again. We have

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

guideline because addiction comes under one of the categories of psychological treatment. So from a lawyer's assistance program they too look at the psychological issues, but that does not afford lawyers diversion in each of the departments. So it is my view that if all departments would have a uniformed diversion rule which expands to include psychological as well as addiction issues that would be helpful because lawyers will be informed as to what will happen if they seek help.

Second, addictions, as they are classified under mental illnesses diversion should be expanded that way.

Lastly, my experiences. And I will relate some stories to you and they are anecdotal and I think they are important.

JUDGE COZIER: We are almost out of time.

MS. SCALISE: So I will just give you one experience and I will wrap up.

There was a lawyer I was prosecuting and he was hospitalized because he was bipolar. And, he called me -- and we were in the middle of the proceedings and they were getting ready to disbar him because he failed to cooperate with the committee -- and what he said to me was: "I need an adjournment from the court. And, I

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

their careers. If we do that they could then again serve the public.

So I'm asking again that we have a diversion rule, that we have some uniformity in the medical and psychological testimony that's given and that when it comes to incapacity -- and this is important -- if you take a look at the cases upstate, how they are reported and the cases how they are reported downstate, you can help people.

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And you should inform people when an attorney has been suspended for incapacity, but do you have to give every little detail? Is that fair in what we do? Lawyers can get back on track. We should make sure they get back on track. And I am hopeful that you will consider my testimony and consider a diversion rule and uniformity, with respect to medical and psychological issues.

Thank you.

JUDGE COZIER: Thank you.

Questions?

MR. GUIDO: Thank you very much, Miss Scalise, for appearing this morning.

I'm personally grateful to hear you address this subject which does not have widespread discussion in the hearings. Because I think it is a very important component to consider in terms of conforming the process

and also based on my own experience we share a higher regard for those individuals that serve in the Lawyer Assistance Programs who address these problems.

But I want to ask you two specific questions with respect to diversion. And I have some interest in that because I served on the commission run by Judge Bellicose that enacted that proposed rule which was adopted in some of the departments. But, one of the

underpinning -- one of the main reasons driving that rule was it was intended or it was designed to have early intervention with lawyers who had not crossed the line yet into serious misconduct as a result of their addiction or other problems. As time has gone on -- and my friends in Lawyer Assistance agree -- the rule has not served that purpose. We have seen relatively very, very, few cases of lawyers proceeding with requests for diversion. I'm interested to know from your view, based on all your experience why you think that is; is there a problem in the rule itself? And, if the rule is not working for that intended purpose why would we expand that rule and why would the courts consider expanding the rule when the mental health portion of it if it is not accomplished set out to do?

MS. SCALESI: Conversion, actually came out of this Bar Association I believe and it is in our reports.

Conversion was really thought about for people who were making minor mistakes and maybe there was something else going on.

In our practice area we usually see it because maybe there was a DWI arrest which has nothing to do with the lawyer's practice but of course they are lawyers and they are sworn to uphold the law and if they are arrested they can be prosecuted. So having said that

diversion really is for getting people back on track. And whether it is psychological -- and there are psychological issues that people have. For instance, the person who I had prosecuted who was by bipolar, he stopped taking his medication. So they have to actively participate fully, the lawyers, in order to get diversion. And it is vetted by both the Disciplinary Committees, the Grievance Committees as well as the court. So there's a whole process that is involved with that. And that means that the lawyers have to do the work.

When it comes to lawyers assistance, they don't just say this is my defense take it or leave it. They are monitored. They must sign a contract. They have a lawyer who monitors them regularly. They usually have psychological treatment. If it is an addiction, they generally go through an addiction dry out program. And, then they will probably participate in either Narcotics

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

see and they cannot self diagnose. If they are now confronted by the system and there is a tool to help them sometimes it helps us too as defense counsel because we get someone back on track. They don't see that they have an issue. They don't see that there is a problem, but we recognize it from years of experience, so that we can get them the help. And by getting them the help they then will do the right job for their clients.

There are certain people that are never going to get the help. We understand that. But, if they are willing to work -- I did have a successful case where a client did do the work for two years after a DWI and now we are dealing with the diversion and we got a dismissal. That was important to her because she had a long history and she was glad for me to relate that to you in my testimony. So what I am saying to you is sometimes lawyers can get back on track and we need

those guidelines and parameters so we can help them. Because most lawyers I believe are honorable if you look at the statistics. Yes, this is a disciplinary process. Yes, I have been part of both sides. But there are some people whose mistakes can be corrected, if we can use lawyers assistance and diversion to help them.

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JUDGE SKELOS: Just a comment.

Based on your experience of the impact for the funding for the lawyers' assistance program, let's say over the last seven to ten years, how has it changed? And the significance of that in your view.

MS. SCALISE: I think that they very often do god's work in lawyers assistance, because they are not judging lawyers, they are assisting lawyers; so they listen to the problems and they have an affinity for what types of stresses lawyers have.

I know this past year OCA saw fit, you saw fit to give additional funding to lawyers assistance and it is much needed. They never say no to people. Pat Spataro and Eileen Travis and their team of people as well as volunteers to the bar associations, they can be reached day and night and will call people back. If someone is in a crisis, they will help them and I think that is really important to understand. We are a helping profession.

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

Claudette Gumbs

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JUDGE SKELOS: There was a time when it was defunded?

MS. SCALISE: It was. It was a lawyers assistance trust and because the courts were lacking in funds, they did away with it and it would be helpful to see it come back because they were at one point offering grants to different bar associations. Right now it is a piecemeal process, but what they do with so little is admirable and helpful to lawyers and judges throughout the state.

JUDGE COZIER: Thank you very much for your testimony.

(Applause.)

JUDGE COZIER: The next witness is Bennett Gershman, a professor of law at Pace Law School.

Mr. Gershman.

Is Mr. Gershman here?

PROFESSOR GERSHMAN: I am Ben Gershman and I just want to thank this Commission for allowing me to

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

liberty, take away a person's life. In those jurisdictions that have capital punishment, fortunately New York abolished it, but prosecutors can still put people in jail for the rest of their lives here and destroy people's reputations.

And I would say that most prosecutors exercise their powers with distinction, responsibly, professionally, carefully, and I was a prosecutor in the city and state for ten years and I can say that my experience has been that most prosecutors are honorable people. Same with judges. Some judges don't follow the rules all the time and we hope that those judges who violate the rules would be subject to some kind of discipline, and they are. But really, actually, prosecutors are not.

In point of fact, based upon my study of the disciplinary system in this state and around the country, one judge of the Ninth Circuit called prosecutorial misconduct an epidemic and if you look at the record, just this past year in the Brooklyn DA's

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

misconduct. That is a fact and the National Registry of Exonerations will bear me out and in fact New York stands second nationally in the number of exonerations, more than 192 now given the last one this last week, and the only state that tops New York in terms of wrongful conviction is of course Texas, and now, I -- my remarks will go towards hoping -- urging this committee to endorse a statewide commission to investigate misconduct by prosecutors.

The disciplinary system that we now have, and I am not blaming the disciplinary system, there are all sorts of reasons why the four departments don't prosecute, investigate and discipline prosecutors effectively. They don't. That is a fact.

I will not say anything more than it is deficient. Some of my colleagues have used much stronger language, but I think that the disciplinary mechanism, they operate in good faith, but first of all, the rules are very, very limited in terms of the model rules that apply to prosecutors. If you use the

American standards, ABA standards, that would be a better fit, but you don't use that.

Forty years ago this year the state created a judicial conduct commission, in 1975. The previous 100 years, how many judges do you think were

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disciplined in this state? Around 20.

In the last 40 years, somewhere upwards of 900 or maybe a thousand judges were disciplined and several hundred were removed from the bench.

Now, prosecutors are lawyers, but prosecutors are different from private lawyers. Prosecutors don't have a client. Most of the rules of professional ethics apply to the private lawyer. We are talking about fees, talking about clients, confidentiality, advertising, conflicts of interest and on and on. Most of those rules don't apply to prosecutors, so there really is a difficulty in disciplining a prosecutor who lies to a judge or suborns perjury or engages in inflammatory rhetoric or hides evidence. These are hard cases to investigate and discipline and the disciplinary mechanism is strapped in terms of resources, expertise, all sorts of reasons and so, given the -- given the effect -- I think a prosecutor is more like a judge. A prosecutor is considered a quasi judicial official, a minister of justice. A private lawyer represents a client, is not a minister

of justice and I think a prosecutor is more like a judge.

So why not have a statewide commission to investigate and discipline misconduct by prosecutors

and at least weed out those prosecutors who do abuse their function? And there are some that do, they do it egregiously and really, I can tell you from many cases that I have studied, none of the cases in Brooklyn involving -- the prosecutorial misconduct, none of the prosecutors was ever disciplined.

There is a prosecutor in New York engaged in six trials who was harshly rebuked by City and state judges, never disciplined, on and on and so, a uniform system to review claims of misconduct by prosecutors I think is a good thing. I think it will help prosecutors because they will know they have a clean house and they are not being sullied and their reputation is not being tainted by the bad prosecutors.

So right now, there is legislation for a prosecutor misconduct commission. Both houses have reviewed it. It has gone out to committee. I would just like to see this Commission say endorse the concept of a prosecutor misconduct commission in the same way as we have used the Judicial Conduct Commission. I think it is a good thing. I think the

time has come and that is all I have to say.

JUDGE COZIER: Thank you, Professor.

(Applause.)

MS. KEWALRAMANI: Thank you. I have a

comment and then I have a question. And the comment is that the New York rules provide, the New York Rules of Professional Conduct have very specific rules regarding government lawyers which also includes prosecutors and I think that is Rule 2.8.

One of the suggestions that you have is to have a commission created that would investigate prosecutorial conduct. Are you also suggesting that there should be a set of ethics rules, Rules of Professional Conduct that specifically apply to prosecutors?

PROFESSOR GERSHMAN: Yes, I am. Those rules should be and they are, codified in the American Bar Association's standards for the prosecutor function and these are hundreds of different subsection of standards dealing with prosecutor ethics. I would ask that this Commission adopt the ABA standards as its template in doing its investigation and discipline, yes. The ABA standards.

JUDGE COZIER: Yes, Mr. Zauderer.

MR. ZAUDERER: Professor, you have written and spoken about this for a long time. Thank you.

You have studied it.

The premise of your presentation is that somehow the committees that discipline lawyers are

either unable or unwilling to apply appropriate disciplinary to prosecutors, so I will give you an opportunity beyond speculation about the reason, which you're free to do. Do you have any evidence from your long-time study that commissions are -- that is, disciplinary committees are applying lesser standards? Are there forces at work which you have been able to identify that establish that premise?

And I will give you an opportunity to address that because we are interested.

PROFESSOR GERSHMAN: I think first of all, from my personal experience, knowing some of the cases that have not gotten to the disciplinary boards, I can simply ask why. I know that some disciplinary bodies will not look at a case unless there is a complaint and complaints against prosecutors sometimes are not that frequent because of the kind of consequences that might happen.

I will say one thing. Here is my -- I -- none of the prosecutors in Brooklyn have ever been disciplined. I know anecdotally of the dearth of public discipline of prosecutors in this state and

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

provide a lot of places where the kind of misconduct that prosecutors commit are contained in those rules. For example, you know there is a rule prosecutors have to serve justice, but that is too nebulous. We don't want prosecutors to embarrass the profession, but that is also nebulous.

Yes, there are rules in terms of hiding evidence, that is a clear rule, prosecutors hiding evidence but you know, when you come to think of it, it is a very difficult task for a disciplinary body to investigate.

First of all, do they have the expertise? Do they have the expertise to investigate a prosecutor who hides evidence? I can tell you that you even in the most egregious cases, prosecutors will say it was inadvertent, it was careless, I didn't mean it, it certainly was not deliberate. That is what the prosecutor said in the prosecution of the late Senator Ted Stevens and how do you overcome that? How do you prove a prosecutor acted culpably with a deliberate attempt to hide --

MR. ZAUDERER: Let's say a lawyer complains. A lawyer tried a case against a prosecutor and thinks

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

it worthy of investigating.

Do the committees have access under current rules to all of the information that they need? Can they, for example, subpoena witnesses in the District Attorney's Office? Can they get the files? Can they see what was in the prosecutor's files? Can they question their comrade in the -- or colleague in the office next door? You know, were you discussing this evidence a month before the trial? What did the prosecutor say, that we will reveal it, they weren't going to reveal it? It is subject to privilege and all of that but are the tools there.

PROFESSOR GERSHMAN: The tools are there. Same way you discipline any lawyer.

MR. ZAUDERER: The DA says I don't give you the files.

PROFESSOR GERSHMAN: They might plead confidentiality, work product, a lot of reasons why government files may be exempt from disclosure. That would be something that would stymie a good faith disciplinary body in seeking to conduct this investigation, yes.

MR. ZAUDERER: So do we need to consider that

along with appropriate procedures?

PROFESSOR GERSHMAN: But in the same way the

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Judicial Conduct Commission in doing its work is able to question witnesses, subpoena a document, the same rules should apply to prosecutors.

MR. ZAUDERER: Thank you.

JUDGE SKELOS: Why do you find the potential for the conflict --if there is a conflict between let's say the post conviction relief that a defendant may seek and the complaint before a disciplinary or an investigatory disciplinary body? How do you see the -- should the complaint before the investigative body mean finality of some post conviction relief?

PROFESSOR GERSHMAN: I would say it should. If there is ongoing post conviction litigation, it should await the finality of that, yes.

JUDGE COZIER; Mr. Morton.

MR. MORTON: Professor, thank you for your testimony. If you would share with me your thoughts on the situation where a finding of prosecutorial misconduct has been made by a court within the context of criminal proceeding. An Appellate Division on appeal finds prosecutorial misconduct or -- on a 440 motion before a trial court.

Would such a finding be entitled to some sort of collateral estoppel effect before a disciplinary

body?

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PROFESSOR GERSHMAN: No, it would not. It would -- it may be the precursor to a disciplinary body conducting an investigation. When they are alerted to a judge, a court finding misconduct, I will say this: There was a recent decision by the Court of Appeals in the People against Wright last month where the prosecutor lied to the jury, said there was DNA evidence when there wasn't. The defendant was convicted of murder. The Court of Appeals reversed the conviction and the prosecutor was found to have engaged in egregious misconduct. We are saying there is DNA evidence when there isn't.

How do you get around that? I will bet anybody in this room that this prosecutor is never disciplined -- or even though the Court of Appeals and the Appellate Division said that the prosecutor committed misconduct. So to me, that would alert a disciplinary body to conduct an investigation however limited that investigation might be and I know that there are private censures of prosecutors I have seen and I have talked to some disciplinary people over the years and the private censure, we don't know about it, but it is there for some prosecutors. They do that. I mean, I would hope, I would hope that the

prosecutors' offices take the responsibility themselves

of disciplining their own errant prosecutors, but they do not and sadly, that is why there needs to be a disciplinary mechanism to do what the prosecutors themselves are not doing.

(Applause.)

JUDGE COZIER: Thank you, Professor. Thank you.

The next witnesses are Daniel Marotta and Allyn Crawford of the Richmond County Bar Association.

MR. MAROTTA: Good afternoon to the Commission and judges and lawyers and members of the public that are here on this important issue.

My name is Daniel Marotta. I am president of the Richmond County Bar Association, an association of over 500 attorneys. With me here today is our vice president Allyn Crawford.

MR. CRAWFORD: Good afternoon.

MR. MAROTTA: I have been an attorney for over 20 years and for 20 years I have been reading and researching cases in real estate, commercial litigation and state litigation in the areas that I practice and it is a tough job to be an attorney, especially an honest attorney. I volunteer my time for pro bono efforts whenever I see a cause that is worthy and I do it regularly.

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

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naive to think that people will not file complaints that are not true or have allegations that are just false. It happens all the time. It is a real problem and a lot of these complaints that come in have to be dealt with administratively, the attorney must answer them and so, how do we address this? Because for the honest lawyer there are severe ramifications and for all attorneys that are involved, and the severe ramifications for a client or a complainant files a complaint against a lawyer that is false, they have nothing to lose. Oftentimes these statements are unsworn, they are written on a letter or a napkin, even. We should require the statements that are submitted and answers given by lawyers must be notarized sworn statements under penalty of perjury, like this is a basic right that we should make sure is enforced strictly.

We should also, in an effort to try to weed out some of the unfounded complaints, have a minimum filing fee, maybe $100 or something that would be an exception only where the client met financial eligibility requirements, in which case there would be no fee or it would be waived or in cases involving theft of escrow funds, in which case there would be no fee. By imposing some fee, I think that a great deal

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of these complaints that seem to have no real basis would be weeded out and you would see a huge decrease in them automatically.

Also, sometimes as we have heard over and over again from our members, that the complaints are often in fact used as a bargaining strategy. Legal fees are outstanding, they have not been paid and suddenly, instead of a phone call, you get a disciplinary complaint. And the appellate divisions and departments know and sometimes recognize that the complaint, although it is labeled as a grievance is really a fee dispute and will refer it to our fee arbitration panel, but there is no way of telling when it is first filed.

For the attorney, the ramification is your reputation is at stake and your malpractice insurance will increase whether the complaint was false, results in disciplinary charges, totally unfounded or filed for some malicious purpose. Your malpractice insurance premiums will increase. I don't see how we could publish this type of defamatory charges or charges against an attorney where there has been no discipline or finding of misconduct.

The medical profession does the same thing. The complaints in those proceedings are not made

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public, the information is not published and republished until there is a finding of wrongdoing.

This again protects the honest attorney who has been the subject of an unscrupulous complaint.

With respect to regional disparities that the Commission is also looking at, and we heard the speaker earlier this morning say that we have a judicial system of resolving complaints among citizens and we have a system for attorney discipline. Our judicial system is based on the fact that there are different departments and local litigants are entitled to have local judges hear their complaints in the county in which they reside. This is our system.

It is not to -- to say it is a disparity is a misnomer. Each locality will have a different set of concerns, a different set of issues that those persons in that locality know how to deal with.

JUDGE COZIER: You have approximately three minutes left. I am not sure whether your intention is for Mr. Crawford to speak.

MR. MAROTTA: Mr. Crawford will add a couple of statements.

My last statement is that I have worked for the Richmond County Bar Association and for a few years now we started a volunteer lawyers program and it is --

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based on examples from our sister bar associations and we attempted to protect the public from the unauthorized practice of law, we have provided legal services for families who can't afford them and I feel that these efforts sometimes are stymied when we are here to discuss issues that might be perceived as attacks on lawyers.

While I understand there are serious and egregious cases, we can't let examples of bad apples be the catalyst to restructure our entire framework that has worked for some time and undoubtedly could use improvement.

Thank you.

MR. CRAWFORD: Thank you. I in large part would be repeating Mr. Marotta's comments if I spoke at length, but the real concern of our association and of the lawyers that Dan and I represent is that if a complaint immediately becomes public or goes into a process where it is reviewed by the public, without there being any controls on that to determine whether there is any validity to it, to a small practitioner, who -- the practitioners that we represent, I mean my firm has four lawyers, Dan's firm has four or five lawyers and we might have two of the bigger firms in Richmond County. These are solo practitioners and

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their real bread and butter in the community is their reputation and our concern is if there is a complaint that is published and it goes out there and is unfounded, the lawyer, his means of making a livelihood is something that is tarnished without there being any control on that and it is a real concern for our membership, I think it is a concern for the bar at large and I think it should be a concern for this committee.

JUDGE COZIER; thank you.

MR. ZAUDERER: Mr. Marotta, let me give you an opportunity to address something which is kind of at the heart of what you're saying.

Underlying the budgetary discussion about attorney discipline is the premise or assumption, which is often true, that the lawyer is in a position of strength vis-a-vis the client and we have to guard against and in appropriate cases punish appropriately and severely cases where the trust in that relationship has been abused, but you have been practicing for 20, more than 20 years, I have been practicing for more than double that and in various bar posts and talking with lawyers in private practice including, I am sure many on Staten Island, there is a distinction which often goes undressed because the complaint never gets

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filed, which is unfair to the lawyer as well which is the fee dispute that you referred to.

You know, there are many clients that are much more powerful than the lawyer who is representing them and that is a fact, that people who are well-heeled may say to a lawyer I don't want to pay the bill and if you will insist on that, I will file a complaint with the Disciplinary Committee and the lawyer faces a situation in which the lawyer basically has to give up, even though the work was earned and just gives into that.

Because of the things that you suggested and if we open up the disciplinary process fully, that lawyer has to contemplate does he or she that simply because they asked for payment they will have a disciplinary complaint against them, and all of the public things that are -- that go along with that.

Now, I have seen many, many cases of that and I am just wanting to bring that into the discussion so that we look at all aspects of this.

Is that something that you have encountered that -- as president of your association?

MR. MAROTTA: Well, we have heard this over and over again and as I said, the disciplinary committee will refer it to the fee arbitration panel if

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they can discern that the complaint is really about money. Of course the problem is the damage is done. In terms of now when you renew your malpractice insurance policy, when you come to that question has -- has there ever been a complaint filed against you, do you have any reason why a complaint would be filed against you any member of your firm any firm you have been prior involved with, the questions become more broad and you check yes, attach an explanation page and it is simply a cost that comes to the attorney.

And for the attorney who prides himself or herself on their reputation it is devastating, just devastating. Especially in a community like Staten Island where there are 500 attorneys, it is not that many.

MR. ZAUDERER: Does the mechanism of the fee dispute resolution preclude the complainant from making complaint that is of record in the disciplinary committee?

MR. CRAWFORD: No, I don't believe it does but it provides the client with a venue in which they can arbitrate or try to facilitate a resolution of that claim. I think that is something -- in my understanding there is a lot of times if a complaint comes into the Appellate Division on an attorney and it

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is reviewed by Appellate Division staff now, rather than publish it as we think we might do, send it out to the local -- or local bar Grievance Committee and then that grievance committee will attempt to resolve the issue between the litigant and the lawyer and they are successful whether through fee arbitration or something else, so I think that is incredibly helpful to the bar and to the people we serve and it avoids what we are looking to avoid.

(Whereupon, the following was transcribed by Senior Court Reporter Monica Horvath.)

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JUDGE COZIER: Yes?

MS. KEWALRAMANI: Mr. Marotta and Mr. Crawford, in your view should the attorney's hearings be opened at all and if so at what stage?

MR. MAROTTA: At the stage when there has been a finding of misconduct against the attorney that results in the imposition of discipline against that attorney.

MS. KEWALRAMANI: So, in other words, when the Appellate Division imposes some form of punishment, is that your view?

MR. MAROTTA: Yes. The same as the medical profession.

MR. GUIDO: Thank you gentlemen, for your testimony.

I just want to address your association's recommendation that we impose a $100 fee upon filing a complaint. I want to give you the opportunity to address that because one of the things that we would do as a body making recommendations, one of the things that any rule making body does when they are considering changing the rules is they have to ask themselves who benefits from the rule change and who suffers detriment.

I would be interested from your point of view, if they are imposing a $100 fee on complainants who is benefitting, and who is suffering detriment, and have

you considered the possibility that the $100 fee could chill the filing of legitimate complaints?

MR. MAROTTA: Yes, I did.

As I said, if the complaint was screened for financial eligibility the fee could be waived.

The imposition of the fee would serve everyone's interest. The imposition of the fee, I do not believe would chill the legitimate complaints.

A legitimate serious complaint against an attorney, I don't think would be chilled, by a requirement that a fee of $100 be paid. A requirement of this fee I believe benefits everyone.

I believe it benefits the attorney that is being charged with a serious matter. I think it kind of imposes some seriousness to the proceeding.

And I also have heard that many complainants do not cooperate very well in the disciplinary committee, when it comes to scheduling and rescheduling and meeting deadlines. So I think the imposition of the fee will, if you will, put some "skin" in the game for the complainant.

And, again, if it is someone that can't afford it then we can address that. And if it involves escrow theft, this escrow theft must be dealt with strictly. And I believe there should be an exemption for

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complaints that involve escrow complaints.

JUDGE COZIER: Thank you very much for your testimony.

MR. MAROTTA: Thank you.

JUDGE COZIER: Our next witness is Robert Tembeckjian, the Administrator and Counsel to the New York State Commission on Judicial conduct.

MR. TEMBECKJIAN: Thank you Justice Cozier and members of the panel.

I will summarize the statement which I believe was distributed to you yesterday and certainly answer any --

VOICE: Please use your mic.

MR. TEMBECKJIAN: My apologies.

I will summarize the statement that I submitted to you yesterday and obviously answer whatever questions you might have.

According to the American Bar Association, New York is the only state that has a multi-part attorney disciplinary system in the country, similar to the way we disciplined judges prior to the advent of the Commission on Judicial Conduct in its present form back in 1978 where there were five different entities responsible for investigating judges.

You have heard other speakers, who have

promoted the commission as a model for you to consider recommending. It is the model on which the legislation for the Commission on Prosecutorial Misconduct is based.

Let me just suggest that there are any number of ways in which the current multi-part system is disparate, not only in result but in rule and in effect.

In the First Department, for example, a lawyer who was suspended for noncooperation, would be disbarred after six months for not cooperating with the proceeding. That is not so in the First and Second Department.

In the First and Second Department, every time an attorney re-registers, he or she, must certify to having read and abiding by the escrow rules and those departments can conduct random audits of attorney's finances. Third and Fourth, not the case.

The First and Second Appellate Divisions have adopted separate rules for courtroom demeanor for attorneys, which the others have not.

In the Second, Third and Fourth Departments, one can be confidentially cautioned for misconduct that doesn't rise to the level of public discipline. In the First Department, that is not the case.

In the Third, there is a very valuable letter of education which the other departments do not have.

We have heard from numerous speakers about the disparities, in discipline that is imposed not only for theft but for others. Frankly, it is incomprehensible, to me that an attorney who is advertently, stealing funds of a client should not be disbarred. It seems to me it should be automatic.

In the 35 years that the Commission on Judicial Conduct has been investigating judges for financial related misconduct, there has never been an instant -- or, I should put it differently, any judge who has been found advertently purposely to have misappropriated, public funds has been removed or has resigned from office in a public fashion. It seems to me that underscoring, and enhancing, public confidences in the legal profession and judiciary, would require no less.

The disparate system that we have in the various departments, might very well have explanations and four different traditions, that led to the disparities, in the way the rules require that a grievance committee process complaints and the dispositions that are ultimately imposed.

But while there may be explanations, there doesn't seem to me to be any discernable rationale for a four-part system, but the solutions, I believe, are relatively simple, although, they might require some

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political will.

For example, you have got eight different offices throughout the state handling disciplinary complaints against judges. I would not close a single one of them, but I would recommend imposing an overview, a statewide disciplinary counsel chosen by the administrative board of the court which appropriated, to this task is divided up by four Appellate Divisions and the Chief Judge to provide some continuity, coordination and similarity, in the way the grievance entities do their jobs.

I would recommend the Administrative Board to put together a Task Force to recommend one set of rules, procedural rules taking the best from all four departments, into a common set of rules which makes it much more logical both for attorneys and their defenders, in disciplinary proceedings to practical cross jurisdictions, to know what the basic rules of the game are. And they are not different. It makes no sense to treat a complaint differently because the lawyer committed the conduct in Manhattan as opposed to Brooklyn, or, Westchester, as opposed to Buffalo or Albany.

I would ask this Task Force to essentially start from scratch. Write the best set of rules

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substantively and procedurally as you may taking the

best of what there is. And to ensure a mechanism, consistent with our administration of justice for there to be uniformity.

In result, I would propose that the Court of Appeals be given discretionary authority, to review the discipline imposed or forgone by any of the Appellate Divisions. In the same way that the Court of Appeals, will resolve different ways on substantive law and procedural law among the four departments, where there might be disputes it seems to me that the best way to say, for example, that any lawyer who stole money should be disbarred, is for the state's highest court to say, that's what we would do and that's the standard and to give them the discretion to take the suspension or censure, from the First or the Second or Third or Fourth Department and say we would do it differently, I think is a way of under the due process of law imposing some uniformity, from where it ought to come which is the state's highest court.

I also believe that there is a lot that the current disciplinary structure can do presently to make it's procedures, and process more understandable, and available to the public.

If you look on the web sites of the four

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

explanation, description, or, history of what they do. Every single disciplinary complaint from whatever department should be on the web site of that department. And there ought to be an index as we have on the judicial conduct web site of substantive explanation or description, of the kind of misconduct and a breakdown, of the judge, the court and the county so that it is relatively easy for us to determine as I think Mr. Zauderer, appropriately pointed out in various clusters, of behavior, that is treated differently, among the departments, in a way that would make sense and inform the public.

One reason why we can't answer a question about whether there is or isn't discipline of prosecutors, because even if there is it is hard to find it. You have to search for key words through Lexis, or Nexis, and maybe you will get lucky and hit a few. But it ought to be on the web site of the disciplinary committees, that are charged with making this information available and promoting to the public a greater understanding of how the process works. And to that effect I would say there is a place for public disciplinary proceedings at a certain point.

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

would suggest ought to be the case for attorneys. At the point that a duly constituted body and that would be a Grievance Committee has found probable cause that misconduct may have occurred and formal charges are preferred against the attorney that is the point at which the proceedings ought to be made public. Not at the point of inception, not during investigation.

I don't think we ought to be inhibiting people from making complaints. I think making complaints, public at the point of inception, would be unfair to the lawyer who is not going to be disciplined, and the vast majority, has not, as with the case of the judicial system.

We get 1,800 complaints, a year. We investigate about 200 of those. And about 20 judges at most are going to be publicly disciplined, and we might have 30 or 35 cautions. The same percentages, are very likely true among the bar. But when a formal body of sophisticated attorneys has made a finding or a probable cause determination that there is misconduct, that ought to be public. Because the license to practice law is not just a privilege it is a public trust. And I believe that the public has a right to know when a

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grievance entity has decided beyond the investigative stage to formerly institute charges.

And I would say that there is a lot that could

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

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JUDGE COZIER: Mr. Tembeckjian, your time is just about over.

MR. TEMBECKJIAN: I would wrap up with one

thought in this regard. A process that takes too long is unfair to the public and to the lawyer. No lawyer and no judge for that matter should be under the anxiety, the stress and the opprobrium, of having charges hanging over them that are ultimately going to be dismissed. And the public should not have to wait an undue period of time for the lawyer or judge that has been engaged in misconduct to be appropriately punished for that behavior.

So it seems to me that opening up the process at an appropriate point using some of the tools that are available now to make the process more explainable, and understandable and accessible, to the public and layering, some of these other procedural changes through the Administrative Board or the courts is in my view compelling.

JUDGE COZIER: Thank you.

Yes, Professor Gillers?

PROFESSOR GILLERS: Thank you for that.

Let me pose a question from the outfield that draws on your experience in professional discipline.

MR. TEMBECKJIAN: The outfield is usually where

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I feel in any gathering of judges and lawyers panel.

PROFESSOR GILLERS: It seems to me that any disciplinary system has limited utility in protecting the public. First of all, it is after the fact.

MR. TEMBECKJIAN: Correct.

PROFESSOR GILLERS: It is not before the fact.

So, something bad has happened already. And even if the best system is to be imperfect, we should try to be as good as we can. But there's a limit to what a post hoc, system, can do.

Now, what that suggests is that the best way for a prospective client to protect himself or herself, is to chose the right lawyer at the outset. And the way people have traditionally done that or should do that as with other professionals is through word of mouth, talking to friends and acquaintances, about their experience with lawyer Smith or Dr. Jones.

Now, it seems to me at an internet age, exchanging that kind of information, about lawyers should be much easier. And, so, what I'm asking you is, do you see any way of creating a functional, equivalent, of a Trip Advisor, for lawyers? You could look up the hotel, you could look up the restaurant, you could look up many businesses that provide services.

If the exchange of information among other

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

information?

MR. TEMBECKJIAN: Well, that is the kind of recommendation I might make in a second career after I have retired from the practice of law. I do think there is some merit to it, but I'm not sure that it is the role of the state or the Grievance Committees, to provide the "Yelp" like review. I don't think there is anything that we could do to stop it.

Frankly, Professor, having heard you make the suggestion I'm surprised it hasn't happened already in the Internet, market place. There are certain things that I think that the grievance structure can do and I have hoped to have outlined, some of those.

The most effective and simplest of which is to put every public discipline of an attorney that they have rendered on the web site so that people have access at least to those who have been adjudicated to have engaged in misconduct.

I'm not sure to the degree that I would trust a system of "Yep" like ratings of attorneys which can be skewed positively by the attorney by his or her friends,

or, negatively, by the one person out of a thousand that might have had a bad experience with that particular attorney.

I think it is worth studying, and it is intriguing. I'm not prepared at this moment to

recommend it though.

JUDGE SKELOS: Mr. Zauderer?

MR. ZAUDERER: I know that your long time professional work deals with judges, not lawyers who are not judges. But let me draw on your experience as it relates to those.

MR. TEMBECKJIAN: Sure.

MR. ZAUDERER: Let's not talk about the very obvious severe offenses such as escrow funds or stealing, which are very serious offenses, but things that are the meat and potatoes, at disciplinary hearings, a conflict of interest.

A lawyer is disqualified in a case because he acted in an arguable situation adverse to a client's interest. Now, there would be regional differences and cultural differences in large firms versus small firms. The federal and state courts have different approaches to "walling" off lawyers. For example, when a lawyer represented a client and now that lawyer is adverse to that client and those really are because of different

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

to deal with it.

So, isn't there a value in keeping local knowledge an irrelevant factor? Having four Disciplinary Committees, who know the people -- and, I don't mean in an intimate way that would preclude them from judging a case, but -- who know the culture, know the practice, when they hear the testimony, just as local juries are called upon to hear testimony knowing the community, maybe not friendly with a particular defendant, isn't there a value in that that we should respect?

MR. TEMBECKJIAN: Well, I think that there is. And I think that whether it is a statewide application or a regional application any entity of responsible people can make reasonable determinations as to what is appropriate and what is not and what ought to be publicly, or privately disciplined.

I will give you an example from my own experience. In a sparse county, single judge county upstate, where within walking distance of the court house there may be one or two places to have lunch, it

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

at the same time, that is not going to result in discipline because a reasonable application of the rules to those facts. And I would say that that might be true in Brooklyn as it might be in Franklin County.

MR. ZAUDERER: But a statewide, body, might not be in the same position to evaluate and understand that as an Appellate Division with four different bodies.

MR. TEMBECKJIAN: Well, that's right. But I'm not proposing a statewide body. I'm proposing, a statewide, coordinated, disciplinary committee system, that would still put before it its recommendations to the Appellate Division, but it is not an authority I would expect it to grant very often or to exercise often to have the Court of Appeals with the discretion to review what an Appellate Division has done in discipline to determine whether or not they got it right or wrong.

I'm not promoting, at all supplanting, the Appellate Divisions. I would think 99.9 percent of the decisions would still be rendered by the Appellate

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

JUDGE COZIER: Justice Skelos?

JUDGE SKELOS: Gentlemen, good afternoon.

MR. TEMBECKJIAN: Hi. Nice to see you again. Which I should say is only because you were a witness in one of my proceedings many years ago in which the judge, waived confidentiality. By the way, one that was very few.

JUDGE SKELOS: So, Mr. Tembeckjian, before, you mentioned the letter of education. You cited to one of the departments, and I forget which.

MR. TEMBECKJIAN: The Third.

JUDGE SKELOS: Okay.

But in the Second Department, you had a letter of admonition. How is that different?

I'm not familiar with the term "letter of admonition," so how is the letter of admonition, different from the letter of education?

MR. TEMBECKJIAN: I believe, an admonition, is a discipline, that the respondent has the ability to

challenge. But it's a discipline as opposed, to a confidential suggestion or recommendation, which is not disciplinary.

JUDGE SKELOS: We also have a letter of caution, which is in the hierarchy.

MR. TEMBECKJIAN: Right.

JUDGE SKELOS: Which is below the letter of

admonition.

MR. TEMBECKJIAN: Right. Which you do, but the First Department, does not.

What I like about the letter of education, is that it's title essentially, describes it. So, if you get a letter of education I think you know what you have gotten. You haven't been punished but you have been advised on a way to amend your behavior to avoid problems in the future.

Whatever we call them --

JUDGE SKELOS: Should we change the title of letter of caution to letter of education?

MR. TEMBECKJIAN: Well, the Third Department, has a letter of caution and a letter of education. And the point I'm trying to suggest is that there is no reason for there to be four different sets of nomenclature among the departments.

Everybody should have a caution, everybody

should have an admonition, everybody should have a letter of education. As well as, the public disciplines.

JUDGE COZIER: Mr. Morton?

MR. MORTON: Thank you.

I would like to get back to something that my colleague Mr. Zauderer, was talking about and it is on

the statewide system.

Thank you for your testimony. You bring a unique perspective overseeing a body like you do.

Just to be clear, you are not suggesting that we should recommend blowing up the existing system --

MR. TEMBECKJIAN: Correct. Not at all.

MR. MORTON: And creating a whole new commission on attorney conduct, for lack of a better word.

MR. TEMBECKJIAN: I would agree.

I think that the current system fundamentally, is sound. But that it is so confusing and somewhat disparate in its various approaches that an overall uniformity, in the way proceedings are brought and cases are investigated among the departments, would make, I believe, a brave new uniformity by the Appellate Division, in rendering decisions more than likely. The same set of rules, the same set of substantive requirements and uniformity, in the way that they are

prosecuted.

MR. MORTON: You know, just to follow-up, I think harmonization of the various Appellate Division Rules is something that this commission is looking into very seriously. But you also suggested a discretionary review by the Court of Appeals.

MR. TEMBECKJIAN: Right.

MR. MORTON: That would essentially, give the

Court of Appeals, a factual degree of power within the judiciary content. Do you think that would require constitutional amendment to accomplish that or would that be really statutory?

MR. TEMBECKJIAN: Well, I'm not sure.

I think any conferring of new jurisdiction on the Court of Appeals, I think would have to be constitutional.

MR. MORTON: Right.

MR. TEMBECKJIAN: Whether we began by giving them essentially, administrative review authority, which would be, you know, similar to the way it might review decisions of an administrative agency or an Article 78, is possible.

Likely, a constitutional amendment, if this is viewed as conferring new authority on the court.

In commission disciplinary cases, it is

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

I think in about 75 to 78 percent of our cases, they agreed with both the facts and the discipline, and in the rest they agreed with the facts but disagreed with the discipline. Sometimes, raising it. Sometimes, reducing it.

I wouldn't be afraid of recommending a constitutional amendment, because I do think ultimately putting the Court of Appeals on top of the system where it belongs is the appropriate way to go.

Again, I don't think they would exercise that authority very often, but were it necessary they should.

MR. MORTON: Thank you.

JUDGE COZIER: Thank you very much, Mr. Tembeckjian.

MR. TEMBECKJIAN: Nice to see you too, Judge Cozier, and the commission.

JUDGE COZIER: Our next witness is Andrea Composto,

representing the Women's Bar Association of the State of New York.

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

reflects the comments from WBASNY's members. We have reflected upon whether New York's departmental-based system leads to regional disparities in the implementation of discipline; if conversion to a statewide system is desirable; and how to achieve dispositions more quickly.

Based on the feedback received from our members, WBASNY, has certain concerns about the implementation of a statewide Attorney Disciplinary System. We have centered our comments to the areas of uniformity, efficiency, and transparency.

Uniformity. Is the current Appellate Division based disciplinary process inherently unfair due to the disparate sanction between the Departments.

Well, first obviously, are there disparities, and do they exist? Yes.

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

necessary. One suggestion that might be considered is that the Commission recommend a comprehensive overview of ten years of disciplinary cases by the four law reviews, one in each Department. Then, the Commission would have a much more complete review upon which to base a meaningful decision of whether a completely new system is warranted.

What are the benefits to our current departmental based system?

Judges decide cases on the facts presented in each case. And unique facts lead to disparate results. That is the nature of our adjudicatory process. Disparities that exist are likely justified by the regional differences in the practice of law. The practice of law here in Manhattan is different from the practice of law in Malone. Paralleling, this then the

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

conduct. Thus, finding a rational basis for the disparities.

But, what enhancements can we make to our current system? A suggestion that WBASNY members have provided is the implementation of uniform rules and procedures to help combat these differences that exist between the procedural and substantive rules of the various Departments.

Currently, some Departments have types of private discipline that do not exist in other Departments. The First Department has hearing panels that review the findings of a referee before the matter is presented to the Court; no other Department does this. Oral argument is permitted in the Third and Fourth Departments but not permitted downstate. If

these differences in procedure were eliminated and uniform rules of procedure were implemented, fair and just outcomes would be achieved.

The Commission could strongly recommend that the four Departments harmonize their rules, so that disciplinary rules and procedures are uniform statewide. This will enable the Commission to maintain the current departmental-based system that we have yet create precedent throughout the state.

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MS. COMPOSTO: Moving on to efficiency: Efforts can always be made in assessing ways in which attorney disciplinary matters could be resolved more expeditiously and WBASNY has no objection toss working towards a means to help resolve the disciplinary proceedings in a more efficient manner. We have received feedback from some of the chapters of WBASNY who propose the consideration for setting up a system of negotiated dispositions or plea bargains.

Unlike other states, the rules in New York provide no means by which an attorney under

investigation can admit to certain misconduct in exchange for an agreed upon disposition. Obviously, enabling or -- enabling such an outcome would resolve some cases more expeditiously than the current full hearing in every case basis.

It has been suggested that a speedy trial provision be enacted for attorney disciplinary cases. WBASNY has serious reservations regarding this idea. Attorney discipline is about protecting the public. The public and aggrieved clients are not necessarily well served by a speedy trial provision that would potentially short circuit an adjudication on the merits.

The staff of the various grievance committees

are tremendously overworked. Over 100 -- 160 open files per staff attorney and a speedy trial provision could result in more dismissals, but not more expeditious dispositions.

So correspondingly, any enactment of a speedy trial rule would have to be accompanied by increased funding or staffing for the Grievance Committee from the Office of Court Administration.

Transparency. In studying ways to make the attorney disciplinary system more transparent, one can presume that a more open and public disciplinary system

will be more trusted by the general public. However, this may not be the case. Once a petition of charges is filed with the court, the whole file becomes public. The file would be accessible by the press and the public and arguments before the court would likewise be open. The thinking here is that the grievance committee acts as a grand jury and approving a petition of charges has essentially concluded that probable cause for a finding of misconduct has been found.

The vast majority of grievances filed against attorneys are disposed of either as frivolous or unfounded, or are resolved before ever reaching the Appellate Division. Making these often unmeritorious or unsubstantiated charges public at such an early

stage without the appropriate investigation or factual findings would do serious and irreparable damage to an attorney's reputation, particularly considering how easy it would be to make them available on the Internet.

Attorneys have no recourse when mere charges are made public. The Appellate Division is currently free to send cases back to the grievance committees for the imposition of private discipline. Still, other cases are dismissed outright and in these instances the public would already have been made aware of the charges against the attorney and although the attorney

maybe ultimately vindicated or lightly disciplined, this will be of little solace when the attorney finds herself clientless due to the salacious charges repeated in the local newspapers.

Making charges public upon filing would hold attorneys to a different standard than other professionals. Currently, disciplinary proceedings against doctors, accountants, architects and even judges are completely confidential until resolved in an order of public discipline. What is the rationale for treating lawyers differently from other professionals?

JUDGE COZIER: Excuse me, Ms. Composto. You have just about 30 seconds left.

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MS. COMPOSTO: Perfect timing, as I am concluding.

So in the area of transparency, it is with a resounding voice that our members of WBASNY feel that charges or filings of grievances should not be made public.

On behalf of WBASNY, I thank you for this opportunity to speak before the Commission and as always, we welcome the opportunity to further discuss this subject matter with Chief Judge Lippman and the Commission.

Thank you.

JUDGE COZIER: Thank you.

Questions? Yes. Mr. Zauderer.

MR. ZAUDERER: One thing -- thank you. One thing that you just touched on was that there are many or most complaints are dismissed as frivolous and you know, that is a very -- can be a very troubling circumstance if it is substantiated and maybe we should get statistics on it. Maybe could you help us with it, in weighing the -- whether the closed nature of the proceedings should be changed, because if you said -- for example, if most complaints statistically were dismissed and you just would have openness at the very filing stage, maybe the charges are filed, that is

another thing, but that is something I think that has to be weighed in the balance here in terms of whether this is something that has to be changed and if you could help us with any statistics, I for one would be interested.

MS. COPOSTO: Currently I don't have the statistics in front of me to present to you, but it is very troubling and I think what the members of WBASNY, what their concern was, especially being that we come from 18 different chapters throughout the State of New York, but you know, in the beginning we thought maybe the smaller chapters would feel this way but it was a resounding agreement that all of our members felt this

way, different chapters, that there is such great concern about the reputation of the attorney being sullied for these grievances that were found to be unmeritorious or frivolous and what does that local practitioner do when -- if at such an early stage that information has been made public and so, that is something that WBASNY feels we should not -- the Commission should take a direction -- should move in this direction.

MR. ZAUDERER: Thank you.

JUDGE COZIER: Thank you. Thank you very much.

MS. COMPOSTO: Thank you very much, your

Honor.

JUDGE COZIER: At this point we are going to take a ten-minute recess and then resume with the additional witnesses. We still have a number of witnesses to testify.

(Pause in proceedings.)

JUDGE COZIER: The next witness is Carol Sigmond representing the New York County Lawyers Bar Association.

MS. SIGMOND: Good afternoon, members of the Commission. I am the president of the New York County Lawyers Association and I am here to address the Commission on behalf of NYCLA and thank for you

granting us the privilege of addressing you on this very most important issue and by the way, you're most welcome here.

Due to time constraints I am only going to give a very short version of our testimony which was submitted in writing previously. I want to cut to the chase and address what I consider to be the five critical issues:

The first issue is, does New York's department-based system lead to regional disparities in the implementation of discipline? And the answer is obviously, it does.

The question is, how significant is that and what should we do about it? NYCLA believes there should be a move to procedural uniformity, but that move to procedural uniformity should be guided by the geographic and population differences in the departments. The First and Second departments are densely populated and relatively small in comparison to the Third and Fourth departments and we see some of the departmental differences as a result of these geographic and population differences. We have an extensive report on these issues on our website should you require any further detail.

We also believe there should be a move to uniformity on the issues of letters of caution, letters

of education and letters of admonition. Whatever policy there is should be the same in all four departments and we would urge the Commission to move in that direction.

Having said that, we concur with the first witnesses who pointed out that there is extensive precedential value in the departments on specific fact-based cases, and for this reason we reject any move to mandatory guidelines or any kind of sentencing guidelines.

The second question is, is there -- is a

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statewide system desirable? And in our view, the answer is no. We believe the statewide system would be more costly and introduce more delays.

We also think a statewide system would undercut the precedential value of the existing fact based decisions and I cannot emphasize enough to you our view that these decisions are frequently very fact based and in that regard, I would echo Ms. Scalise' testimony on that point.

The third question is -- on everyone's mind is, how will the disciplinary committee achieve decisions more quickly and there are two simple answers; one is more resources and the second is plea bargaining. There has not been much discussion of

that, but maybe there should be. In the First Department there are cases where the parties come quickly to the conclusion of what should happen and then they go through a three-stage process to finally reach the decision that they have already figured out in advance. It is not something that has been discussed, but it is something that should be considered.

The fourth issue is the question of public disclosure of the process. We oppose any disclosure prior to the imposition of formal discipline. Any

other result would undercut the letters of education and caution that are issued in some of the departments. We think on balance, balancing the public interest and the interests of the counties, that is the right balance and it is currently the statutory balance.

Finally, an issue that has not gotten enough attention maybe because it doesn't really belong here and that is the question of discovery response for attorneys. We support discovery for attorneys and support the six recommendations of the committee on discipline.

That concludes my oral statement.

Thank you.

JUDGE COZIER: Thank you.

Yes.

MR. GUIDO: Thank you.

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

organization have a view as to whether or not the hearing panel should be eliminated?

MS. SIGMOND: Generally speaking, we think that the referee system is more efficient. We think it is more cost efficient for the respondent/attorney, and we think it would reduce some of the delays.

I would say that we do see some value in the bifurcation of holding a two-stage hearing. But I think the referee system would look like it should work efficiently.

MS. KEWALRAMANI: Thank you for your testimony.

What are your views on opening up the disciplinary process?

MS. SIGMOND: We oppose it. In this age of

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

action, the Appellate Division has the power to suspend prior to the formal hearings so the public can be protected without damaging the attorney's reputation until the attorney has had an opportunity to defend himself.

JUDGE COZIER: Thank you very much.

MS. SIGMOND: Thank you.

(Applause.)

THE COURT: The next witness is Paula Edgar --

A VOICE: I am supposed to be at 12:45. The person who went at 12:15 already went, so I have to believe somehow I was omitted. My name is Janice Lintz.

JUDGE COZIER: Your name is?

A VOICE: Janice Lintz.

JUDGE COZIER: There are several people ahead of you on the witness list. We are running behind schedule.

A VOICE: Am I on the list?

JUDGE COZIER: Yes, you are.

We will move on then to J. Richard Supple Junior from the New York City Bar Association.

MR. SUPPLE: Thank you, members of the Commission. I am testifying today on behalf of the

Committee on Professional Discipline of the New York City Bar Association, of which I am a member. We are pleased that the Commission is undertaking a comprehensive review of New York's attorney discipline system. We urge you to focus particular attention on the following three areas where we believe improvement in the disciplinary system is needed most.

Some of what I will say is going to echo some of the other witnesses that you heard earlier.

First, attorney discipline procedural rules we believe should be uniform across the four departments in New York State. Only the First Department has at present detailed rules governing the procedure.

The Second, Third and Fourth departments have few rules and moreover, the rules that do exist

demonstrate substantially different practices. For example, unlike many professionals subjected to discipline, an attorney/respondent has no opportunity to appear personally before the Court in the First and Second departments before he is censured, suspended or disbarred but in the Third and Fourth departments by contrast, oral argument is available.

Another example is diversion of an attorney's case where alcohol or drug abuse is a causative factor.

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The Second, Third and Fourth Departments can issue non-disciplinary letters of caution, although they are not used, but the First Department, however, does not and while the Second and Fourth departments can issue non disciplinary letters of caution to address poor attorney conduct, in the Third Department there are several non-disciplinary cautionary tools, including the letter of education that had been spoken about earlier. The First Department allows only for dismissal or discipline, although it recently promulgated a new rule somewhat similar to a letter of education permitting dismissal with cautionary guidance.

Different procedural opportunities and different nomenclature portend different outcomes. For purposes of evaluating and prosecuting, it should not matter whether an attorney practices in Buffalo or

Brooklyn.

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

non-privileged materials in the prosecutor's file and also, permitting limited discovery following service of formal charging.

And to this end, we recommend the following five new rules:

First, after a complaint is filed, and without having to make a formal request, respondents should be given copies of the complaint and any reply filed by complainant.

At present, some but not all staff counsel refuse to provide or refrain from automatically providing a respondent with a complaint from a member of the judiciary for example, while most but not all staff counsel will forward a copy of a complainant's reply submission.

Second: After a complaint is filed, the Respondent should automatically have access to

exculpatory materials in a staff counsel's file. Again, most prosecutors provide such access, but others do not.

Third. After charges are filed, a respondent should have the ability to request documents before hearing from third parties via so ordered subpoenas. At present respondents may only subpoena third parties to appear with documents at a hearing.

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Fourth. After staff counsel's investigation is completed and charges are filed, a respondent should be granted access to non privileged materials in staff counsel's file.

And Fifth, after charges are filed, a respondent should be allowed to take depositions of the complainant and any witness that staff counsel intends to call at a hearing, provided that respondent makes a clear showing that a proposed deposition is likely to adduce evidence on a disputed issue of material fact that is important to an element of a charge.

While such a standard would not favor depositions in most cases, in these limited circumstances a deposition will be useful to clarify and particularize the factual dispute at hand or alternatively, to confirm or refute a factual claim.

We believe this last proposed rule would not adversely impact the speed and efficiency of a

disciplinary system because it will be invoked relatively rarely and may contribute to efficiencies by clarifying facts in a way that encourages and facilitates the kinds of agreed proposed dispositions that I will discuss in a moment and then -- that other witnesses have discussed before me.

Third. Disciplinary complaints take too long

to be addressed. Many witnesses have already discussed that. In the First Department, up to two years can pass before disciplinary staff counsel makes any follow-up inquiry or takes action regarding following receipt of a respondent/attorney's answer to a complaint. This delay can occur even in cases where the attorney is alleged to have mishandled or misappropriated client funds. Not often, but it can happen. And substantial delays also plague the other departments.

Lengthy delays can prejudice both the prosecution and defense for obvious reasons; including because witness memories fail or erode or because evidence is disregarded or destroyed. Protracted delays also act as a disincentive to bringing complaints in the first place.

In addition, during the long period that complaints are pending, attorneys maybe burdened by

unnecessarily increased malpractice insurance premiums, or prevented as a practical matter from moving between law firms. In all such instances public confidence in the system is undermined.

The City Bar is well aware that a principal cause of delays is reduced state funding for the state attorney disciplinary system. Several budgets have

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resulted in too few procedures to handle the persistently high numbers of complaints filed each year. However, because it is unrealistic to expect in our view that the Legislature will fully fund the attorney discipline system, as it has never done that before even in prosperous times, we believe that the following four changes could speed up the process by which disciplinary matters are evaluated and resolved without sacrificing the quality of justice:

First, we believe there is a possibility or a process that could be employed to better triage complaints when they come in. Disciplinary prosecutors currently open matters for investigation even where there is only the remotest possibility that discipline will be imposed. We believe the system would be more efficient if senior disciplinary committee members took a hard look, harder than they do today, at the viability of complaints during a second screening process of a receiving an attorney's answer

and a reply from any complainant.

Greater winnowing of complaints will prevent many matters from languishing on uselessly for months and years and will allow for more focused and quicker attention to serious matters.

Second. We urge more use of mediation. The

City Bar and other bar associations have rosters of trained lawyers qualified to mediate disputes between attorneys and clients. Mediation is especially valuable where the attorney and complainant still have an attorney/client relationship and the gravamen of the complaint is a failure of effective or timely communication. The disciplinary committees across the different departments tend to use mediation infrequently and inconsistently. More consistent use of mediation will result in a quicker resolution of referred matters while freeing up staff again to concentrate on more serious cases.

Third. We believe that there could be a process by which agreed resolutions could be promoted. Unlike many jurisdictions, New York disciplinary procedural rules do not permit staff counsel and attorneys to agree to a proposed resolution of a disciplinary matter subject to approval from the court. In many, if not most instances, the facts relevant to a

complaint are not in sharp dispute.

Correspondingly, where staff counsel and a respondent can't agree on facts and agree that the law suggests a particular outcome in the respondent's disciplinary case, it makes no sense in our view to hold hearings before a referee and a hearing panel.

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Instead, staff and the respondent could stipulate to the relevant facts and the relevant mitigating and aggravating evidence and propose a resolution for the court to support or reject at its discretion.

JUDGE COZIER: Excuse me. You have one minute.

MR. SUPPLE: I am just about finished. Thank you.

Such negotiated regulations will not only result in faster disposition preventing an attorney from continuing to practice because of the overly protracted delays, it would also save staff counsel substantial time and effort, freeing him or her up to handle more serious matters.

And finally and lastly, we believe there should be a better streamlining of jurisdiction. As disciplinary procedural rules read today, a disciplinary or grievance committee may investigate a lawyer admitted or officed in its department as well as for conduct occurring in its department. Many times, particularly when attorneys are residing or practicing

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

charge and this process can take years. To minimize confusion, jurisdictional rules should be reformulated to make clear which department should assume responsibility for a given matter and in this respect, we believe that the greatest weight should be accorded to the location of the attorney's office unless the attorney resides out of state, in which event, jurisdiction should lie in the department where the attorney was originally admitted.

Thank you.

JUDGE COZIER: Thank you. Questions.

JUDGE SKELOS: The same question I asked before and it references your last statement that there is passing around of the football, okay?

What empirical evidence do you have to suggest that that happens with such regularity that it impairs the administration of justice? I mean, when people come here and suggest anecdotally that things like this happen, I am not sure that it really adds to the discourse.

If there is empirical evidence that this is something that is impairing the process, then I think every member of this Commission would be interested in hearing it.

But where it becomes anecdotal, I am not sure how that answers the questions that we are asking.

(Whereupon, the following was transcribed by Senior Court Reporter Monica Horvath.)

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MR. SUPPLE: Thank you, Judge Skelos.

And because that was discussed earlier on the rule it is very difficult to get statistics in a mostly privately closed system that discussed things across the state.

I do practice in this area and have done so for quite a number of years and have handled many cases where this has occurred. So I can say from my own personal observation that it has happened. Again, you know, it doesn't happen all the --

JUDGE SKELOS: What is the percentage of the cases that you have handled where you have encountered this as a problem?

I sat on the Appellate Division for 11 years. I hardly saw a case where something like this happened.

MR. SUPPLE: I have one quite notably egregious, case now.

JUDGE SKELOS: Again, counsel, that is anecdotal.

MR. SUPPLE: I understand, Your Honor.

And I will say that it does not because of the circumstances. Clearly, in most instances the

jurisdiction is clear. But this is a simple re-write of rules to just make clear what the priority of jurisdiction is.

When you read the rules as they are now they

provide a laundry list of jurisdictional opportunities that basically open the system up to anybody's interpretation.

And, yes, while it is true that it doesn't happen all the time because the circumstances by which the political football, by which the case football, would get passed back and forth, it is not going to happen all that often numerically. It is an easy fix. And when it does happen it can result in years and years of delay.

Including a case I have now, which is four years delayed. So I think it is a fairly simple and straightforward proposal and I'm not sure why it would be so strongly resisted. Simply to prioritize and make clear who should take the case in the first instance. It would give the complainant greater clarity as to where the complaint should be filed and it would give the prosecutors an easier reference as to who should be taking control of the matter.

JUDGE COZIER: Yes, Mr. Guido?

MR. GUIDO: Two questions.

I was troubled, to hear you say on a few

occasions staff counsel refused to give you a copy of the complaint.

MR. SUPPLE: No. I don't believe I said a copy

of the complaint. I said a copy of the complaint and reply. Because I always get a copy of the complaint.

MR. GUIDO: But not from judges sometimes.

MR. SUPPLE: That was information provided to me through some of the members from our Committee. I have not personally experienced this. But this was a consensus of the Committee that I am testifying. But that has happened in instances where there are sue sponte investigations and instead of providing whatever transmittal letter came from the judge to the Disciplinary Committee or Grievance Committee itself, there would be a different communication that would go out to the court.

MR. GUIDO: I want to ask you the same question I asked Miss Sigmond. Does your organization, have a view assuming we recommend and move towards a unified process rules as to whether or not the hearing panels should be eliminated to achieve that uniformity?

MR. SUPPLE: Speaking for myself, because I haven't been instructed by my Committee as to how to respond to that particular question, I don't believe that the hearing panels in a typical case where there is

an original referee review of facts add a whole lot to delay the process.

Hearing panels, however, can offer in the First

Department where they exist can be substantially valuable in matters such as reinstatement matters and things of that sort where it is useful to have a variety of people hear the evidence, presentation-wise. And it is a fairly simple presentation that can be done one time.

Hearing panels are hard to convene and have for lengthy processes because there are so many members and it just makes scheduling things difficult and again delays the process.

JUDGE COZIER: Thank you, Mr. Supple.

MR. SUPPLE: Thank you.

JUDGE COZIER: The next witness is Professor Caprice Alves.

MS. ALVES: Hi. Thank you.

So I am here to speak I guess on behalf of consumers like from a consumer's perspective and to the point at which disciplinary charges, or findings should be publicly revealed. I believe that complaints themselves -- maybe I agree with Professor Gillers, where he said as soon as there was probable cause for a complaint to be processed it should be publicized.

I know that Judge Skelos, has said that

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

things do speak to the process. They do speak to the structure of things and how the structure of things is flawed and hurts consumers.

One example is -- well, all three examples involve lawyers. So shall I name the lawyers and give you the specific examples?

JUDGE COZIER: No. I prefer you not name lawyers, please.

MS. ALVES: Okay.

One particular lawyer was brought to the attention of the First Department Grievance Committee for bad deeds. Just unethical behavior with real estate and things liked that. He was actually my lawyer and I made a complaint against him for things that he was doing. And he actually tried to take my apartment somehow that I owned and he said he was going to make me an investor and different things. I brought the bad behavior of this person to the Disciplinary Committee, and they didn't act on the complaint that I submitted.

After three years of me trying to get this person -- the complaint processed against this person they got tired of me and dismissed the complaint all together. Three weeks after the complaint was dismissed

he got arrested by the FBI.

I did a doctorate, and I just defended it last

year, actually. And the title of my dissertation, is: "An Analysis Of the Perception of the Legal Profession Through The Eyes Of Dissatisfied Consumers of Legal Services in Manhattan, New York." An interpretative and analogical analysis.

While I was doing my case studies, my comprehensive exams, I decided to do it on this particular lawyer and the situation with the First Department. As I was looking up things and doing my research for that case study, I found out that he was breaking the law for the whole three years that the Disciplinary Committee had his complaint.

In Florida, he had someone sitting in prison while he robbed the family. He told the person to plead guilty, then he went against them and he took the house, the rings, the cars, and everything from the family. He was rearrested, shipped back to Florida to face charges where he was practicing in Federal Court, where he didn't have a license. And now he is in prison for seven years.

The second example is a gentleman, an attorney, a Brooklyn attorney, who represented an elderly, Harlem woman with a property that she owned and bought I think in 1956 or something like that. The property she paid

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

dollars now. She asked him to manage the building for her and he did. He represented her. And first he would keep the money from the tenants and not return it to her, and then he got tired of that slow process so he just marched into the building and stole the whole thing. When a news reporter got wind of the story and the things that he was doing previously they made a report.

They did a report on this particular lawyer and all of the outrageous bad deeds that he was committing, so he sued the reporter for defamation, to stop the reporter from publishing this information.

Long story short that person is now in prison for six years in federal prison. And for the past year, although he has been in prison for a year now, the lawyer's cite AVO and the court system's web cite said that he was a lawyer in good standing with no disciplinary records to be found.

The third example is a lawyer who represented me. I have a high-end co-op in Manhattan and all we do is disagree. So, I decided to go to court one year and I hired a lawyer and I guess he felt liked he was in a win/win situation, I have this apartment, we have the 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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challenging his behavior he just decided to quit, but he kept all of the money that I gave him.

After submitting these people to the Disciplinary Committee, all of the complaints that I submitted were dismissed. They would call each other and say not to represent me, the next lawyers and things like that. All of the complaints were dismissed. So the only thing that I had at my disposal was the opportunity to submit a consumer review. Which, I did. I put a report of him on-line and stated exactly what he did. For the last three years and two months he has been suing me for defamation frivolously, because he says that my complaint, my consumer review is not true and I am saying that it is true.

We are now on the fourth judge because they keep quitting. The judge's don't want to be bothered. And they have been doing improper things causing one judge to quit on the record and stated that they were sending him things improperly and all of these things. But, either way, we are on the fourth judge, three years and two months later. There is no end in sight. I'm fighting back against him and his frivolous claims. Which I don't think he expected. But this is what is happening.

So, anecdotes aside the First Department

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receives 3,300, complaints a year. Out of the 3,300, complaints that they receive they dismiss over 98 percent of them. The confidentiality laws don't allow consumers to know that certain lawyers are capable of certain behaviors. If you don't know that these lawyers, particular lawyers would be capable of particular behaviors there is no way in the world that you could be an informed consumer. You are susceptible to the experiences of the three lawyers that I outlined.

That particular lawyer that is suing me has actually been in litigation and is still in litigation, with some of them 26 clients that he is either suing or are suing him for excessive legal fees.

So, that is what I'm speaking to today. The fact that the complaints should be public as soon as there is probable cause or else consumers are not protected from the egregious offenses of bad apples.

MR. : Thank you for your testimony.

MS. ALVES: Thank you.

(Applause.)

MR. ZAUDERER: If I understood you correctly, you had perhaps three complaints that were filed and they were dismissed?

MS. ALVES: More than three. But, yes.

MR. ZAUDERER: More than three.

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MS. ALVES: They were all dismissed.

One last point. The cases are dismissed with no proper explanation.

MR. ZAUDERER: That is what I was going to ask you.

MS. ALVES: Right.

The dismissal is just stayed. "We went through this process" -- and they spell out the process -- "we sent it to this committee and that committee and there was no finding of wrongdoing," and the consumer has -- I have a Doctorate degree. I have no way of understanding what that means or how to protect myself or other people in the future.

MR. ZAUDERER: So let me ask you about that.

Did you ask the staff in the Disciplinary Committee for an oral explanation, or a written one and did they give you either?

MS. ALVES: Yes, sir. I did ask, many times.

MR. ZAUDERER: Tell me what the response was.

MS. ALVES: The response is always that they can not talk to you and tell you certain things because of confidentiality laws.

The written complaints were never anymore than, "we did an investigation and we didn't find wrongdoing." And, that is about it.

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In fact, I was told at one point that the consumers are not entitled by -- consumers don't have the write to the Disciplinary Committee. That the Disciplinary Committee is sort of a luxury or just -- I can't think of the word to use -- just sort of a luxury, that is in place but consumers are not entitled to it. Therefore they don't give out their e-mail addresses and give you complete access to the Disciplinary Committee people.

MR. ZAUDERER: Thank you.

JUDGE COZIER: Thank you, Ms. Alves.

MS. ALVES: Thank you.

JUDGE COZIER: The next witness is Janice Lintz.

MS. LINTZ: Good evening. My name is Janice Schacter Lintz. I am a retired attorney who has testified on these issues before Congress and the Moreland Commission.

Attorney discipline should be consolidated. Geographic disparities should be eliminated. There needs to be uniformity across the state. Out-of-state attorneys shouldn't be able to enter our jurisdiction without being subject to our state's rules. We don't need more rules. We just need the rules we have enforced.

The perfect example of this is self

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certification of paying child support where every attorney must sign before they are readmitted to the bar every year. If an attorney does not pay child support, you can't go to the Bar Association and say, they lied.

VOICE: Adjust your mic. We cannot hear you.

JUDGE COZIER: One moment.

We will not encounter any disruptions. Please observe the courtesy of allowing the witness to testify.

VOICE: We are trying. We could not hear.

JUDGE COZIER: If you are not on the witness list you should not comment.

VOICE: They were saying they could not hear you.

MS. LINTZ: Sorry.

Okay, can you hear me now?

VOICE: Yeah.

MS. LINTZ: Great.

So, if an attorney, for example, self certify, every year that they pay child support and you go to the Bar Association and say no they haven't, the Bar Association can't do anything because you are not a client.

The dismissal of so many cases is concerning. Contrary, to self serving statements in the Law Journal and the CJC by Mr. Tembeckjian, it is not a positive

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experience. Otherwise, Judge Laura Drager, would be removed from the bench. The CJC, should not be used as a model of excellence. The CJC, should do a similar hearing but they wouldn't dare.

The matrimonial part has become pay to play and it is a money making operation for key individuals. Ethics, are irrelevant. Part of the problem is the judges don't follow the rules and enforce their own orders. Hence, Judge Heitler is being investigated. How could she oversee the judges in her court when she is allegedly "dirty"? This trickles down to the lawyers appearing before the judges who know the judges are corrupt. The lawyers are running ramshackle through our system. A centralized system would permit greater oversight.

There needs to be greater transparency and accountability for attorneys. The public is clueless when they retain an attorney. A government controlled "Yelp-like" page with index numbers, to insure accuracy would help overcome the issues that were mentioned before. This way complaints could be corralled and people could see who they are hiring. As I have since said an informed consumer is our best customer.

Having one system will prevent attorneys from currying favors with judges and the local oversight

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committees at bar related events. Attorneys in the matrimonial bar size you up financially by looking at your Net Worth Statements. They throw gasoline on the fire and have no incentive to stop until you run out of money. One attorney told me they will get paid before my children eat. The judges encourage this and ensure the attorneys are paid to prevent appeals and complaints against them. This is no different than a syndicate. This is the "matrimonial mafia".

(Applause.)

A centralized discipline system will help eliminate the collusion.

Attorney's interest rates need to shift the market and/or be eliminated. Attorneys are making more money from interest than from fees. Why make a motion to get paid when you can make more money from interest? My attorney said it was the best investment he ever made. He made more money from interest than he did from the case.

The billing practices need to be codified with strict censure if an attorney fails to bill. My attorney failed to bill me for a year-and-a-half. There was nothing I could do. If I filed a complaint he would quit. Since I was an un-monied spouse I would be truly unrepresented but I already was.

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Attorneys are no longer receiving bags of money but receive career enhancing favors including but not limited to contributing quotes to books, as my ex-husband's attorney did, receiving speaking engagements and/or free passes to conferences. This "income" should be disclosed each year on a state controlled form including who provided the benefit similar to how politicians are supposed to report such benefits.

Patterns of currying favor need to be disclosed and posted on-line for all to see. In my opinion and upon information and belief, attorneys use their books to curry favors with key people who participate in the legal process, including but not limited to law guardians who contributed to my ex-husband's attorney's book at around the time she represented my children and he represented my husband who was awarded most decision making and no one disclosed.

Judge's law clerks should be required to "garden". They she should not be permitted to work for a firm that appears before the judge where they previously worked for a year. Again, my husband's attorney hired the law clerk from our judge while we were still before the judge.

VOICE: Wow.

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MS. LINTZ: It is concerning how he received all parenting decision making.

The state needs a more centralized oversight for the law guardians and the assignments should be randomly assigned similar to judge assignments. A law guardians entire case work should flow from this random assignment to prevent case referrals by parties. Again, my ex-husband told me he frequently referred cases to her.

The role of the law guardian must be clearly defined and informed and grievances are unable to be reported unless the party pays their bill. But this may be the person in the case who is being accused of abuse.

My daughter wrote an article and filed her own appeal against her law guardian at age 17. Her article appeared in the Huff Post. Not all kids are capable of doing that.

The law guardians are terrorizing their young clients. They bill with abandon, fail to act in their client's best interests.

Lack of oversight permits them to curry favor with the judges including issuing reports the judges desire so they are reappointed. Some of them hang around the hallways, and I can tell you who, looking for cases like ambulance chasers.

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Lawyers should be required to sign a statement disclosing all conflicts of interest. Failure to disclose should mean censure. A lawyer with a second violation should lose their license. Lawyers are colluding. And this is no different than a RICO violation. There were multiple lawyers in my case who had worked on multiple cases together including the infamous Soft Split case.

Attorneys should not be required to make a motion for fees when a party is a non-monied spouse. It consumes their fee award. My attorney refused to make a motion for fees and I had no ability to force her to make a motion.

It is also ridiculous that criminal charges need to be filed for the Bar Association to reprimand an attorney who enters a client's home without their permission. My attorney entered my home to appraise it for a Heloc without my knowledge or consent while I was in Thailand. The Heloc was to pay her fees violating the SCRR. A complaint was filed and the Bar Association did nothing. I had missed the criminal SOL since I was pro se. Had I filed a complaint, I would lose my attorney. I have the letter with me. I don't understand how any attorney can enter my home without my knowledge or permission and the Bar Association does not find that a

problem. That is so disturbing it goes beyond common sense.

Attorneys who view misconduct in court should be required to report it and failure to do that should require immediate censure.

The New York City Bar Association, also needs to be investigated. It is concerning that committee appointments are apparently made at the "unfettered discretion of the New York City Bar President." Sitting Judge Evans was meeting with "invited" attorneys on select committees. I have that letter too. The bar is giving certain attorneys preferential access to sitting judges.

The e-mail I received -- because I am a retired attorney I asked to be appointed to the Matrimonial Bar Committee:

"We have received your application to join the City Bar Committee with accompanying materials. As you know, not all association members are appointed to a committee. Committee membership is made only by the appointment of the President, whose decisions are left to the unfettered discretion of the President. I am writing to advise you that your application for committee membership has been denied."

I walked into a meeting and saw a sitting judge

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with certain key matrimonial attorneys. I can't even believe that that could be ethical. I must have missed that class in my Ethics class.

VOICE: I missed it too.

MS. LINTZ: Ethics Committees are packed with "besties" overseeing their friends. The Ethics Committees need to be transparent and the sessions need to be public to avoid any appearance of helping out a friend. The public is subject to open courtrooms without controls and subject to the same tarnish and potential media's presence. I know, my case has been all over the Post and the Daily News and so should attorneys. Bill Cosby's victims came out when the issues are disclosed and the same will happen with attorneys and then you will have your empirical evidence.

The process needs to be decentralized to avoid favoritism. Different locations have different rules. We are a state with one set of laws. There needs to be uniform behavior by attorneys.

Attorneys who are part of matrimonial actions should be subject to the bar's code of ethics. My ex-husband is a partner at Cadwalader.

JUDGE COZIER: You have about one minute.

MS. LINTZ: I understand. But I had a problem

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dealing with the microphone so I get one extra minute.

JUDGE COZIER: No, you don't get an extra minute.

VOICE: Awwww.

MS. LINTZ: My ex-husband, a partner at Cadwalader, routinely violates court orders including nonpayment of support, paying it late, taking unauthorized deductions, cursing me on the phone and in e-mails -- I have those -- chest bumping me in court and I am dependent for the judge for sanctions solely because I was once married and not a client. He uses this loophole to further abuse me. I should not be a client for bar ethics to apply. My ex-husband is acting as his attorney and his behavior is unbecoming to an attorney and this loophole needs to be closed.

Attorneys coming into our jurisdiction and fail to maintain an office it should be directly enforced. The attorney representing my husband knowingly and intentionally misleads the court, violates court orders and there is nothing I can do because --

JUDGE COZIER: Thank you very much.

MS. LINTZ: Because New York State does not have oversight over him.

THE VOICE: Thank you very much.

MS. LINTZ: Who do I give the rest of my testimony to?

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

hard, because I was so terrified, you can not even fathom.

No, I was not sent to -- she uses it as a terrorizing technique. I have been placed in handcuffs three times. I don't even have a jay walking ticket. I think in total in my life I have gotten two parking tickets. It is unfathomable to me.

And the reason I was placed in handcuffs is because she was creating a record where she was lying and I prevented her from doing that so I could appeal.

MR. ZAUDERER: I think you answered my question. Thank you very much.

MS. LINTZ: Thank you.

Any other questions?

VOICE: Oh, come on. Somebody ask another question.

MS. LINTZ: I would like to now have the same questions directed to me as a former attorney as you have had to the other people. Because, otherwise, it is giving the impression that our opinions don't really count or matter.

VOICE: Yes, yes. That is true.

VOICE: Come on, ask a question.

WOMAN'S VOICE: You go girl.

JUDGE COZIER: Let me explain the difference

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between your testimony and some of the earlier

testimony.

Your testimony focused on your case, your circumstances.

MS. LINTZ: No, actually it didn't.

JUDGE COZIER: But you didn't address the issues -- you did mention the uniformed rules, a couple of things, but we understand the testimony, so if we don't have any further questions --

MS. LINTZ: You know what, I am actually somebody who sits on federal, state and city committees, in my work arena and write public policy. All the air samples you see around the city for people with hearing loss, that is my work.

So, while I gave you empirical evidence because that is what I can, the issues if you look at them are the same across the state. And there are women all across the state that are having the same issues, but the problem is there aren't people like us on the committees and we file the complaints. So I have the complaints, but they are always dismissed.

And, so, if the committee doesn't ever do anything and then says but look at the number of complaints that are dismissed it becomes self serving because it is a committee not taking. And if we

developed a pattern and looked at the number of people

filing complaints against the same attorneys over and over. So, maybe as pro se clients, we may not be the best people filing complaints, but, then, you know, where there is smoke there is fire. It is the same attorneys that are constantly complained against. You have to wonder. Because I kept an Excel spread sheet and I can tell you the pattern of five attorneys in the matrimonial part. It is the same issues over and over. And then the question is why isn't the Committee doing anything?

JUDGE COZIER: Thank you very much.

VOICE: Yes. Yes.

VOICE: A benevolent dictator, would do a better job. We must look in the mirror.

JUDGE COZIER: Sir, I will ask you to refrain or you must step out.

MS. OXMAN: I am giving you this because I believe you asked for some statistics.

(Whereupon, witness hands to the panel.)

MR. ZAUDERER: Give it to Mr. Caher in the back.

MS. OXMAN: No problem. Thank you. Thank you very much.

My name is Ellen Oxman.

Ladies and gentlemen, kindly allow me to read

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

statement:

"Among the issues to be studied by the Commission on statewide attorney discipline are whether New York's departmental-based system leads to regional disparities in the implementation of discipline; if conversion to a statewide system is desirable; and how to achieve dispositions more quickly in an effort to provide much-needed closure to both clients and attorneys."

Ladies and gentlemen, there is an elephant in the room today. And that elephant, is this, you can make the rules uniform across the state, you can dispose of complaints quicker, you can tweak the rules all you want, but if the rules are not followed it won't solve the problem.

VOICE: Here, here.

MS. OXMAN: The problem, and let's state it clearly, is that there is no oversight of the Attorney Disciplinary Committees, nor, of the Commission on Judicial Conduct. And this has led to well documented corruption. In fact, overwhelming evidence of corruption. They simply don't follow the rules when they don't want to and there is nothing to be done about it.

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

attorneys. The documentation starts at least as early as the Murphy Report in 1989 when Judge Murphy, the Chief Judge of the First Department at that time fired two top Disciplinary Committee executives for among other charges falsifying timesheet's, whitewashing well substantiated claims against favored attorneys, targeting out of attorneys, warehousing complaints instead of addressing them and using quota systems to arbitrarily close cases to the detriment of complainants, and justice. This kind of corruption continues today and is much worse.

MS. OXMAN: And as much worse. Twenty years later we heard the same types of stories at Senator Samson's 2009 hearings. Although consumers, attorneys

and judges traveled from near and far to testify about corruption in these offices, I being one at that time, the hearings were halted without explanation. The verbal testimony relegated to You Tube, the submitted documentation warehoused or simply discarded. No report was ever generated by the Senate Judiciary Committee who heard the testimony. The judiciary committee's 2009 annual report makes no mention of the hearings having even taken place. Dead silence in response to overwhelming evidence of corruption.

These two offices, the attorney disciplinary committees, the subject of today's hearings, and its counterpart the Committee on Judicial Conduct are quietly the two most powerful offices in the entire court system. If they are honest and function correctly, they are powerful guiding forces to keep the court system fair, above board and respected by the public. But if they are corrupted and are used to target or protect attorneys and judges, the court system then and is now a tool of criminals. Let's face it. You can make all of the laws you want, just you know, against looting, you can make them -- laws

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

what you're seeing.

The time is now, because what you have is probably the most corrupt court system in the United States --

(Applause.)

-- with the most corrupt attorneys in the history of this country who go blithely unpunished and are fully protected by those who are charged with exposing them.

We now know what Senator Sampson knew in 2009 as he sat listening to our testimony; that he was a criminal who was facing substantial jail time if caught. Now he is a convicted criminal and yet to my knowledge he has not been disbarred or suspended from practicing law in New York by the disciplinary committee.

Judge Gonzales, the current chief judge of the First Department, admitted to substantial untruths on a mortgage application and to engaging in nepotism, hiring family members to do court related jobs that in some cases they weren't qualified to even do. The report exonerating the judge conspicuously neglected to

mention his background was as a housing court judge and therefore, someone who should be conversant with mortgage fraud.

To my knowledge, he, too, has received no

discipline whatsoever. Yet Judge Gonzales has been left at the helm of the First Department overseeing its disciplinary committee and even as the head of the Appellate Division, determining which lawyers should escape discipline and which should be punished. This in a word -- that is outrageous. Judge Lippman knew about Sampson's hearings on allegations of corruption. He knew that the hearings were abruptly dropped, the testimony orphaned. He received countless pleas from me, being one of them -- from legal consumers, professional organizations. Judge Lippman was in a position to do something about it as the Chief Judge of the First Department and now as the Chief Judge of New York State, but instead, your mission statement entirely sidesteps the question of corruption.

So here we are again today, pretending there is no corruption. That we need to improve the rules.

I personally over the course of eight long years have submitted clear and convincing evidence uncovering more and more in my own case alone, on how this office is run to target and protect, to enable

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

within these offices, a corruption that I have been forced to endure at deep expense to my children and myself. It crosses state lines, involves forgery, fake documents, fraud upon the court, a cornucopia of corruption that is flourishing and not being stopped at all. The standard is so low that forum shopping for the easily available corrupt lawyers in Manhattan Supreme Court alone is now a known at traction for big law from other states and countries, where we even see what was once the most prestigious law firm Dewey Ballantine corrupted and bankrupted because there is zero accountability by these lawyers and these judges.

Where is the Attorney Disciplinary Committee and its counterpart, the Committee on Judicial Conduct? Where are they? The lights are out. They are not in their offices. The looting of the courts by corrupt attorneys and corrupt judges is on their watch. As we speak, it continues apace, legally destroying our court system. Right now, that is your terrible legacy and instead of addressing it, you mock the public. We don't want to be mocked any longer in the public realm.

Claudette Gumbs

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In my response --

JUDGE COZIER: Ms. Oxman, you have about a minute.

MS. OXMAN: I will just state then that I am a victim of domestic violence. I have many documents

going back to 2007 about the lawyers in my case who were never let out of my case. Her name is Pamela Sloan from Sloan, Robarge and Herman. Never let out of my case. I am a musician, I am not a lawyer. I had no idea that a lawyer has to make a motion to be let out of the case. They are still the attorney of record for my litigation.

My husband is a famous lawyer. His brothers went to law school with Bill and Hillary Clinton. These are people who are powerful, who understand the system and they are connected. I am not.

When my husband threw me against the wall in my building, Chris Wasserstein, who is Bruce Wasserstein and Wendy Wasserstein's relative wrote an affidavit on behalf of getting me a temporary order of protection which Judge Evans turned down. I had to go to Family Court to find out I was divorced in front of Robert Stolz because the NYPD sent me to Family Court to get an order of protection for myself. At that Family Court hearing I found out I was divorced. What

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country am I in?

JUDGE COZIER: Ms. Oxman, thank you.

JUDGE COZIER: The next witness is Alton Maddox.

MR. MADDOX: Thank you very much. At the outset I want to assure any and everybody on this panel

that I am not here as an individual grievant. I am here because I am the leading voice in the black community and I am speaking for the black community. I don't think anybody would quarrel with that.

I would like to give thanks to attorney Grant Victor for giving me notice of this hearing on attorney discipline. I am JUDGE COZIER man of the United African Movement, which has the rich history of being involved in the criminal justice system, especially as a consumer watchdog.

The consumer class in New York is disproportionately persons of African ancestry and they also include black lawyers as well. This has been a very interesting day, interesting because so many things that we have talked about in the black community seem to transcend the black community. It seems as though there are people throughout this state who are adversely effected, despite their backgrounds or their color or class.

I invite this panel to engage in a give and

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take with me. I don't want anybody to back down. But while you are thinking about whether you should or not, I would like to point out some things that were mentioned earlier in this hearing.

One is that there is a concern about prosecutors. And my comment is that I am the only

lawyer in this nation, the only lawyer in this nation who has ever been involved in two special prosecutions, one in Howard Beach and the other one in the Tawana Brawley case.

Secondly, while we are contemplating whether I should be quizzed or not, I will bring out some matters on secrecy. I am the only lawyer ever in the history of New York who demanded and obtained a full public hearing on disciplining lawyers. Ever in the history of the state. So I think I have a few things to say if questioned about secrecy, if that is our concern.

The third problem that I find here is one of what I call judicial gerrymandering. There has been much discussion today about people being treated differently in the various departments. Well, the department that I am concerned about is the First and Second, because most blacks in New York live within the confines of New York City or its suburbs. The problem

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

out in Suffolk County who sought to defend his family, but was told by the Second Department that Negroes have no rights that a white man is bound to respect. And this is the policy in the Second Department, and this is the reason why there are so many people coming here complaining they might not be able to understand the terminology that is applicable, but this is the situation and since -- it is a historical problem and it is such a historical problem that I have been all my life involved in the civil rights movement, from the time that I was in high school and that has been quite some time ago and so, I know very well about the issue of racism and I know very well about the problems that black people have confronted and had to confront all of their lives.

And so, after the New York State Commission on Judicial Minorities in 1991 said that New York was infested with racism, infested, this is not somebody from the hood talking, these are the most advanced

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

questions asked is in itself a miscarriage of justice.

Rosa Parks is not here. Dr. Martin Luther King Junior is is not here. But if they were here, they would do what I am calling for now and as I have called for in the New York Amsterdam News this week: Blacks must boycott New York courts now. It makes no sense for another black defendant to go into a racist courtroom and expect justice. That makes no sense. At all. It has to come to an end.

I am not here to ask you or beg you or plead with you, because I never believed in plea bargaining. A client came to my office, I said three things to black people. One, I will never ask you what happened, because you don't understand the language. I am not going to ever ask you to take the witness stand because you may get tripped up. And I am never going to ask you to plead guilty because I don't know what that is.

The only thing I know to do in a courtroom is to knock the door down and whip some butt. That is the only thing I do know and the only thing that I will ever know and that is why nobody will ever get me back in a courtroom again, because they don't want any more butt whippings.

I am here saying that blacks must boycott New

York courts now. I also -- and that is in the New York Amsterdam News this week. I also say that this is gerrymandering, apartheid justice and that is what we are talking about, judicial gerrymandering and apartheid justice and it doesn't relate to black people, it relates obviously to everybody. And then everybody wants to sit there and don't want to ask any questions as the lady asked sometime ago and said will you please ask me a question? And nobody said a word other than ten minutes is up and so before you, Mr. Cozier get a chance to tell me to sit down, I will take the liberty of doing it myself so you won't have the pleasure of asking Alton Maddox to sit down.

Thank you very much.

(Applause.)

MS. KEWALRAMANI: Mr. Maddox, thank you for your testimony.

MR. MADDOX: You're welcome.

Claudette Gumbs

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MS. KEWALRAMANI: What are your views on opening up the disciplinary process?

MR. MADDOX: I believe that any secrecy involved in the discipline of lawyers is in violation of the Fourteenth Amendment, and -- if lawyers are treated differently than the average common thief. I find no reason why there should be any secrecy or any veiled secrecy around lawyers, it doesn't happen

anywhere else and so when these bogus charges were brought against me, I said I won't do anything but the only thing I will demand is to let the public know. That is how you educate the public, by letting them know. I don't have anything to hide. I never had anything to hide on any issue all right? And so therefore, I will be treated like any other person. I don't want to have the privilege of being a lawyer elevating me above the common people. That is not my thing, that is not my interest and I will continue to fight until the very end for the injustices that are putting millions of blacks and Latinos behind bars.

(Applause.)

JUDGE COZIER: The next speaker is Elena Sassower.

MS. SASSOWER: If I may --

JUDGE COZIER: We are not accepting submissions

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here, Ms. Sassower. You made a submission to us.

MS. SASSOWER: -- I am presenting you with statistics and other information that will make the testimony --

JUDGE COZIER: The information you submitted before will be made part of the record.

MS. SASSOWER: My name is Elena Sassower. I am Director and Co-founder of the Center for Judicial

Accountable Inc, a non partisan nonprofit citizens organization that for more than a quarter of a century has documented the corruption of judicial selection, judicial discipline and the judicial process itself.

This includes the judiciary's corruption of the system of attorney discipline, all aspects of which it controls and which it uses to protect and insulate from accountability the politically connected attorneys and to retaliate against judicial whistleblowing ones.

I am also privileged to be the daughter of two such judicial whistleblowing attorneys. My father, George Sasssower, was disbarred by a February 23, 1987, order of the Appellate Division, Second Department, for violating court orders requiring him to acquiesce to the court's cover up of lawyer larceny of assets of an involuntarily dissolved corporation, assets which have yet to be accounted for

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by the Court nearly 30 years later.

My mother, Doris L. Sassower, was indefinitely suspended by a June 14, 1991 so-called interim order of the Appellate Division Second Department, without reasons, without findings unsupported by a petition or by any hearing as to which to date, nearly 25 years later, there have been no findings, no hearing, no appellate review.

New York's court controlled system of

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

Claudette Gumbs

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It is to the credit of Chair Cozier and prior thereto, Chair Prudenti that in response to my inquiries on the subject, that they threw up a website and announced these public hearings.

I have handed up and I ask you to open the file folders so that we can examine together what I think Mr. Zauderer identified as something of concern to him and that was the statistics. So the very first page are statistics. Now, I will tell you that the

Office of Court Administration does not make these readily available. They are not on its website, they are not really anywhere, and to the extent that you can find anything, you can get from the Fourth Department its statistics which are part of its annual report and the First Department has its statistics in its annual report at the back.

I have given you the page from the New York State Bar Association's annual report that is put out by its Committee on Professional Discipline and this is the most recent for 2012.

Let's just take a look at matters disposed of, okay? For 2012. All right. Now, we talk about the grievance committees but the fact of the matter is, the grievance committees are sham entities, not -- they don't really exist, don't operate as committees with

all of their membership because most of the complaints that are filed with the committees are going out at a stage where none of the committee members have ever seen those complaints. They are being processed by staff. All right.

Now, if you look at the statistics here you will see -- and because of lack of time, I -- I don't want to dwell on it, but if you see that the three, departments, the Second, Third and Fourth departments are dismissing between 45 and 52 percent of complaints

they receive -- are rejected by them as failing to state complaint which means of course that they are purporting that the allegations, if true, would not be misconduct. All right.

But look at the First Department. It is only 11 percent. That is too great a range. There is something wrong. How do you account for that difference?

Now, look at the next category. Dismissed or withdrawn. First of all, that category makes no sense, correct? Because a complaint that is dismissed is very different from a complaint that is withdrawn. They should be in separate categories. But they are bunched together. Okay. But if you add up those two categories and what you see in the First Department is

that it makes up for the statistical difference by dismissing 63 percent of complaints for -- it doesn't identify the reason but -- that they are being dismissed, plus the 11. The cumulative statistic is that between 74 percent in the First Department, 63 percent in the Second Department, 69 percent in the Third Department and 75 percent in the Fourth Department are being dismissed at the outset.

And the truth of it is that those dismissals are not being made by the committee. You can talk

about the presence of non lawyers on the committee, no non-lawyers and actually, it would appear that with the exception of possibly the First Department, all of these dismissals at outset are not seen by a single committee member, lawyer or lay.

In the First Department, these dismissals possibly and it is not clear from a reading of the rules, are with the acquiescence of a single lawyer member. Okay. So the lion's share of complaints -- and how many are we talking about? Well, we are talking about matters disposed of -- well, you have thousands and thousands -- matters disposed of here. It is 11,661. Okay.

(Whereupon, the following was transcribed by Senior Court Reporter Monica Horvath.)

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Now, what can we tell from statistics?

Well, the statistics, are very limited because the question is are those dismissals appropriate, are they correct? And to make that evaluation, you need to see the complaints. You need to see the complaints, and you need to compare them with the dismissal letters. And what do the dismissal letters say about the complaints, and is it consistent?

JUDGE COZIER: Miss Sassower, you have about one minute remaining.

MS. SASSOWER: Oh, dear.

So let me very quickly tell you.

In 1989 the State Comptroller tried to do an audit on the Commission of Judicial Conduct which wouldn't allow the Comptroller to its files. The Comptroller knew that without access to the record of complaints and dismissals he could make no assessment as to the legitimacy of the dismissals of complaints. The Commission wouldn't give access so he wrote a report called "Not Accountable to the Public".

You have no auditing. In all these years there has never been an independent auditing of the complaints filed with the Grievance Committee. You are not in a position to do an independent audit, but I will, since my time is up, I I want to just leave this with you.

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(Whereupon, the witness approaches the panel and distributes packet.)

All those who have testified should be providing you with their complaints.

I have brought here a sample, an illustrative sample of let's see five -- here, five.

JUDGE COZIER: Those can all be given to Mr. Kohler.

MS. SASSOWER: And I have additionally -- excuse me.

I want to say that the important law review of Professor Gillers, which really gave rise to this Commission as powerful as it is, it is flawed. Why? Because it never goes beneath the surface of the judicial decisions. And the judicial decisions over and again like the dismissals of complaints they are not really by the Grievance Committee

but by the staff are frauds.

JUDGE COZIER: Your time is up.

MS. SASSOWER: And you can discern them by examining the case files.

JUDGE COZIER: Thank you, Miss Sassower.

MS. SASSOWER: Here are the case files as to the unconstitutionality of the New York Attorney Disciplinary Law.

(Whereupon, the witness leaves a cart full of files in front of the panel.)

MS. SASSOWER: You may be sure --

JUDGE COZIER: Miss Sassower, thank you very much.

VOICE: Do you have any questions?

JUDGE COZIER: Thank you very much.

MS. SASSOWER: I have a few things, because Mr. Zauderer, asked another very important question at the Albany hearing.

JUDGE COZIER: Your time is up.

VOICE: Let her finish.

MS. SASSOWER: Would you repeat the question to me that you asked the state bar?

MR. ZAUDERER: Sorry, I don't remember what you are referring to.

MS. SASSOWER: May I remind you?

MR. ZAUDERER: Go ahead.

JUDGE COZIER: Miss Sassower?

MS. SASSOWER: He asked me to remind him. He asked me to remind him. Thank you.

Liked to Professor Gillers --

JUDGE COZIER: Miss Sassower, please.

MS. SASSOWER: Mr. Zauderer asked the President of the state bar who spoke up --

JUDGE COZIER: Miss Sassower, your time is up.

VOICE: Let her talk. Let her talk.

MS. SASSOWER: No, no. He asked me to respond to the question that he asked the President of the State Bar in

Albany at the first hearing. Because the President of the State Bar had testified about introducing discovery into the attorney disciplinary proceedings. And the State Bar has issued a report and Mr. Zauderer -- because discovery is such a fundamental thing it is a matter of due process, confrontation rights, and -- Mr. Zauderer, asked the intelligent question, "Well, what is the opposition; what could be the opposition to discovery?" And, believe it or not, the President of the State Bar fumbled and was not really able to answer that question. And, I said -- I tried at the end -- I said, "I have the answer," and, so, now, I will give you the answer.

JUDGE COZIER: Briefly.

MS. SASSOWER: The answer is that in all the decades that we have had this attorney disciplinary regime, you may be sure that prosecuted attorneys have made motions and sought appeals and have raised the constitutional issue among others of their entitlement to discovery. They have raised it before the Appellate Division. They have raised it

before the Court of Appeals.

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

from the court: "Denied".

There is no discussion. No elucidation. There is nothing. And that is why there is no case law. And if you look at the report of the State Bar Association, too, on the issue of discovery it is in a vacuum, just like Professor Giller's article.

JUDGE COZIER: Ms. Sassower, I think you have said enough.

MS. SASSOWER: Don't you think attorneys have raised the equal protection invidiousness that is affected by your article? Of course, they have. And what has been the response? "Denied".

VOICE: Yeah. Yeah.

VOICE: Here, here.

(Applause.)

MS. SASSOWER: Oh, oh, one other thing.

WOMEN'S VOICE: Let's get the job done.

VOICE: Let's get the job done.

MS. SASSOWER: The judiciary has consistently not requested funding for the Attorney Disciplinary System with consistency. In fact, the funding has gone down.

The funding has gone down even as they were

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

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VOICE: What?

MS. SASSOWER: The judicial pay raises paid out since 2012 are at least $150 million and $50 million each and every year.

JUDGE COZIER: Today's testimony is concluded.

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