

1 _____

2

3 In the Matter of the New York State Commission on
4 the Future of Indigent Defense Services

4

5 _____

6

PRESENT: Hon. Burton B. Roberts, Co-Chair
7 Professor Willaim E. Hellerstein, Co-Chair

8

9 Hon. Phylis Bamberger
10 Christopher Chan, Esq.
11 Hon. Penelope Clute
12 Hon. Janet DiFiore
13 John Dunne, Esq.
14 John Elmore, Esq.
15 Klaus Eppler, Esq.
16 Hon. Martin Murphy
17 Hon. Herbert Altman
18 Fern Schair, Esq.
19 Laurie Shanks, Esq.
20 Hon. Joseph Fahey
21 Lawrence Goldman, Esq.
22 Frederick Jacobs, Esq.
23 Barry Kamins, Esq.
24 Anita Khashu, Esq.
Hon. Elaine Jackson Stack
Hon. Joseph Zayas
Steven Zeidman, Esq.
Michele Zulflacht, Esq.

19

20

21

22 TRANSCRIPT OF PROCEEDINGS in the above-entitled

23 matter held at the Albany County Courthouse, Fourth

24 Floor, Albany, New York, commencing on May 12, 2005.

(David Mayo, Official Court Reporter)

1 (The proceedings were convened as
2 follows:)

3 MR. HELLERSTEIN: Good morning. Welcome
4 to the fourth hearing of the New York State
5 Commission on the Future of Indigent Defense
6 Services. I am Co-chair William Hellerstein.
7 Co-chair Burton Roberts.

8 Welcome to all of you who are in
9 attendance. We have a tight schedule today,
10 and we hope that everyone will stick to the
11 15-minute time allotment.

12 If you have written submissions, we would
13 appreciate copies of them. And if you do have
14 them, to not repeat any detail that is in those
15 submissions. If not, we would ask that, in
16 particular, Public Defender and other
17 witnesses, that you address the problems that
18 you feel most deeply about in your respective
19 operations. And colleagues on the commission I
20 am sure will ask necessary questions.

21 Mr. Frost.

22 MR. FROST: Good morning. Good morning,
23 Chair, Commissioners. I'm Jerry Frost. I am a
24 native of the Albany/Troy area. I lived here

(David Mayo, Official Court Reporter)

1 all my life except for the three years I spent
2 in law school in Boston. I have been
3 Rensselaer County Public Defender for ten years
4 and I have been a lawyer doing criminal
5 defense, among other litigation work, for
6 almost 40 years.

7 Rensselaer County, where I am from, is a
8 county with 150,000 citizens. Rensselaer
9 County Public Defender's Office represents
10 approximately 40 to 45 percent of the criminal
11 defendants in Rensselaer County. I have myself
12 and I have ten assistants. Seven of those are
13 criminal defense assistants; one is a special
14 concepts court assistant, integrated court,
15 drug court, domestic violence court; and two
16 are in Family Court.

17 I have a caseload of about 4200 cases a
18 year. All of my criminal assistants are
19 part-time, working about 20 hours a week. So
20 that's the perspective that I am coming from.
21 We represent clients in 22 courts, many of
22 which have two Judges.

23 The system in Rensselaer County is working
24 well. It's not working perfectly. I don't

1 think there is any system that works perfectly.
2 But to cite one example, we have only one
3 pending indictment that is more than six months
4 postarraignment. I think that's probably seven
5 months postarraignment.

6 I think I am very fortunate in having an
7 uninterrupted tenure, because Public Defenders
8 are political appointees. If there is a change
9 in politics, there is a change in Public
10 Defender. And I think that's one of the
11 inherent weaknesses in the system.

12 I think you need, first of all, in the
13 public defense sector, you need independence.
14 And the best way to be independent is not to
15 have to depend upon politics for the
16 continuation of your tenure.

17 I have been very fortunate. I have had
18 very good County Executives. They have been
19 very supportive of me and the job I have been
20 doing. But that doesn't mean that is
21 necessarily going to be the case everywhere.

22 If I had my druthers, I would urge the
23 appointment of a Public Defender and I would
24 urge an appointment with a term. And I believe

1 the term -- a Court of Claims Judge has a term
2 of ten years. I don't think a term of ten
3 years would be unreasonable.

4 I also feel that it is necessary and would
5 pose a problem if the provision of public
6 defense were done other than on a local level.
7 I think the Public Defender model is probably
8 the best model I know for providing indigent
9 defense services. And I think one of the
10 reasons that makes it effective is that it is
11 local.

12 And one of the things I fear is the
13 bureaucratization of the public defense
14 function. I think if we have Public Defenders
15 become bureaucrats and share the same
16 courthouse with prosecutors, all of whom are
17 also to a certain extent and to a much larger
18 extent bureaucratized, it takes away from the
19 independence that is absolutely necessary to
20 the proper provision of criminal defense
21 services, because it has been my job, it has
22 been part a big part of my job for almost 40
23 years, to represent people that most people
24 don't like. In fact, people that in some cases

(David Mayo, Official Court Reporter)

1 most people despise. So the only person you
2 really should have to please, besides yourself,
3 is your client. So that is my principal reason
4 for urging independence of the public defense
5 function.

6 Of course, money is also an issue,
7 obviously. We are not the most highly
8 compensated professionals. A lot of our
9 compensation comes from the satisfaction of
10 doing a good job, I guess, but it doesn't
11 necessarily pay for groceries and it doesn't
12 necessarily pay for mortgage payments.

13 I think a lot has been accomplished in the
14 past couple of years with the new rates for
15 assigned counsel. I use that with my own
16 county as the basis for over a one-third
17 increase for all of my assistants and myself,
18 because we were underpaid, just as assigned
19 counsel were underpaid.

20 I think money is also very important for
21 training, for provision of expert services, for
22 the provision of investigative services.

23 MR. HELLERSTEIN: Do you have sufficient
24 funds to do that now?

1 MR. FROST: I do. I do. I don't know
2 that Rensselaer County is typical. And I can
3 only speak for Rensselaer County.

4 I have served in the last few years
5 adjoining counties. My personal opinion, it is
6 only my opinion, is that of the counties in
7 this area, Albany, Schenectady, Saratoga and
8 Rensselaer, I think Albany County is
9 underfunded. And I am not going to give my
10 judgment on the quality of the provision of
11 criminal defense services in Albany County
12 because I don't know enough about it. But I do
13 know that the compensation levels in Albany
14 County are at such a level that if they hope to
15 maintain quality services, they are going to
16 have to better compensate for people.

17 MS. ZUFLACHT: What is the salary range of
18 your attorneys? What would the starting salary
19 be and what is the top attorney's salary?

20 MR. FROST: I have a position of less than
21 full-time. I also have a private practice, so
22 I have the privilege of spending about 70 hours
23 a week working. I'm paid something like
24 \$68,000 a year. The entry level is \$40,000 for

1 my assistants. They all get raises. When the
2 bargaining unit gets raises, they get raises.

3 MS. ZUFLACHT: Are they full-time?

4 MR. FROST: All my criminal assistants are
5 part-time, working about 20 hours a week. One
6 of the advantages -- I believe in the flexible
7 system. I don't think it is the ideal system.

8 I think probably the best would be a
9 combination of full- and part-time people
10 because I find that I have very, very
11 experienced trial lawyers on my staff. We're
12 batting better than .500 in our trials, let's
13 put it that way, and I think that's a
14 remarkable statistic.

15 MR. KAMINS: Mr. Frost, your position is
16 that the independence of a County Defender,
17 Public Defender, would be lost if there should
18 be an implementation of a statewide defenders
19 system?

20 MR. FROST: I am saying it would be
21 compromised. I am not saying it would be lost.
22 I'm in favor of a local Public Defender system.
23 I think any local provider of services is more
24 responsive to the needs of a locality.

1 The way I see it, from the City of Troy, I
2 can walk into the mayor's office. I can't walk
3 into Governor Pataki's office. I certainly
4 can't walk into President Bush's office. I
5 think the farther the provider of services gets
6 from his constituents, the less accessible and
7 the less responsive he is. This is my
8 philosophical opinion.

9 And I have an open door policy in my
10 office. Anyone, anyone, can come into my
11 office; a client, relative of a client, someone
12 looking for a job coming off the street with
13 enough gumption to knock on the door, saying,
14 "Do you have any openings?" And I think that
15 helps. It helps me be more responsive to the
16 needs of my clients. I think it works better.

17 MR. ROBERTS: Are there any minimum
18 standards the Public Defenders you hire or you
19 are told to hire must have in order to become a
20 Public Defender?

21 MR. FROST: Are there any what?

22 MR. ROBERTS: Do did you have any minimum
23 standards?

24 MR. FROST: Minimum standards? I'm a very

1 good hirer, your Honor. No one tells me to
2 hire anybody. People may recommend people. If
3 I don't like what I see, I throw them back,
4 okay? I haven't had a vacancy in my office in
5 four years.

6 My office is run like a criminal defense
7 firm. That's what I say, we are a criminal
8 defense specialized firm. I want someone. I
9 like self-starters. I like intelligent people.
10 I don't send anybody in to try a felony case
11 unless he or she has sat in three, four or five
12 -- second seated three, four or five felony
13 trials from beginning to end. And obviously I
14 don't give that person for his or her first
15 felony trial a Murder Second case or anything
16 like that.

17 I have been very lucky. But I think the
18 secret of success in any enterprise is to hire
19 the right people and let them do their job.

20 MR. GOLDMAN: Mr. Frost, let me ask you
21 about the Judge Bauer case.

22 MR. FROST: Okay.

23 MR. GOLDMAN: I should say by way of
24 introduction, I was home from vacation and the

1 Commission over my dissent voted to remove
2 Judge Bauer, and the Court of Appeals agreed
3 with that.

4 And Judge Bauer had consistently set
5 inordinately high bail. There was no question
6 about that. \$25,000 for driving a bicycle on
7 the sidewalk, sometimes \$50,000 for loitering
8 outside the premises. And what I found, and I
9 read about 40 transcripts, was almost all these
10 people were represented by the --

11 MR. FROST: My office.

12 MR. GOLDMAN: -- Troy City Public
13 Defender. And in almost every case -- in fact,
14 every case there were no appeals of those
15 bails. People sat in jail on really
16 ridiculously minor charges for a week. A week
17 later, on an average or so, when that person
18 came before the Judge, the Judge said, "Plead
19 guilty to this. I will release you from jail."

20 And in virtually every case, I read those
21 transcripts, sir, and every case the Public
22 Defender was listed and in virtually every case
23 the Public Defender was silent. No objection
24 to what both the Commission and the Court of

1 Appeals found -- coerciveness -- and no appeals
2 to the County Court. The indigents, to my
3 view, were just not represented properly. Why?

4 MR. FROST: How many of those cases were
5 there, sir?

6 MR. GOLDMAN: I'm sorry?

7 MR. FROST: How many of those cases were
8 there?

9 MR. GOLDMAN: I read about 40.

10 MR. FROST: Do you know how many cases
11 Judge Bauer handled in his term, sir?

12 MR. GOLDMAN: I'm sure he had a lot more.

13 MR. FROST: Probably around upwards of
14 20,000.

15 MR. GOLDMAN: 40 people who sat in jail
16 for a week who probably shouldn't have.

17 MR. FROST: Right. I agree that they
18 shouldn't have. But in those situations -- and
19 I think Judge Bauer had a little bit of a blind
20 spot on that subject. I also think this
21 situation pertained more so in the beginning of
22 his career.

23 Bail is a problem in Rensselaer County
24 because our County Judge -- I know of one case

1 involving Judge Bauer where the County Judge
2 was approached and he said, "Well, I would have
3 set bail at \$50,000 in that case."

4 I think the reason Judge Bauer did it, I
5 can't put myself in his mind and I don't know
6 why he did it, but if he set \$250 bail or \$100
7 bail for these same people, they wouldn't have
8 been able to make that. And the one particular
9 case I think that served as kind of the lever
10 for his removal was a person who didn't show up
11 in court when he was supposed to show up in
12 court and had had a history of failing to
13 appear. That's really it. So he probably
14 should have been denied bail.

15 You are entitled to your opinion,
16 obviously, sir. My opinion is that we have an
17 effective and good Public Defender's Office and
18 we do a good job from bottom up.

19 And I note there was a dissent, very
20 strong dissent, including Judge Peters, on our
21 Appellate Division, in Judge Bauer's case. And
22 I also note that if Judge Bauer had been
23 sensitive enough and intelligent enough to show
24 a little remorse and explain and inform the

1 Court that he had learned something from the
2 process, he would still be Troy City Court
3 Judge.

4 MR. GOLDMAN: Sir, I mean, my question
5 really isn't focused on Judge Bauer, who had
6 his day in court just next door.

7 There were on a large number of these
8 cases people who were found by the Commission,
9 and the Court of Appeals, more importantly,
10 clearly had been improperly held on high bail
11 but so much that it was judicial misconduct,
12 worthy of removal.

13 Why didn't the Public Defender go to
14 County Court? Why didn't the Public Defender
15 speak up to the Judge and say, "Judge, you are
16 coercing a plea?"

17 MR. FROST: You weren't there, sir.

18 MR. GOLDMAN: Most of them, virtually
19 every case, in which the person came back to
20 court a week later, he was represented by your
21 office.

22 MR. FROST: You weren't there, sir.

23 MR. GOLDMAN: No. I read the records.

24 MR. FROST: I know, but you weren't there,

1 all right? And I'm not here to defend Judge
2 Bauer. And I will defend my office. We did
3 protest. And we did go to the County Judge.
4 And our County Judge has a reputation and, in
5 fact, it is his practice to set very high bail.
6 That's a practice I object to very strenuously.
7 But do you know what? It doesn't change the
8 situation. That's what it is. It is what it
9 is.

10 MR. HELLERSTEIN: Thank you. Go ahead.

11 MR. KAMINS: You are saying your office
12 works well for the most part. Do you share
13 that view of other Public Defender Offices in
14 the area?

15 MR. FROST: I think Saratoga County works
16 well. I don't know enough about Schenectady
17 County to pass judgment on that. I think
18 Albany County needs improvement.

19 MR. HELLERSTEIN: Mr. Frost, I just want
20 to clarify one thing. You said that you have a
21 very good relationship with your County
22 Executive and you have been there for ten years
23 and --

24 MR. FROST: My third County Executive,

1 sir.

2 MR. HELLERSTEIN: If I understand you
3 correctly from your statement, you also said
4 that could change if you had different types of
5 County Executives based on politics; is that
6 correct?

7 MR. FROST: Well, I can tell you something
8 else. If we have a member from the opposing
9 party elected in November, I won't be Public
10 Defender next year. That's the way it is.

11 MR. HELLERSTEIN: So your independence is
12 contingent upon the political situation of your
13 particular jurisdiction?

14 MR. FROST: It is not contingent upon it.
15 I say, if you ask anyone who knows me, you will
16 see that I'm not a shrinking violet, sir.

17 MR. HELLERSTEIN: I wasn't suggesting
18 that. I was thinking structurally.

19 MS. SHANKS: Hi, Jerry. I had a question.
20 And this was a rumor that I heard and I just
21 want to know if it is true or not. Your office
22 is now not doing your own appeals.

23 MR. FROST: That's right.

24 MS. SHANKS: And that they are going out

1 at a flat fee, irrespective. I know you tried
2 a couple of very serious murder cases that
3 lasted quite a long time and the records are
4 tremendously voluminous. So I was concerned
5 about that.

6 Can you just tell us how it is being done
7 now and if it is true that there is a flat fee,
8 irrespective of the amount of work?

9 MR. FROST: Here is what the situation is.
10 One of the cases you are referring to is
11 probably the Wilhelm case.

12 MS. SHANKS: Yes.

13 MR. FROST: I reserved that to myself.
14 And I am working on that right now and hope to
15 perfect it within the next couple weeks.

16 And one of the reasons we do very few
17 appeals is because ineffective assistance is a
18 standard appellate issue in any case. And if
19 it is ineffective, we are automatically out of
20 the appeal. What we have in Rensselaer County
21 now is an appellate defender who handles all
22 appeals unless there is a conflict.

23 MS. SHANKS: And is it done at a
24 per-appeal basis?

1 MR. FROST: He is an employee of the
2 county, just as I am. So it is not a per-case
3 basis. He receives a salary. His name is
4 Eugene Grimmick. He is a very, very able
5 appellate lawyer.

6 MS. SHANKS: And no matter how many
7 appeals there are, he does them -- do you know
8 what his salary is?

9 MR. FROST: I don't. It is probably in
10 the range of \$45,000 to \$50,000 a year.

11 MS. SHANKS: So he is required to do all
12 of the appeals for that?

13 MR. FROST: Yes, he is.

14 MS. SHANKS: Okay. Thank you.

15 MR. FROST: But he has been doing assigned
16 appeals out of Rensselaer County, Appellate
17 Division assignments, for the last 20, 25
18 years. He knows what he is doing. He is an
19 excellent appellate lawyer.

20 MS. ZUFLACHT: What is the geographic
21 distribution of your county as to justice
22 courts?

23 MR. FROST: 14 town courts, three village
24 courts, two city courts, county court,

1 integrated court, Family Court.

2 MS. ZUFLACHT: And does your office cover
3 them all?

4 MR. FROST: Yes, we do.

5 MS. SCHAIR: I have a very quick question.
6 I know you mentioned earlier your office
7 handles specialty courts.

8 MR. FROST: Yes.

9 MS. SCHAIR: I was wondering if you got
10 additional monies to do that or if you have to
11 take somebody out of their regular --

12 MR. FROST: The county was good enough, at
13 my urging, to create a new position to handle
14 these courts. And if I may say one more thing.

15 I had applied for a grant with the
16 Criminal Justice Services a few years ago for
17 just that position. Of course, I was turned
18 down. And we talked to the Justice Department.
19 And someone down at the Department of Justice
20 in Washington, they laughed at us and said,
21 "There are no grants for criminal defense." So
22 that's something that ought to be looked into,
23 too.

24 And I notice that the Department of

1 Criminal Justice Services is part of the
2 nominating commission here. I mean, that's
3 like putting the fox in the hen house, as far
4 as I'm concerned.

5 If I may say one thing. I really do
6 believe that independence is the primary
7 consideration and I don't think it should
8 become -- I think it should be kept local. I
9 think the bulwark of all of our rights are the
10 individual lawyers, small firms, small
11 practitioners, and local operations, people who
12 aren't afraid to -- you won't see too many
13 white shoe firms representing a child sex
14 offender, I don't think.

15 MR. HELLERSTEIN: Thank you.

16 MR. ROBERTS: Mr. Montanye?

17 MR. MONTANYE: Yes.

18 MR. HELLERSTEIN: Good morning,
19 Mr. Montanye.

20 MR. MONTANYE: Good morning, everyone.
21 Members of the commission and fellow members of
22 the Bar, I practiced for four years in the
23 Essex County District Attorney's Office, three
24 years in private practice, and a year and a

1 half in the Essex County Public Defender's
2 Office after it was newly started.

3 It has been said that misery loves
4 company. That may explain why today 25
5 attorneys are giving up their time, rearranging
6 their busy schedules to address this very
7 important issue.

8 We are not here to build our bank
9 accounts. We are not here to put our revered
10 profession in the limelight. The reason we
11 gather today is to once again defend the
12 Constitution of this state and the Constitution
13 of the United States.

14 In this country we pride ourselves on the
15 notion that each of us has a right to speak
16 freely, worship freely, peaceably assemble,
17 whether to celebrate or protest. We boast of
18 our right to a trial by a jury of our peers
19 and putting the government to its test, not the
20 citizen. But it is not until we exercise our
21 right to counsel that those and many of our
22 other rights are truly secure.

23 It is that right to counsel that keeps our
24 government in check. To those fortunate enough

1 to be able to retain the attorney of their
2 choosing, their rights are secure. But for the
3 indigent defendant, the reality is that their
4 rights have been and continue to be trampled.

5 As you all know, in 2003 counties across
6 New York State opted for a Public Defender
7 program instead of the assigned counsel
8 program. This wave of change was the result of
9 an assigned counsel fee increase under County
10 Law 18-b. Essex County was among those that
11 chose to escape the financial collapse that was
12 forecast by county administrators if those
13 lawyers were allowed to charge the county \$75
14 an hour to represent someone on a serious
15 felony. So with a single full-time Public
16 Defender at \$65,000 a year, a part-time
17 assistant, and even a couple of computers and a
18 secretary, the rights of the indigent defendant
19 in Essex County were once again secure.

20 The budget, however, was only a fraction
21 of the District Attorney's Office budget, which
22 employed five full-time prosecutors, an
23 investigator, three secretaries, and even
24 sported its own sport utility vehicle. And

1 let's not forget that the DA also has at his
2 disposal, as do all the other District
3 Attorneys in the state, local police
4 departments, sheriff's departments, the State
5 Police, the State Lab, and any other resource
6 he may need.

7 Shortly after the Essex County Public
8 Defender's Office was created, the Department
9 of Homeland Security chose the Town of North
10 Hudson, New York, to establish an extended
11 permanent checkpoint on the southbound lane of
12 I-87. The border patrol's assumed assignment
13 was to route out illegal aliens and protect
14 this country against another terrorist attack.

15 North Hudson, New York, population 266,
16 quickly became the drug capital of northern New
17 York. With the assistance of the New York
18 State Police and the U.S. Border Patrol's
19 drug-sniffing canines, drug arrests mounted,
20 with no end in sight. The felony hearings that
21 followed those drug arrests became almost a
22 regular occurrence in what once was a quiet
23 court with an occasional Environmental
24 Conservation arrest. The Public Defender's

(David Mayo, Official Court Reporter)

1 Office ship was taking on water. It was time
2 to signal a May Day.

3 With significant increases in the number
4 of New York State Police stationed in Essex
5 County, coupled with the border checkpoints in
6 North Hudson, the number of cases quickly
7 became unmanageable. After multiple requests,
8 the Public Defender's Office was given
9 permission to hire one full-time assistant.

10 During one of my meetings, however, with the
11 board of supervisors to ask for this assistant,
12 one supervisor stated that "these defendants
13 don't need to have Johnny Cochran, you know."

14 I thanked him for his kindness in putting
15 me in the late Johnny Cochran's company and
16 then proceeded to read an excerpt from Justice
17 White's concurring opinion in the United States
18 Supreme Court case of Wade, 388 U.S. 256, which
19 sets forth a very clear description of who we
20 are and what we do.

21 During another meeting I was told by that
22 same supervisor that I should join the District
23 Attorney in his effort to keep the streets of
24 Essex County safe. To that comment I had no

1 response, or at least one that should not
2 appear in the record.

3 The political pressure didn't stop there.
4 I was encouraged to relieve my newly hired
5 assistant because none of the local Judges
6 liked the way he did business. That was after
7 many, many felony complaints began to be
8 dismissed for being facially insufficient, with
9 defendants sitting in jail on those complaints.

10 Just when I thought things had really spun
11 out of control and my private practice seemed
12 like a heaven, the New York State Commission on
13 Corrections ordered the Essex County Jail
14 closed. The Essex County solution was simply
15 to send all the inmates to other jails and
16 transport them back when they had court.

17 Inmates were shuffled from county jail to
18 county jail, from Jefferson County to Orange
19 County, from Broome County to Schoharie County.
20 When I complained to the sheriff that I could
21 not meet with my clients, he informed me there
22 was nothing he could do, the commission ordered
23 the jail closed.

24 Surely, the Judge would be sympathetic to

1 the plight of my clients, I thought. Well, his
2 response was he couldn't order the sheriff to
3 do anything. If you want to see your clients,
4 do like Probation does and drive and see them.

5 Let's see. Four hours to Broome County,
6 three hours to Schoharie County, three hours to
7 Jefferson County, one way. So who is going to
8 make those bail applications and conduct those
9 felony hearings while my assistant and I were
10 taking our show on the road? No one.

11 Well, I could try to talk to my clients on
12 the phone. That seemed easy enough. All I
13 would do was call the jail and if they had
14 time they would let my client know that he
15 should call me collect on their new high-tech
16 private phone system. What a deal. \$4 for the
17 first minute, \$1.70 for each additional minute.

18 But there is always a catch when you have
19 a deal that sounds that good. The phone system
20 didn't allow for "custom calling features."
21 Nobody could tell me what that term meant at
22 the jail or at the phone company. I know what
23 it meant. For no apparent reason, after 45 to
24 50 seconds, calls were routinely disconnected

1 and I would be informed by a recording that
2 custom calling features were not allowed.

3 Not all was lost. My clients would simply
4 call back at \$4 for the first minute, \$1.70 for
5 each additional minute. That is, if you got
6 the additional minute.

7 A little side note. Most defendants
8 sitting in the Essex County Jail or every other
9 jail in New York State who were retaining their
10 own lawyer are out on bond or bail.

11 In spite of all these obstacles, we
12 continued to fight for our clients using the
13 most powerful weapon and seemingly the only
14 weapon we had left, the motion. And, boy, did
15 we use it. But when we arrived in court to
16 receive the fruits of our labor, we instead
17 received lectures on how much time it was
18 taking to answer these motions and decide these
19 motions and the system wasn't designed to run
20 this way. You should be pleading these cases.
21 Threats that if this motion was decided and the
22 indictment wasn't dismissed, your client was
23 pleading to the entire indictment or he was
24 going to trial.

1 The DA complained and began to ask for
2 another assistant. The DA insisted on
3 conducting trial by ambush, turning over
4 discovery only when demanded and ordered by the
5 Judge and sometimes the Appellate Division.

6 Well, the light at the end of the tunnel
7 turned out to be a speeding train, and it was
8 time for me to call it a day. I informed the
9 board that I could no longer practice and
10 uphold my ethical obligations under those
11 conditions. I resigned in August of 2004. I
12 left my family with a part-time income and
13 faced starting in a private practice once
14 again. Seeing the writing on the wall, my
15 assistant quickly followed suit and left his
16 position with no job to follow.

17 In my opinion, what transpired in Essex
18 County since 2003 was not a mere accident. The
19 new 18-b rate increases came at a tremendous
20 price. The little bit of independence that
21 assigned counsel attorneys enjoyed is gone
22 forever. Now with most counties opting for
23 Public Defender Offices, the indigent defense
24 system in New York State is under very real and

1 very direct political pressure. We didn't
2 necessarily ask for it, but that's what we
3 have.

4 But now that we know what is going on, the
5 question looms, what are we going to do about
6 it? In *Gideon v. Wainright*, the Supreme Court
7 required states to provide sufficient numbers
8 of public defense lawyers with caseloads that
9 meet professional standards, salaries, and
10 support staff equivalent to the prosecution,
11 with adequate training for defense technique.
12 So New York State complied with *Gideon* and they
13 did what it does best. They gave 62 counties
14 one more unfunded mandate.

15 Until New York State establishes a
16 Defender General's Office and gives it the
17 funding it needs to provide indigent defense,
18 and, most importantly, insulates that office
19 from political pressure to guarantee its
20 independence, the Constitution of this state
21 and United States will continue to be trampled.
22 Please remember injustice anywhere is a threat
23 to justice everywhere. Thank you.

24 MR. FAHEY: What happened after you left?

1 What is the status there now?

2 MR. MONTANYE: When I left in August of
3 2004, so the story goes, it reverted back to an
4 assigned counsel system. The County Judge
5 appointed attorneys to represent defendants
6 that were in our office at the time. Newly
7 acquired cases were farmed out to assigned
8 attorneys.

9 One of the reasons they went to a Public
10 Defender's Office in the first place, they
11 couldn't find attorneys to take cases. That
12 continued in September through January, when
13 they hired a new Public Defender. That's the
14 state of affairs.

15 MS. SHANKS: What would you recommend?
16 You say Defender General's Office. Are you
17 asking for a statewide Public Defender's
18 Office?

19 MR. MONTANYE: I can't give an exact
20 description of it. I think it should be
21 designed somewhat in the resemblance of the
22 Attorney General's Office. A statewide
23 program, given regional offices or county
24 offices, if you will, but insulated from those

1 political pressures or state-level pressures.
2 Whatever commission or body that's overseeing
3 this Defender General's Office should be
4 independent of political pressure.

5 MS. SCHAIR: Sir, you are on the other
6 side of the position that says you have to have
7 a local person to do this job. If it was a
8 local office where the person may have come
9 from somewhere else, you think the job could be
10 done as well?

11 MR. MONTANYE: I think the job would be
12 done in some cases better. The fact that it is
13 a local person gives it the appearance that
14 there is something to be gained or something to
15 be lost. It is often a political appointment,
16 and the very nature of the political
17 appointment is that it's a favor. And you have
18 to ask yourself, a favor for what?

19 So I think it should be removed
20 completely. If they are an able-bodied
21 attorney with sufficient training and
22 experience, I don't care whether you come from
23 Brooklyn or Erie County, I think you are able
24 to defend clients in Essex County.

1 MS. SCHAIR: Thank you.

2 MR. HELLERSTEIN: Thank you, Mr. Montanye.

3 MR. MONTANYE: Thank you.

4 MR. HATCH: Good morning. My name is

5 Livingston Hatch. I have been an attorney

6 probably as long as Mr. Burton. And I was in

7 the Bronx when you were District Attorney.

8 I practiced in New York for a number of

9 years and left. I was there before Gideon v.

10 Wainright, when a Judge called you up and said,

11 "You're going to take that case."

12 I moved up to the north country, where I

13 was originally from, and they had the 18-b plan

14 in Essex and Clinton County. And I practiced

15 under that system for a number of years. And I

16 think, if I remember correctly, in the

17 seventies each Appellate Division handled their

18 own assigned counsel. And in this department

19 at the time it was Clarence Hurlihy who was in

20 charge of it. We got along pretty good. If

21 you had a problem, you went to the Appellate

22 Division. You didn't talk to the Judge, but

23 you talked to the people that you were working

24 with and they resolved the problem.

(David Mayo, Official Court Reporter)

1 Now, the problem is money. That's what
2 the problem is. The politicians don't want to
3 spend money to defend people. So what you have
4 to do is you have to devise a program. I think
5 a good example of how you get this mammoth
6 system is the Capital Defenders. I mean, you
7 know, I tried a murder case with a guy in 1967
8 in New York City. So I was probably the oldest
9 guy around trying murder cases. Ms. Clute,
10 when she was District Attorney, we tried a
11 number of them in Clinton County.

12 So did I ever get on the Capital
13 Defenders' program? No. It became a private
14 club. It became a private club that you could
15 not get into. They would call you on a Friday
16 afternoon and say, "By the way, there is a
17 meeting in Westchester County if you want to
18 apply to be qualified." And you look at the
19 books about how they select a jury and all that
20 stuff. They have been doing that for years.

21 So I just think that's a good example of
22 what happens when you talk about this select
23 group that's going to -- when you have an
24 organized system, like the Assembly bill I

(David Mayo, Official Court Reporter)

1 think suggests, that there will be this
2 oversight committee and eventually there will
3 be this department that will be appointing
4 various people to run.

5 I think that you have to divide this state
6 up into various departments. You have to look
7 at Clinton, Franklin, Essex, Hamilton, all the
8 smaller counties. They all have Justices of
9 the Peace. But the City of Plattsburgh, the
10 only place we have a Law Judge sitting, and
11 that's Mrs. Clute that sits there. The rest of
12 them are guys who are firemen, farmers, that
13 are handing out justice.

14 And you think about it. They have more
15 power than most of you Supreme Court Judges,
16 because you will order a presentence report.
17 They will send a guy to jail for 89 days and
18 don't ask questions.

19 So if you are going to do a committee, you
20 are going to do something, you have to divide
21 the state up and look at it. Because Albany
22 County, everybody that sits here, either in the
23 city or something like that, are Law Judges.
24 And I think Colonie, there are Law Judges. In

1 other words, people with law degrees and things
2 of that nature.

3 But out in the sticks, and just what
4 Mr. Montayne said, the other night there was
5 this young kid that was out in North Hudson,
6 New York, where he was talking about. And I
7 went out there and I said, "Judge" -- it was
8 just a traffic ticket but it was AOU Third
9 because it was a misdemeanor. And he wanted to
10 put \$5,000 bail on the person.

11 I said, "You can't do that." "Well, what
12 do you mean, I can't do that?" And right away
13 I noticed the tone in the voice and all. So I
14 finally talked to the Assistant District
15 Attorney, put a \$200 bail on it. Of course he
16 could pay it and get out.

17 That's like Mr. Montayne said. His files
18 are replete with having to go from the Town
19 Justice, who they have all these ex parte
20 communications with the District Attorney's
21 Office and sets the bail. Like, we have one
22 with three misdemeanors. They set \$20,000
23 bail. And it went to Judge Lawless, who was
24 assigned to that case, and he kept the bail at

1 \$20,000. Next step is going to the Court of
2 Appeals. That's a lot of time and effort. We
3 finally got the man out, but it was difficult.

4 So I think when this committee looks at
5 what needs to be done, I think you need to
6 distinguish between what you have to do. In
7 our area, I don't know, you either get rid of
8 the Justices of the Peace or you educate them.

9 I remember a Law Day dinner or some dinner
10 with Magistrates. One of the famous lawyers
11 from the Albany area was up there fraternizing
12 with the Judges, telling them what you should
13 do is make the defense counsel come into court.

14 And I got up and I said, Mr. So-and-So, will
15 you stop telling these Justices of the Peace?
16 The District Attorney is the guy who has the
17 obligation to carry the ball forward, not the
18 defense.

19 Tonight, for example, I have to go to
20 three courts tonight. No plea bargains. No
21 nothing. But I have to go there. They tell me
22 I have to go there. I usually tell them I am
23 not going until I have a plea bargain.

24 So in order to resolve the problem -- and

1 you know we all dance around it. We go to the
2 Court of Appeals and talk to them about having
3 a trial with a non-law judge and stuff like
4 that. And they make a decision that skirts
5 around. And usually it is a four-to-five
6 decision to keep it.

7 MR. HELLERSTEIN: Mr. Hatch, are you the
8 current Essex County Public Defender?

9 MR. HATCH: I am the current Essex County
10 Public Defender.

11 MR. HELLERSTEIN: Mr. Montayne's successor?

12 MR. HATCH: I am his successor, yes.

13 MR. HELLERSTEIN: You heard him testify.
14 Has anything changed from the time he was there
15 until your tenure?

16 MR. HATCH: Yes. I disagree with him on
17 the organized overlord to look over the system.
18 I don't think the problems exist except for
19 those which can be taken care of, as I
20 indicate, what non-law Judges to deal with.
21 You have got 62 counties and -- what is it?
22 Out of the 62 counties, probably 58 of them are
23 all Justices of the Peace that have no law
24 education.

1 MS. SHANKS: Mr. Hatch, I didn't
2 understand what you meant. You said tonight
3 you are going to three different courts and you
4 don't want to go unless there is a plea
5 bargain.

6 MR. HATCH: Yes.

7 MS. SHANKS: Have you already met these
8 clients? Like Mr. Montayne said, are they now
9 in three separate county jails --

10 MR. HATCH: No, they are all out of jail.

11 MS. SHANKS: They are out of jail.

12 MR. HATCH: The minute they are in jail we
13 make an application to the County Judge to have
14 either the bail reduced or to have them
15 released in their own recognizance.

16 Unfortunately, you almost have to do that in
17 every case because they have this thing about
18 setting bail at \$5,000 cash and \$10,000 bond.

19 It is their favorite figure up there. So you
20 have to make an application to the County
21 Judge.

22 MS. SHANKS: So are they still dispersed,
23 as Mr. Montayne said, into different jails?
24 Are you traveling? And I also want to know how

1 many assistants you have. Are you now
2 traveling four hours to Franklin County jail in
3 order to see your client? And how are you able
4 to do that?

5 MR. HATCH: I don't think I have anybody
6 in the county jail except for some people in
7 Washington County that are doing time as a
8 result of a sentence. There is one there that
9 was released the other day on an application to
10 the Judge. There are some that are not my
11 defendants -- in other words, that were in that
12 period between the time Mr. Montayne left and
13 they assigned cases out. There are a couple
14 out in Onondaga County and stuff of that
15 nature.

16 MR. KAMINS: Mr. Hatch, you said the
17 problems exist in the counties where there are
18 non-law judges. What about the quality of
19 defender services? You are saying there are no
20 problems around these counties with the quality
21 of the defenders services or you are satisfied
22 with the representation being used?

23 MR. HATCH: Yes.

24 MR. KAMINS: And this is not only your

1 county but other counties in the area?

2 MR. HATCH: Yes. I think the lawyers do a
3 pretty good job.

4 MR. KAMINS: The problems that were
5 mentioned by the previous speaker, you disagree
6 that those problems exist?

7 MR. HATCH: I have not seen the problem in
8 Essex County. I just haven't seen those
9 problems because we have it assigned out and we
10 haven't conflicted out very many cases. I
11 think we only conflicted out one case.

12 MR. ROBERTS: You mentioned that there was
13 someone in your county that was being held on
14 \$20,000 bail for two misdemeanors. And you
15 mentioned you brought it before the Court and
16 the bail was still retained at \$20,000?

17 MR. HATCH: Yes.

18 MR. ROBERTS: And you said, "We finally
19 worked it out." What do you mean, you worked
20 it out? How did you get that man out of jail
21 that was then jailed for \$20,000?

22 MR. HATCH: Entered a plea to a
23 misdemeanor and got three years probation.

24 MR. ROBERTS: Had a plea?

1 MR. HATCH: Yes.

2 MR. ROBERTS: And when he pled, he was
3 then released from jail?

4 MR. HATCH: That's right. Yes.

5 MS. SHANKS: How many cases do you have?

6 I am interested in Mr. Montayne, because I see
7 even in Albany that there is a huge number of
8 cases now because of this checkpoint. I know
9 some of them are hiring attorneys in Albany.

10 And I would like to know what your caseload is,
11 and if you can break them down in terms of that
12 and how many assistants you have. So what is
13 your --

14 MR. HATCH: I have one assistant.

15 MS. SHANKS: What is your current
16 caseload, your handling and the assistant's?

17 MR. HATCH: 185 open cases at the present
18 time.

19 MS. SHANKS: Felonies?

20 MR. HATCH: No. 22 felonies.

21 MS. SHANKS: That's for you and your
22 assistant?

23 MR. HATCH: Correct.

24 MR. ROBERTS: Is bail being used to coerce

1 people to take pleas?

2 MR. HATCH: I think so, in that county.

3 MR. ROBERTS: Pleas to crimes they didn't
4 commit?

5 MR. HATCH: I think he committed this
6 crime, Judge. I think he committed this crime.
7 It is a domestic case in which he has been
8 arrested several times, pled. This was in the
9 previous administration. He is in on three
10 that he did.

11 MR. ROBERTS: Wouldn't an oversight
12 committee be able to check into things such as
13 this and prevent them from occurring?

14 MR. HATCH: What would an oversight
15 committee do? Would they pick up the phone and
16 call the town justice to say, Listen, you know,
17 you waived the felony. You let this man out
18 based upon a waiver of his felony hearing.
19 Isn't that what you did? They have these
20 conversations with the District Attorney and
21 they work out something between them. You are
22 the last to know.

23 MS. KHASHU: You said there was quality
24 defense. I am wondering how you define that

1 and what standard of quality you judge the
2 attorney that works under you.

3 MR. HATCH: I think every case that has
4 gone to the Appellate Division, Third
5 Department, that has raised lack of effective
6 assistance of counsel, and that's almost every
7 one of them, they say he has had meaningful
8 representation. There is only one that went up
9 there. Judge Lattman took a different tact to
10 lack of effective assistance of counsel. He
11 listed all the things that they didn't do and
12 he said that was the lack of effective
13 assistance of counsel.

14 MS. KHASHU: I'm sorry. What I meant to
15 say is, how do you judge it? You are saying
16 your judgment of what is quality representation
17 is the same as what the courts find to be
18 effective assistance of counsel? Is that your
19 standard of quality representation?

20 MR. HATCH: Well, my standard, my own
21 personal standard, of trying cases and having
22 done them for -- what? Almost 35 years.

23 MR. ELMORE: Mr. Hatch, on an average
24 year, how many jury trials does the Public

1 Defender's Office in Essex County handle?

2 MR. HATCH: I have only been in this since
3 November 8, so there have been no jury trials.
4 There was one nonjury trial in the IDB court.
5 That was the only trial.

6 MR. ELMORE: Every case results in a plea
7 bargain?

8 MR. HATCH: Yes.

9 MS. SHANKS: Mr. Hatch, I didn't
10 understand. You were talking about the CDO
11 model. And I didn't understand if you said you
12 thought this was a good model or you didn't
13 think that was a good model.

14 MR. HATCH: I think that has become a
15 select group that go to Franklin County and
16 rent a house and stay there or they go to
17 Clinton County and they rent a house and they
18 stay there. They know nothing about the local
19 community.

20 MS. SHANKS: What do you think about the
21 quality of the representation that was provided
22 by the CDO and their independence of the local
23 politics?

24 MR. HATCH: I don't think it is very good.

1 I have two cases. I can tell you that I took
2 over after they got done. I thought the
3 investigation was terrible.

4 MR. KAMINS: You mentioned the case is
5 resolved by a plea bargain. I assume some
6 cases are dismissed, some cases there is a
7 suppression motion.

8 MR. HATCH: Quite a few of them dismissed.

9 MR. KAMINS: Not every case is a plea
10 bargain?

11 MR. HATCH: That's right.

12 MR. ELMORE: Would you say how many
13 suppression hearings you have conducted or your
14 office has conducted since November?

15 MR. HATCH: One. I mean, if they give you
16 an ACD, do you want to conduct a suppression
17 hearing? They have a B felony and they reduce
18 it to a disorderly conduct, do you want a
19 suppression hearing?

20 I am just saying, yesterday was the first
21 B felony that my office has gotten since the
22 beginning of November. The first B. And
23 that's a sexual abuse or sexual misconduct.
24 That's the first one.

1 MR. HELLERSTEIN: Thank you, Mr. Hatch.

2 Thank you.

3 MR. HATCH: Okay.

4 MR. CARTER: Good morning.

5 MR. HELLERSTEIN: Mr. Carter, welcome.

6 MR. CARTER: Thank you for giving me this
7 opportunity to speak to you about the future of
8 indigent defense in my state.

9 Let me take a moment to introduce myself.

10 I have been involved in indigent
11 representation, indigent defense and liberty
12 interests representation in one form or
13 another, throughout my professional career.

14 I started at the Monroe County Public
15 Defender's Office, where I was a trial
16 attorney, essentially, for most of the time
17 that I was there, in the local and superior
18 criminal courts when the Rockefeller Drug Laws
19 were passed long ago. I organized and
20 supervised the drug offense representation
21 section. And when I left I was the chief of
22 the local court representation section.

23 I then joined the Wisconsin State Public
24 Defender's Office as a regional supervisor.

(David Mayo, Official Court Reporter)

1 During the seven years I was there I first set
2 up the State Public Defender's Office's
3 operation in five counties surrounding
4 Milwaukee and southeastern Wisconsin.

5 I was also a member of the agency's
6 central management team. I played a number of
7 roles in the statewide management of the
8 office, including co-chairing the
9 computerization and technology task force. I
10 worked on agency rules and regulations and
11 administrative procedures.

12 For the last 15 years I have been the
13 director of the law guardian program of the
14 Appellate Division in the Third Judicial
15 Department. The law guardian programs are
16 essentially the state's largest assigned
17 counsel programs representing clients whose
18 liberty interests are as much at stake, I would
19 contend, as those in classic criminal cases.

20 Beyond that, in the Third Department we
21 have also set up offices to provide a portion
22 of the representation in several counties.
23 Consequently, the initiatives we have
24 undertaken over the past decade or so address

1 issues that indigent defense is almost certain
2 to encounter in our state. And we have learned
3 lessons that I believe can inform the
4 commission of the indigent representation as
5 the commission looks to the future of indigent
6 defense in our state.

7 So this morning I would like to describe a
8 few of the initiatives that we have undertaken
9 and some of the lessons that we have learned.

10 As I do that, please let me make clear that the
11 views that I am expressing are my own. They
12 are not the views of the Appellate Division,
13 Third Department, or any of the members of the
14 court.

15 First, let me give you a quick overview of
16 the law guardian program. Like its counterpart
17 in other judicial departments, the law guardian
18 program provides legal services to clients in
19 Family and Supreme Courts. More than 850
20 attorneys in private practice are designated by
21 the Appellate Division as members of county law
22 guardian panels and are then appointed to
23 represent clients on a case-by-case basis.

24 In five counties representation is also

1 provided by law guardian offices operated under
2 agreements between the Appellate Division, and
3 the statutory phrase is qualified attorneys.
4 And I believe that's also the reality. In two
5 other counties law guardian offices operate
6 under contracts between the Office of Court
7 Administration and the Legal Aid Societies.

8 Last year the Third Department law
9 guardian program provided legal services to
10 approximately 23,000 clients. The program's
11 oversight board is a departmental advisory
12 committee of 15 members, which consists of
13 Judges, law guardians, academics, child welfare
14 experts and law guardians. In addition, the
15 court system has established the statewide law
16 guardian advisory committee to deal with
17 overarching issues related to law guardian
18 representation across the state.

19 Beyond administering panel and office
20 operations, the law guardian program provides
21 law guardians with support resources, including
22 a comprehensive continuing legal aid education
23 curriculum, which I will talk about in more
24 detail in a second. All law guardian program

(David Mayo, Official Court Reporter)

1 activities are funded by the state; all state
2 dollars.

3 Let me summarize law guardian program
4 initiatives in the last ten years, several of
5 them. Three primary areas. Representation
6 standards and attorney qualifications,
7 continuing legal education, and the use of
8 offices to establish mixed representation
9 systems.

10 If you would like more detail on the
11 information I am about to summarize, I invite
12 you to take a look at our web page, which is
13 accessible through the Third Department's law
14 guardian website. You can click on the link to
15 the law guardian program. It is undergoing
16 some repairs. It is kind of ugly at the
17 moment, but the information is all there. So I
18 invite you to take a look.

19 Let me say at the outset in putting these
20 initiatives before you I don't mean to suggest
21 we have resolved all questions with regard to
22 law guardian representation or that we have
23 perfected the craft. But while we still have
24 matters to work on, I do believe that it is

1 clear that we have taken several steps in the
2 right direction.

3 First, promulgation of standards and
4 attorney qualifications. In 1990 the Appellate
5 Division promulgated law guardian continuing
6 legal education rules to require one day of
7 training within the first year of an attorney's
8 membership on a law guardian panel. In 1996 we
9 strengthened those rules to require two days of
10 continuing or of introductory legal education
11 for law guardians as a prerequisite to panel
12 membership. At the same time the rules on
13 experience required to become a law guardian
14 were strengthened to require actual
15 participation in proceedings and also
16 participation in hearings where testimony was
17 taken.

18 The law guardian program recertifies law
19 guardian panels annually. In 1996 again the
20 Appellate Division's rules on panel
21 redesignation were amended to require
22 evaluation by Family Court Judges according to
23 such criteria as rapport with clients, case
24 preparation, legal knowledge, and vigor of

(David Mayo, Official Court Reporter)

1 advocacy. The rules were also changed to
2 clarify the grounds for and process for removal
3 of panel members.

4 Performance assessment continues to be a
5 subject of active discussion. We recently
6 updated a survey we did several years ago about
7 assigned counsel panel assessment systems
8 around the country. And a major portion of our
9 advisory committee's last meeting was devoted
10 to the subject of performance evaluation. I
11 think it is going to be a subject we are going
12 to be dealing with for some time.

13 In the area of performance standards the
14 law guardian program has issued a summary of
15 law guardian responsibilities that encapsulates
16 the steps the law guardian has to take to
17 provide effective representation. The
18 statewide law guardian committee has issued a
19 statement on the role of law guardian, which,
20 as I am sure many of you know, has been the
21 topic of considerable discussion in our state
22 over the last few years.

23 And we have also participated actively in
24 the process in the State Bar Association of the

(David Mayo, Official Court Reporter)

1 review of the definitive and authoritative law
2 guardian representation standards. I'm on the
3 subcommittee that's about to present to the
4 full committee a redraft of the representation
5 standards on custody matters.

6 Training and education. The law guardian
7 program produces a full curriculum of
8 continuing legal education. The elements
9 include fundamentals of law guardian advocacy,
10 a two-day residential training program for new
11 law guardians, which is offered twice a year;
12 our law guardian update series, which is three
13 programs, offered at various areas around the
14 Third Judicial Department to keep experienced
15 attorneys up to date with the issues in
16 children's law; our annual in-depth
17 conferences, where we bring in a national
18 expert to do a close examination of a topic
19 that's of concern to law guardians; and also
20 our trial skills program.

21 We have two trial skills programs. One is
22 our mock trial, in which we have experts try a
23 case in front of an audience and give
24 commentary on what they are doing. And we also

(David Mayo, Official Court Reporter)

1 have our trial advocacy workshop, which is a
2 participatory workshop where attorneys perform
3 exercises with the review of expert faculty.

4 Law guardian program seminars are
5 videotaped and available to law guardians at
6 Supreme Court law libraries around the
7 department. You are perfectly free to take a
8 look at one if you would like to.

9 Law guardian offices. Our objective in
10 creating law guardian offices is to establish a
11 mixed representation system for a county. A
12 system that builds in participation in
13 providing services by the private bar, not
14 simply to handle conflicts or overflow but as a
15 central component of high-quality
16 representation in our community. Our offices
17 are designed to supplement, not replace, the
18 panels.

19 In general, our offices serve clients in
20 approximately one-half of the county's law
21 guardian caseload. Law guardian office
22 attorneys are chosen through a careful and open
23 selection process. Our attorney agreements
24 incorporate standards of representation, as

(David Mayo, Official Court Reporter)

1 well as minimum and maximum caseloads to
2 prevent excessive workload but also assure cost
3 effectiveness.

4 Office budgets include funding for such
5 items as clerical services, clerical support,
6 consultants and investigative services. And
7 our offices are offices. There is actually
8 literally a law guardian office, a place where
9 people can identify as being the law guardian
10 office in that community. Now, the lessons
11 learned --

12 MR. EPPLER: Do you provide half of the
13 services to the caseload that your --

14 MR. CARTER: I'm sorry, sir?

15 MR. EPPLER: Do you provide those services
16 to the half of the caseload that's, in effect,
17 assigned counsel?

18 MR. CARTER: Yes, sir. Well, we don't
19 provide clerical services to panel law
20 guardians, but we do have provisions for
21 providing investigative and other support
22 services to other law guardians.

23 MR. EPPLER: How does that work? Do they
24 have to apply to the court or to you?

1 MR. CARTER: We regard this as something
2 that -- we are not trying to prevent law
3 guardians from getting the resources they need
4 to clients effectively. We want to make sure
5 they have resources. So we work with the court
6 to try to develop a collaborative process so
7 that the courts know that we are willing to do
8 that, that we are willing to provide those
9 services and to underwrite those services.

10 There is a requirement that the court
11 approve the services, but we have frequently
12 engaged in discussion with courts about
13 reassuring them that the monies there, we are
14 willing to support the cost.

15 I can't think of the last occasion on
16 which we denied an expensive representation.
17 We sometimes negotiate it with the attorney to
18 see if we could do it more inexpensively if
19 there were other approaches to it; using
20 telephonic testimony rather than bringing
21 somebody in from Florida or something of that
22 nature. But in general we are not looking for
23 ways not to give people the services that they
24 need to represent their clients effectively.

1 MS. SCHAIR: May I ask about the need for
2 and availability of interpreters' services?

3 MR. CARTER: We have had very few
4 occasions in our department that I can recall
5 where we have been asked to do that for law
6 guardians. But in the cases where we do, we
7 treat that as an expense of representation,
8 essentially like an expert service, and we work
9 with the law guardian to retain the service.
10 And when they do, we compensate for them.

11 MS. SCHAIR: They go to their office for
12 that help? They know that?

13 MR. CARTER: We don't -- well, we try to
14 make it clear that expenses of representation
15 are one of the things that we do in addition to
16 compensation. It is in our administrative
17 handbook. We pound it at our continuing legal
18 education programs. What people know, but the
19 fact of the matter is there are resources
20 available to do that.

21 MR. HELLERSTEIN: Based on your experience
22 in the Wisconsin Public Defender world, do you
23 have a view as to whether you can transpose the
24 model that you are now having engaged in the

1 law guardian context to the focus of this
2 commission, and that is the Public Defender
3 system in our state?

4 MR. CARTER: I think the Public Defender
5 system in Wisconsin is something this
6 commission should look at very hard. To pick
7 up on one of the points that was made earlier
8 about the distinction between having a state
9 entity, an attorney, drop in from someplace
10 else that nobody knows in a community, one of
11 the things that they did in Wisconsin, one of
12 the really important things in implementing the
13 office there was to designate the folks who
14 were the head of the offices as the local
15 representative in that community. Our people
16 typically lived in the communities where they
17 provided representation.

18 Yes, they worked for the State Public
19 Defender's Office, they followed the
20 procedures, they did the motions when they were
21 supposed to, they filled out the same forms,
22 but they also played softball in the same
23 leagues and worked with the Judge in the
24 community.

(David Mayo, Official Court Reporter)

1 Some of the communities that I worked with
2 were quite small. Others were quite, quite
3 large and quite urban. One of the things we
4 really tried to do was to make sure that we had
5 a focus on the local community and understood
6 what the local community is about.

7 On the other hand, we also understood
8 whose side we were on. And it is possible to
9 do both.

10 I guess the answer to your question, if
11 you are careful about it and it's done well,
12 you can have an oversight.

13 I think the thing in New York that's
14 really going to make the difference with regard
15 to that has to do with the complexity of the
16 issues that we face, the size of the
17 population, the various practice cultures that
18 we have, although Wisconsin had different
19 practice cultures; Milwaukee as opposed to
20 other areas, as opposed to the rest of the
21 state, which was more rural.

22 But I think the thing that should
23 determine the vehicle that's used has to do
24 again more with the practice cultures and

(David Mayo, Official Court Reporter)

1 perhaps the legislative climate. But in my
2 view, in looking, the ideal representation
3 system should integrate -- let me step back a
4 second.

5 In my judgment, the overriding issue in
6 New York, the limiting issue in New York, is
7 the fragmentation of our representation
8 systems, fragmentation geographically,
9 financially, administratively, conceptually, in
10 terms of the kinds of cases we are talking
11 about. And in my judgment, the solution to
12 that is the integrated delivery of services
13 with all the other aspects of indigent
14 representation; administration, eligibility
15 assessment, standard setting.

16 And I believe that if you have those
17 integrated in an entity that provides services
18 and if you provide that entity with the full
19 range of options for developing services, that
20 is, the Public Defender model, the contract
21 model, the panel model, and you direct that
22 entity to establish mixed representation
23 systems in the localities, you will come a long
24 way toward a model that I think would work in

1 New York State and achieve both the kind of
2 local feel that I think -- I mean, the defense
3 system has to be sensitive to the practice
4 culture and its community. It can't succeed
5 without it.

6 MS. BAMBERGER: Are you saying that the
7 model should be a centralized system for
8 oversight, training, investigative services,
9 but the actual representation is done by local
10 lawyers with an attorney in charge for that
11 locality and that attorney were to assure that
12 the standards are being followed and that the
13 investigators are available, would communicate
14 with this centralized office? Like a two-tier
15 system.

16 MR. CARTER: Perhaps in response, I was
17 the regional supervisor in southeastern
18 Wisconsin. I was headquartered in Racine,
19 Wisconsin. I was responsible for that county,
20 which is a county of about 200,000 people, and
21 five or six other counties around Milwaukee.
22 The office supervisors in those offices
23 reported to me. Each of those offices had
24 office supervisors. And I, in turn, responded

(David Mayo, Official Court Reporter)

1 to, reported to, the director of the trial
2 division, who was the Deputy State Public
3 Defender. This was administratively.

4 So that's how the work was essentially
5 devolved from the central administration in
6 Madison to the regions. I was, again, a
7 regional supervisor.

8 MS. BAMBERGER: How many regions were
9 there?

10 MR. CARTER: Ten.

11 MS. BAMBERGER: And each region had a
12 supervisor?

13 MR. CARTER: Yes, ma'am. There are more
14 now.

15 MS. BAMBERGER: And then each locality
16 within that region had the local attorney in
17 charge of the office?

18 MR. CARTER: Typically, ma'am, it was done
19 by county. But there were some places, some
20 smaller counties, where we did it, combined two
21 counties. North of Milwaukee there were two
22 counties, the communities of Port Washington
23 and West Bend, famous for the kitchen
24 appliances, or whatever.

1 But, at any rate, we had an office in West
2 Bend that had two attorneys in it. One of the
3 attorneys in that office spent half his time in
4 Washington, in the county next door, the
5 adjacent county. He actually lived in the
6 county next door and spent half his time there.
7 So he was that county's Public Defender, in a
8 certain sense, along with the proportion of the
9 panel that did a lot of the representation. It
10 wasn't 50 percent, but it was a considerable
11 portion in that county.

12 So he worked out of an office, so it was
13 fully staffed with clerical support that had
14 secretaries, that had access to investigators.
15 Actually, the investigators weren't in that
16 office. They were in an office in an adjacent
17 larger county.

18 MS. BAMBERGER: But they had access to
19 them?

20 MR. CARTER: They had access to them, yes.

21 MR. KAMINS: Mr. Carter, you mentioned
22 that the law guardian program was funded
23 entirely by the state.

24 MR. CARTER: That's correct.

1 MR. KAMINS: What about the decision to
2 have the state fund the Public Defender's
3 Office services?

4 MR. CARTER: I think it is inevitable. I
5 think we may have taken a step in that
6 direction through the funding of the indigent
7 services defense fund. It seems to me,
8 frankly, if the flow of money were reversed --
9 I am not a budget expert. I don't know how
10 these things work. But if the flow of money
11 were reversed, if, for example, that the money
12 that the municipalities are spending on
13 indigent defense representation -- we now know
14 what that is because of the indigent services
15 defense fund. They all filed claims against
16 the indigent services defense fund telling how
17 much.

18 If the money were to flow, instead of
19 flowing to the municipalities, to be broken up
20 to the counties, if the money were to flow the
21 other way, from the municipalities to a state
22 entity or to a larger geographic -- I'm not
23 sure that a state entity is necessarily the
24 best way to do it, but it could be.

1 At any rate, if it were to flow in the
2 other direction, it would, first of all, freeze
3 the county's costs at what they are now. It
4 could be done with the assumption that the
5 state would be continuing to pick up the share
6 of the costs beyond what it does now,
7 increasingly deliver defense services through
8 state funding. But I think it's inevitable.
9 It is a state of responsibility, after all.

10 MS. SHANKS: Mr. Carter, I have taught in
11 the last couple years in Wisconsin.

12 MR. CARTER: I'm sorry?

13 MS. SHANKS: I have taught in the last
14 couple years in Wisconsin. All of the
15 training and all of the hiring was done by the
16 state office.

17 MR. CARTER: Yes, ma'am.

18 MS. SHANKS: Is that the same model?

19 MR. CARTER: No.

20 MS. SHANKS: It's the same model, where
21 the training and everything is done statewide,
22 but then you are assigned to a local office,
23 but you are independent of those local Judges?

24 MR. CARTER: The thing is, independent is

1 a relative term. When I was the first
2 assistant, I don't know how --

3 MS. SHANKS: You weren't appointed by --

4 MR. CARTER: I was hired by the State
5 Public Defender's Office.

6 MS. SHANKS: I just wondered if the model
7 had changed.

8 MR. CARTER: On the other hand, the first
9 person I talked to when I went to Wisconsin to
10 develop the office in Racine was the Presiding
11 Judge of the Circuit Court in that county. You
12 have to be able to --

13 MS. SHANKS: You weren't appointed by that
14 locality?

15 MR. CARTER: No.

16 MS. SHANKS: I wondered if that changed.
17 Did you feel that system worked well then, in
18 terms of both knowing the local Judge but
19 having more centralized training during
20 administration?

21 MR. CARTER: I think you have to be -- I
22 think that can work. I think that's one model
23 that can work. I think also it is a
24 collaborative process we are involved with. I

1 think it is possible to deal productively with
2 the judiciary, obviously. How could I not?
3 But at the same time I think it is still
4 possible to know whose side you are on and what
5 your function is in the system. I think that's
6 a system that can work.

7 Again, the issues in New York are
8 considerably -- the scale is different. I'm
9 not sure about that. But I think it is a model
10 that this commission ought to look at. I am
11 sure there are other models in other parts of
12 the country that would also be useful.

13 I understand that Tennessee has a regional
14 model of providing defense services. That
15 might also be appropriate, given the practice
16 culture and the geography and the scale of
17 issues in New York.

18 Again, I think also the law guardian
19 program, the way that that's structured, is
20 something that also might be considered with
21 the regionalization of services or adaptation
22 to the local needs, the regional needs that we
23 identify, with an overarching board that is
24 responsible for smoothing out the overarching

1 issues that are in effect statewide.

2 MR. ROBERTS: Thank you.

3 MR. CARTER: Thanks.

4 MR. HELLERSTEIN: Thank you so much.

5 Mr. Castillo?

6 MR. CASTILLO: Yes.

7 MR. HELLERSTEIN: Welcome. Good morning.

8 MR. CASTILLO: Thank you. Good morning.

9 My name is Gaspar Castillo. I practice in the
10 Capital District, right now primarily in Albany
11 County.

12 By way of a little background, I am a
13 graduate of Albany Law School and I have been
14 an attorney now for 25 years. For the last 22
15 years my practice has virtually been devoted to
16 criminal defense, both in the state court and
17 federal court. Throughout my career as a
18 lawyer I have accepted assigned counsel cases
19 from both the state courts and the federal
20 courts.

21 Last year, because I was at a point in my
22 life where I thought I wanted to do something
23 different, I applied, sort of not knowing if I
24 really wanted the job, I applied for the job as

(David Mayo, Official Court Reporter)

1 the Albany County Alternative Public Defender.

2 As you all know, the Legislature increased
3 the rates of pay for assigned counsel lawyers,
4 so many counties, including Albany County, have
5 created these offices to sort of take the load,
6 so to speak, of assigned counsel cases. And so
7 to my surprise, I was offered the job and so I
8 took it.

9 The first thing that I did is that I
10 didn't think that Alternative Public Defender
11 really clearly indicated what the job entailed.
12 So I have with an asterisk, still admitting
13 that the office is called Alternative Public
14 Defender at the bottom of the letterhead, I
15 have taken the liberty of changing the name to
16 the Albany County Conflict Defender. The
17 reason being that I believe that the public
18 and, more importantly, the clients need to
19 understand the role of the office. And I
20 thought that calling it conflict would clearly
21 make clients understand that this particular
22 office is designed to take cases where there
23 are multiple defendants or where there is a
24 conflict of interest in the regular Public

(David Mayo, Official Court Reporter)

1 Defender's Office.

2 There are some problems with the system
3 that I want to talk about and I want to bring
4 to your attention. I am sure you know all of
5 the problems. You have heard from other
6 people.

7 Before I do that, I do want to talk about
8 the pluses and the positives. When I met with
9 the man who I guess is my boss, County
10 Executive Breslin, and we talked about how this
11 job would work, I had indicated that I hadn't
12 worked for anyone in many years so it would be
13 difficult for me to all of a sudden have a
14 boss. And I was told that I would have
15 autonomy, that I would have complete control of
16 the office. I asked for and was granted the
17 right to hire whoever I saw fit. And I also
18 had over time made additional demands for more
19 money and things of that nature. So I want to
20 start out with those positives.

21 I am happy to report that, contrary to
22 what might be the trend in a lot of offices, my
23 office is made up of lawyers who at a minimum
24 have ten years experience. Three of the

(David Mayo, Official Court Reporter)

1 lawyers have over 20 years experience. And so

2 I want to report those positives.

3 The problem that I see with indigent
4 defense services has to do with attitude,
5 attitude both of the community and attitude
6 also of the lawyers.

7 When I talk about attitude, what I am
8 talking about is, let's face it, it is not a
9 constituency that enjoys popular support. We
10 are talking about people that are accused of
11 crimes, and there is a tendency in the
12 community to think that people who get arrested
13 for something, well, they should get whatever
14 they deserve and we shouldn't be so concerned
15 about what type of services they get.

16 So when you talk about the burden of proof
17 and things of that nature and the right to
18 competent counsel, I think that there has been
19 a tendency throughout history to feel that as
20 long as some lawyer is provided that that's
21 good enough.

22 Similarly, the problem that I see in the
23 public defense arena is in the attitude of
24 lawyers themselves, the lawyers that provide

1 these services. And what I'm talking about is
2 the feeling that those clients that are public
3 defense clients maybe are not entitled to the
4 same level of service, of commitment, as the
5 paying clients.

6 I can tell you that in the office that I
7 run, I have established certain conditions
8 which I think are necessary and I suggest to
9 you are important in the changes that need to
10 be made.

11 I have insisted that lawyers go to the
12 jail and see their clients and that they do
13 that regularly. In fact, in our office the
14 rule is that every lawyer in the office goes as
15 a group at least once a week to the jail to
16 visit clients, with the goal that every lawyer
17 see during the three-hour period of time at
18 least three people, with the hope that at least
19 30 to 40 clients monthly are visited by our
20 office.

21 Lawyers have to be responsive to their
22 clients in terms of receiving client telephone
23 calls and providing copies of documents to
24 their clients. Again, that's an area where I

1 have seen some deficits in the public defense
2 system. And in our office the rule is that
3 there has to be a lawyer in the office at least
4 several hours a day to receive client
5 communications.

6 One thing that's lacking in the state side
7 that does exist in the federal side is that in
8 the federal system, and I know this because I
9 have been obligated to participate in it, there
10 is a mandatory training that all lawyers that
11 are part of what they call the CJA panel,
12 Criminal Justice Act panel, are required to
13 attend yearly in order to remain on the panel.
14 It is a comprehensive program, it is a full-day
15 program, and it's free.

16 There is no similar type requirement in
17 the state side. I believe that that should be
18 a prerequisite for any lawyer who takes
19 assigned counsel cases or even Public Defender
20 lawyers, that there should be a mandatory, at
21 least once-a-year training, on recurring and
22 important issues that come up in criminal
23 cases.

24 MR. GOLDMAN: Sir, let me ask you. Does

1 the State Division of Criminal Justice Services
2 provide any training whatsoever for defenders?

3 MR. CASTILLO: Well, there is training
4 that's provided that is made available through
5 local Bar Associations, including that entity.
6 But my point is that the training should be
7 mandatory. As a prerequisite to being on the
8 assigned counsel list of any county, it should
9 be mandatory that any lawyer as part of that
10 list be required to attend at least one yearly
11 program on recurring issues in criminal law.

12 MR. KAMINS: Mr. Castillo, do you also
13 agree that there be uniform statewide
14 standards, rather than leaving it up to someone
15 like yourself, who sets laudable goals for a
16 particular office but there is no guarantee
17 that other individuals around the state have on
18 an ad hoc basis set those standards for their
19 office?

20 MR. CASTILLO: I do believe there should
21 be uniform minimum standards that appear
22 throughout the state, yes, I do, for the
23 reasons that you have outlined. There is
24 inconsistency in the level and quality of

1 services, perhaps, that's provided, depending
2 on the area that the client finds himself in.

3 MR. KAMINS: And there should also be a
4 way of enforcing those standards?

5 MR. CASTILLO: Exactly.

6 MS. SHANKS: Mr. Castillo, given your
7 experience both in federal and state court --
8 for members of the panel, I am very familiar
9 with Mr. Castillo. He is one of, certainly,
10 the finest lawyers in the Capital Region.

11 If you could design a system that would
12 ensure that all indigent defendants receive not
13 only adequate representation but excellent
14 representation, what model would you recommend
15 to the commission?

16 MR. CASTILLO: Well, one of the comments
17 that I was going to make, and I will answer
18 your question while I am making my comments, if
19 you don't mind, I know from experience and I
20 know from statistics that in today's times you
21 are going to have a clientele that involves
22 people that are Spanish speaking. So I think
23 that at a minimum offices should have someone
24 on staff who is Spanish speaking. In my office

1 four other lawyers are Spanish speaking. The
2 secretary is Spanish speaking.

3 The point is that when a client calls or
4 comes to the office, if that person is not able
5 to communicate sufficiently or at all in
6 English, there will be someone to serve that
7 person. So I think a model should include
8 someone who is Spanish speaking.

9 As important, in my opinion, is cultural
10 sensitivity. There has to be an awareness on
11 the part of lawyers as to cultural and ethnic
12 characteristics that come into play in how
13 people respond to the legal system, to lawyers,
14 to courts, so that there is a better ability to
15 communicate with the clients and reach the
16 clients in order to get the client's
17 cooperation in terms of providing information
18 to the lawyer.

19 You know, there are many cultures, as I am
20 sure you know, where there is a philosophy of
21 not disclosing private or what is viewed as
22 confidential family information that may become
23 important either in defense of the case or in
24 mitigation of punishment; areas such as whether

1 or not there is domestic violence in the home,
2 abuse, things of that nature.

3 I also think that as a model, besides what
4 I have already said about regular visits to the
5 jail, that has to be mandatory. It has to be a
6 condition of accepting a case. I don't know
7 that there necessarily has to be a rule that
8 you have to go once a week or twice a month,
9 but I would say -- I can tell you that in my
10 personal practice I try to make it my business
11 to see every client that I represent, whether
12 privately or in the Conflict Defender Office,
13 at a minimum once every three weeks.

14 MS. BAMBERGER: Mr. Castillo, I want to
15 take your observations a little bit more
16 globally, and perhaps Professor Shank's issue
17 can be discussed on a broader level.

18 We have heard a lot of testimony from
19 people who feel constrained because of the way
20 in which they are appointed that they have
21 limits set on them by local officials who are
22 fundraisers or appointing agents. So one of
23 our concerns is: How do we create a system
24 which gives independence, which is what would

1 be required for adequate representation, and at
2 the same time provide some of the local
3 context, which many of your colleagues have
4 suggested is so important?

5 Now, we have had several proposals.
6 Actually, today we have had a lot of really
7 very substantial and important information
8 about centralizing with local components,
9 totally centralizing, minimal centralizing with
10 a powerful local component. What would your
11 view be?

12 MR. CASTILLO: I would be in favor of a
13 centralized operation where there would be
14 certain basic minimum operation that would then
15 lend itself to a local system. I don't know if
16 you are talking about a statewide public
17 defense office.

18 MS. BAMBERGER: That's one of the things
19 that has been suggested. Does everything get
20 focused from the top or does the top say, "We
21 are going to delegate some authority or some
22 independence to the local offices"?

23 So, for instance, training would be
24 statewide, the enforcement of standards would

1 be statewide, but there would be local control
2 of how the office is run. So, for instance,
3 your particular goals for your belief in
4 adequate representation could be more locally
5 obtained.

6 Is that a good model? Or does everything
7 have to come from the top? Does the top merely
8 provide a resource center, as opposed to a
9 control center?

10 MR. CASTILLO: Okay. I understand your
11 question. I think that there should be
12 statewide minimum standards and I think that
13 there should be a statewide central resource
14 center but that individual offices should have
15 the discretion and authority to run
16 independently so that they can meet the needs
17 of their particular communities.

18 MR. HELLERSTEIN: If you had statewide
19 standards, where you leave it to the discretion
20 of the local offices, how would you suggest the
21 enforcement of those standards be accomplished?

22 MR. CASTILLO: I think the enforcement of
23 standards, I guess, could be accomplished by
24 regular review by the centralized office,

1 either by the receipt of reports, input from
2 community organizations, client-based
3 organizations that can provide feedback as to
4 whether or not the particular local office is
5 performing in accordance with the standards.

6 MR. ELMORE: If you were to model the
7 statewide agency, how would you structure
8 salaries?

9 MR. CASTILLO: Salaries?

10 MR. ELMORE: Yes.

11 MR. CASTILLO: That's one of the things I
12 was going to talk about, so I'm glad you asked
13 the question. There still is -- I know that it
14 exists in this county, and from what I have
15 seen it exists in all counties.

16 There isn't parity of pay. There isn't
17 parity between local prosecutor offices and
18 defense offices, whether they be Public
19 Defender or Conflict Defender, Alternate Public
20 Defender.

21 There needs to be parity of pay. That's
22 the only way that you are going to attract not
23 just the lawyer but an experienced lawyer, a
24 committed lawyer, a lawyer that believes in

1 what he or she is doing and in the importance
2 of the job that's being done. So I think that
3 a very, very important area is that there needs
4 to be parity of pay. Yes?

5 MS. SHANKS: Along those lines, do you
6 think, if there is parity of pay, do you think
7 you would be able to get the level of
8 experience of the lawyers that you have if
9 there was a requirement that they be full-time
10 and that they have no outside practices?

11 MR. CASTILLO: Yes, I do.

12 MS. SHANKS: Can you just discuss that?
13 Are your attorneys part-time? What do they get
14 paid? And do you think there would be a
15 benefit if they were full-time and simply
16 getting more appropriate salary?

17 MR. CASTILLO: I will speak about the
18 office that I run. And in the Conflict
19 Defender Office the lawyers are full-time,
20 meaning that they have to work 35 hours, which
21 is the number that this county indicates is a
22 full-time level.

23 Everyone that I have hired I have
24 indicated to them what the conditions of their

1 job are so that they know coming in what the
2 number of hours are, the required jail visits,
3 things of that nature. So that is what happens
4 in my job.

5 However, I do believe that the money needs
6 to be better, because the reality is that if
7 the pay is not up to par, there will be a need
8 for those lawyers to have outside work in order
9 to supplement their income.

10 MR. EPPLER: All your lawyers are allowed
11 to take outside work?

12 MR. CASTILLO: Yes.

13 MS. BAMBERGER: The question of if we had
14 this divided system of a statewide something
15 with local input, who would, in your view, be
16 the most appropriate entity? What would be the
17 appropriate entity to appoint the local
18 defender office chief or attorney in charge?
19 Would it be the local executive or would it be
20 the defender's structure itself? How would you
21 envision that, to provide the independence?

22 MR. CASTILLO: Well, I think that there
23 needs to be a collaboration between that
24 central operation, but that ultimately I think

1 reality says that the appointment has to be on
2 a local level, with the understanding that the
3 requirements will be met in terms of experience
4 and in terms of the requirements of the
5 operation of the office.

6 MS. ZUFLACHT: How much are the attorneys
7 in your office paid?

8 MR. CASTILLO: \$41,000.

9 MR. HELLERSTEIN: Thank you, Mr. Castillo.

10 MS. BAMBERGER: Thanks very much.

11 MR. CASTILLO: Thank you.

12 MR. HELLERSTEIN: Mr. Deitz?

13 (There was no response)

14 MR. HELLERSTEIN: Burr Deitz? No. Miss
15 Trimble? She is not on your list. She is a
16 substitution. Miss Melanie Trimble of the
17 NYCLU.

18 MS. TRIMBLE: I am Melanie Trimble,
19 Executive Director for the Capital Region
20 Chapter of the New York Civil Liberties Union.

21 The New York Civil Liberties Union is an
22 affiliate of the ACLU, and we cover in the
23 Capital Region Warren, Washington, Saratoga
24 Schenectady, Rensselaer, Albany, Greene and

(David Mayo, Official Court Reporter)

1 Columbia Counties.

2 As you know from testimony delivered to
3 the commission in New York City on February 11,
4 our executive director, Donna Lieberman, and
5 Vince Warren, a staff attorney for the National
6 Legal Department of the ACLU --

7 MR. ROBERTS: Will you speak a little
8 louder, please?

9 MR. EPPLER: And I think a little slower.

10 MS. TRIMBLE: Slower. Okay. Well, I have
11 it all written for you, too.

12 MR. EPPLER: Terrific.

13 MR. HELLERSTEIN: If possible, since it is
14 written, if you could summarize it.

15 MS. TRIMBLE: Summarize it. Okay. Well,
16 over the past year and a half the Civil
17 Liberties Union began looking into county
18 Public Defender offices. Locally, we have been
19 involved in investigating Albany and
20 Schenectady Counties.

21 Our concerns are outlined here as to what
22 we see. Let me describe a little bit about
23 what we did. We actually interviewed several
24 Judges. We observed criminal proceedings in

1 three courts in Albany City and in Albany
2 County. We interviewed all the Public
3 Defenders. We interviewed the Chief Public
4 Defenders, incoming and outgoing, because in
5 Schenectady they had a turnover of Public
6 Defenders while we were doing a study.

7 And we have continued to interview
8 defendants and inmates, as far as what they
9 think their representation is. We looked at
10 annual reports. We looked at a sample of
11 appellate briefs. And we looked at statistics
12 that have been gathered in both Albany and
13 Schenectady County regarding indigent
14 defendants.

15 Our investigations revealed deficiencies
16 in the provision of adequate and effective
17 representation. We found the Public Defenders
18 are not only underfunded, understaffed and
19 underresourced but that the structure of their
20 offices in Albany and Schenectady have posed
21 problems that prevents most indigent defense
22 attorneys from adequately representing their
23 clients.

24 We found that public defense attorneys in

1 Albany are all hired on a part-time basis,
2 although they have the same hourly requirement
3 of a full-time employee. They receive full
4 benefits but no vacation time. And the
5 official full-time designation is resisted by
6 the Public Defender's Office because such
7 designation would prevent the attorneys from
8 carrying on private practices.

9 Thus, each attorney is able to maintain a
10 private practice in his or her spare time. And
11 we believe this undermines the attorney's
12 ability to adequately represent indigent
13 defendants, since they must balance their time
14 between an overwhelming caseload of indigent
15 defendants and clients who hire them through
16 their private practice.

17 Additionally, Public Defenders in Albany
18 are assigned specific days in court rather than
19 specific clients. This was also true in
20 Schenectady, where each duty was handled by a
21 different attorney. So the defendant may face
22 -- every time they arrived in court there would
23 be a different attorney. Because there was no
24 jail night instituted in Schenectady initially,

(David Mayo, Official Court Reporter)

1 the interviews with the attorneys would occur
2 just prior to the hearing. No communication
3 with the attorneys before their appearance in
4 court.

5 This lack of consistency in representation
6 and time constraints on the part of the
7 attorneys, not visiting their clients or
8 answering their phone calls while the
9 negotiations were continuing, were the major
10 source of complaints that we received prior to
11 our investigations.

12 So, of course, the bullets are that we
13 don't have sufficient number of qualified
14 attorneys to handle the caseloads. There is
15 inadequate training provided for new attorneys.
16 There are not sufficient resources for lawyers
17 to engage in independent, expert, investigatory
18 services when needed.

19 There is often an assumption that when a
20 defendant enters the courtroom that they are
21 going to plead to something rather than be
22 defended. And if they are completely innocent
23 of all charges, as very often is the case, that
24 in order to get out of jail they simply plead

1 out to get out of there because there will be
2 no investigation made into their defense.
3 Their defense attorney will not go to trial for
4 them.

5 In most cases, I think it's in the 90
6 percent range of cases that do not go to trial.
7 And there is a reason for that. There is no
8 time and no investigations for the attorneys to
9 move forward and adequately defend innocent
10 clients.

11 MR. GOLDMAN: Excuse me. Are you saying
12 that people -- do you have cases where people
13 have pleaded guilty that your investigation has
14 shown should have gone to trial? In other
15 words --

16 MS. TRIMBLE: There are defendants that we
17 spoke to that very much wanted to go to trial
18 and yet the cases would be continued every time
19 they appeared in court and they would go back
20 to jail. And so eventually they just got worn
21 down and said, "Look, I want to get out of jail
22 here."

23 In some cases in Schenectady the
24 defendants actually served the maximum sentence

1 for whatever they would have received if they
2 had been found guilty at trial. So the
3 attorney will say, "You have already served the
4 maximum time. Why don't you just plead guilty
5 to the charge and you will get out today?" And
6 so they do.

7 MR. GOLDMAN: Have the defendants' claimed
8 they have been coerced into that? Other than
9 what other force and effect the system has that
10 keeps you in jail with high bail, and then to
11 say we will free you if you plead guilty, the
12 attorneys coerce them or the system?

13 MS. TRIMBLE: I think the system has
14 coerced them. I would not say the attorneys
15 are misrepresenting the facts. It is just the
16 way the system has worked.

17 MR. GOLDMAN: I am a private attorney and
18 people are faced with that situation.

19 MS. TRIMBLE: Right.

20 MR. GOLDMAN: But I don't know that it is
21 the attorney's fault.

22 MS. TRIMBLE: Exactly.

23 MS. BAMBERGER: How many motions were made
24 under the state's speedy trial statute?

1 MS. TRIMBLE: I'm sorry. I don't know
2 those statistics.

3 MS. BAMBERGER: Because there are
4 mechanisms for release after continuing
5 adjournments or continued requests for
6 adjournments.

7 MS. TRIMBLE: Right.

8 MS. BAMBERGER: So did your survey show
9 that lawyers weren't doing anything to push the
10 cases to trial?

11 MS. TRIMBLE: As far as filing motions
12 that you are talking about, we didn't do a
13 statistical analysis of this. We interviewed
14 defendants and we found that there were cases
15 where no motions were filed in cases where they
16 served the maximum time but were not even on a
17 misdemeanor --

18 MS. BAMBERGER: On a misdemeanor?

19 MS. TRIMBLE: Not on felonies. On
20 misdemeanors.

21 MS. BAMBERGER: They would in jail for a
22 year?

23 MS. TRIMBLE: Right.

24 MR. KAMINS: Your colleagues in New York

1 said that based upon the investigation that's
2 being done and surveys and statistics that
3 litigation was contemplated by the Civil
4 Liberties Union challenging the providing of
5 defense services in New York.

6 Could you comment on that, as far as the
7 lawsuit? You are taking a wait-and-see to see
8 what our recommendations are going to be or are
9 you going forward with litigation?

10 MS. TRIMBLE: I really can't comment for
11 sure whether we are going to move ahead with
12 litigation. I know that we are in the process
13 of gathering information and looking for
14 plaintiffs in possible cases. And that's just
15 ongoing. But I can't comment on the definite
16 timeframe for that and whether we are going to
17 wait for your commission's decisions, and so
18 on.

19 MS. SHANKS: When you interviewed the
20 Public Defenders, both the Assistant Public
21 Defenders and the Public Defender of Albany and
22 Schenectady, did they refute the allegations of
23 their clients or did they concede the
24 allegations? And, if so, what did they give as

1 their reasons for not filing motions?

2 MS. TRIMBLE: Well, I wasn't -- you know,
3 as far as official comments, I can't put words
4 in their mouths because I wasn't at the Albany
5 interviews.

6 In Schenectady there was a concern with
7 the number of caseloads over there. Their
8 filing of motions was I think inadequate. I
9 really can't. I'm sorry to say I don't think
10 we actually directly asked them, you know,
11 whose fault is it that the client is in jail
12 indefinitely.

13 MS. SHANKS: I didn't mean that. I meant,
14 did you ask them specific questions, like, "Do
15 you visit your clients at jail?"

16 MS. TRIMBLE: Yes.

17 MS. SHANKS: And what was their response
18 to that? I mean, did they say they did or they
19 didn't?

20 MS. TRIMBLE: They agreed that they did
21 not have time to visit their clients in jail.

22 MS. SHANKS: So that was the reason given
23 with them, they didn't have time?

24 MS. TRIMBLE: That they didn't have time.

1 MS. SHANKS: But they conceded that they
2 don't visit their clients?

3 MS. TRIMBLE: Correct.

4 MR. ZAYES: In terms of the delay, from
5 the amount of time you invested and observed
6 the proceedings, did you observe the attorneys
7 consenting to the delay or not aggressively
8 trying to move the case? There is a way to
9 demand an immediate trial. Were they sort of
10 just consenting to delay after delay after
11 delay?

12 MS. TRIMBLE: My understanding is yes,
13 they did not file the proper motions to get
14 things moving and to push the time constraints
15 on the trials.

16 MR. ROBERTS: Did they say they would have
17 been able to do a better job if they had more
18 personnel?

19 MS. TRIMBLE: Yes, particularly in
20 Schenectady, where they had a big turnover.
21 They had fewer attorneys working. One was out
22 on a disability leave and they couldn't replace
23 that attorney. I think that has been corrected
24 with the new Public Defender.

1 MR. ROBERTS: So that would have been lack
2 of personnel?

3 MS. TRIMBLE: Lack of personnel. Correct.

4 MS. BAMBERGER: Is it your view if the
5 defense lawyers started to push for more
6 trials, either by objecting to adjournments
7 requested by the prosecutor or by filing
8 motions, then the prosecutors would simply say,
9 "We need more lawyers. Give us more money"?
10 Is it that kind of cycle that we're in?

11 MS. TRIMBLE: You know, first, I think
12 that there are enough prosecutorial attorneys.
13 I think that what has happened is that the
14 system has become so normal for the District
15 Attorney's Office to deal with indigent defense
16 clients in a certain way and it has become such
17 a pattern that it is not one in which I think
18 the District Attorney's Office feels that they
19 wouldn't be ready to go to trial and needed a
20 continuance. I think it is more that they just
21 know it is never going to go to trial and they
22 want to figure out what the defendant is going
23 to plead to, rather than worrying about whether
24 they are going to be ready.

1 It is such a common practice. It is
2 something that really needs to be stirred up
3 and refocused, because virtually people have
4 not been represented in the courts.

5 MR. ROBERTS: Do you find that bail being
6 set was excessive and that it was being used
7 for coercive reasons, to cause individuals to
8 plead guilty?

9 MS. TRIMBLE: In cases where bail was set
10 there are instances that we came across where
11 no motions were made to lower the bail. And
12 that became a major concern with people having
13 to stay in jail while their cases were being
14 heard.

15 I wouldn't say that I heard a lot of
16 incidents of excessive bails, but bails that
17 certainly couldn't be met by indigent
18 defendants, so they spent an inordinate amount
19 of time in jail without motions for lower bail.

20 MR. ROBERTS: Thank you.

21 MS. SHANKS: When you said that the Public
22 Defenders are assigned by day and, therefore,
23 each time a new attorney would be representing
24 a client he or she never met before, did you

1 ever see any cases that did go to trial, and,
2 if so, who was the trial lawyer?

3 MS. TRIMBLE: We didn't follow any of
4 these cases through the adjudication process,
5 so I did not see any of them go to trial. We
6 observed courts on a daily basis and we watched
7 arraignment hearings and then one single court
8 trial. We did not follow a client.

9 MS. BAMBERGER: Many of the things that
10 people have said here to us are that the
11 community as a whole, in particular, local
12 officials, the executive, the local
13 legislatures, do not appreciate the idea that a
14 particular person who is charged with a crime
15 and arrested for it could possibly be innocent
16 or not have committed the crime or that the
17 People can't prove it.

18 You are an agency that has broad scope in
19 the community. How are we going to correct the
20 perception that everybody might be innocent?
21 How are we going to correct the perception and
22 make people understand that everybody might be
23 innocent? How do we do that?

24 MS. TRIMBLE: Well, you know, when I talk

1 to people who are complaining about the system,
2 people in general feel that they are innocent
3 until they are proven guilty. And they are
4 shocked when they enter the criminal justice
5 system in Albany and Schenectady and are faced
6 with the fact that they are being assumed to be
7 guilty and that they must prove their innocence
8 rather than feeling as though the District
9 Attorney has the responsibility to show that
10 they are guilty. It is completely turned on
11 its heel.

12 In order to change that I think you need
13 to do what you are doing and set up a state
14 agency that will oversee a county's structure
15 in their Public Defender offices and through
16 that establish a real reeducation campaign
17 along with it. That would come almost
18 naturally.

19 I think there is a strong interest in
20 every Public Defender office that we have
21 interviewed, and we have gone into three so
22 far, with Onondaga being added to Albany and
23 Schenectady, and there is a very strong
24 interest on the part of the Public Defenders

(David Mayo, Official Court Reporter)

1 themselves to have more support from the state
2 and to be able to walk into a courtroom and
3 know they are going to defend their clients, as
4 opposed to just striking a deal with the
5 District Attorney and the Judge.

6 And that's the perception of most of the
7 defendants that we spoke to, was that it is a
8 slam dunk, already done, they have no defense,
9 it is simply a deal that's struck between the
10 Public Defender, the District Attorney, and the
11 Judge, and often without even turning to ask
12 the client whether they agree to the plea.

13 The Judge usually at the end of the case
14 explains to the defendant what has happened and
15 what they have agreed to, but the defendant
16 isn't asked if that's agreeable in some cases.
17 And we even have one case that's actually in
18 the testimony that speaks of a defendant who
19 just didn't realize what he was pleading to at
20 all. That's a real concern.

21 MR. KAMINS: Have there been 440
22 applications? Have there been applications
23 made based upon these ineffective colloquys and
24 the fact that defendants don't understand what

1 they are pleading to?

2 MS. TRIMBLE: Well, when you talk about
3 the appeal process, having a defendant who
4 doesn't understand what happened and going into
5 the appeal process, the appeal process
6 basically in Albany for indigent defendants is
7 non-existent. They had too big of a backlog
8 and they have decided not to take any new
9 appellate cases.

10 MR. KAMINS: How do they turn down a
11 defendant? What do they say to the defendant
12 when they say they are too busy?

13 MS. TRIMBLE: You know, I don't know what
14 they say.

15 MS. BAMBERGER: They are not filing
16 notices of appeal?

17 MS. TRIMBLE: No. That's my understanding
18 of the questions asked of the Public Defender
19 in Albany.

20 MR. KAMINS: I don't understand. They are
21 saying they are too busy, we can't handle your
22 appeal?

23 MS. TRIMBLE: Right. The caseload is
24 excessive and they cannot handle appeals.

1 MR. ROBERTS: If the defendant comes and
2 he tells you folks he never accepted a plea of
3 guilty or he indicated he did not understand
4 what was going on, do you ever get the
5 transcript to see if that was so?

6 MS. TRIMBLE: No, we haven't done that in
7 an individual case.

8 MR. ROBERTS: Some defendant comes in and
9 says, "I never really pleaded guilty. I never
10 said I pleaded guilty." You don't check to see
11 whether or not there was a plea?

12 MS. TRIMBLE: Well, we are not bringing it
13 as a case. These are not defendants of ours.
14 This is information after interviewing the
15 defendant.

16 MR. ROBERTS: You use one person, the
17 defendant. How about the attorney?

18 MS. TRIMBLE: It is a single case that we
19 thought was strong enough for you to hear of.
20 If you don't want to believe the defendant's
21 story, that's fine.

22 MR. ROBERTS: Well, you check the story.

23 MS. TRIMBLE: We would check it if we were
24 going to use it as a plaintiff in a suit.

1 MS. SHANKS: The information about the
2 caseload and the Public Defender's Offices not
3 filing appeals, did you get that from a client
4 or from an attorney at the Public Defender's
5 Office?

6 MS. TRIMBLE: From the Chief Public
7 Defender in Albany.

8 MR. FAHEY: Is it a situation in which
9 notices of appeal are not being filed because
10 the appeal is being waived as part of the plea
11 negotiation?

12 MS. TRIMBLE: I can only quote what was
13 said by the Public Defender because I wasn't at
14 that interview.

15 MR. HELLERSTEIN: Were there supposed to
16 be appeals from cases from pleas of guilty or
17 after trial?

18 MS. TRIMBLE: I'm sorry. What was the
19 question?

20 MR. HELLERSTEIN: Did the Public Defenders
21 tell you they didn't appeal cases in which
22 there had been pleas of guilty or they weren't
23 appealing cases in which there was a trial?

24 MS. TRIMBLE: All I know is he said he is

1 not taking any additional appeals.

2 MR. HELLERSTEIN: Whether it is a trial
3 case or plea case?

4 MS. TRIMBLE: You would have to clarify
5 that with the Chief Public Defender in Albany.
6 I apologize.

7 MR. HELLERSTEIN: Thank you.

8 MR. KAMINS: Thank you.

9 MS. TRIMBLE: Thank you.

10 MR. HELLERSTEIN: Ms. Brink. Good
11 morning, Ms. Brink.

12 MS. BRINK: Good morning. I wanted to
13 thank you for giving me the opportunity to
14 speak on this important topic.

15 MR. HELLERSTEIN: Tell us something about
16 the Prison Action Network in New York State.

17 MS. BRINK: I started out as a chaplain at
18 Albany Medical Center and I met a lot of
19 incarcerated people on their secure unit. As a
20 result of my involvement with them, I have
21 become one of the co-founders of an
22 organization called Prison Action Network,
23 which is an advocacy organization for the
24 families of incarcerated people and an advocate

1 of changing some of the things that we feel
2 aren't working in the criminal justice system.

3 And I came here to speak about the people.
4 I speak to a lot of people who are incarcerated
5 or to their family members. And I don't always
6 talk to them about their arrests or subsequent
7 convictions. And for most of them that's not
8 the biggest thing that's on their mind.

9 But an overwhelming number of the people
10 that I speak to are from low-income
11 neighborhoods, and I am assuming that most of
12 them could not afford a private lawyer. Of
13 those I have asked, I can only recall two who
14 were able to hire a private lawyer. One of
15 them was an upper middle class convicted money
16 launderer.

17 80 percent of those accused of crimes in
18 this country can't afford a lawyer to defend
19 them, according to Stephen B. Bright, who is
20 the director of the Southern Center for Human
21 Rights in Atlanta, in an article titled, "The
22 Accused Get What the System Doesn't Pay For."
23 And I have no trouble believing that.

24 I want to acknowledge that from what I

(David Mayo, Official Court Reporter)

1 have read New York State does have one of the
2 better indigent defense systems. So I am happy
3 to hear that. But I think we have a long way
4 to go before I start seeing justice being
5 afforded to people who can't afford to pay for
6 it.

7 And I am not a lawyer, obviously, and I
8 don't understand the problems that the legal
9 system has delivering this care, so I want you
10 to -- I mean, you know that.

11 I am going to speak from the point of view
12 of somebody who knows somebody who has been on
13 the receiving end. I want to tell you about
14 two people who came to mind when I chose to
15 take this opportunity to speak.

16 The most upsetting is a man who has now
17 completed 13 years of a 32-and-1/2-to-65-year
18 sentence for a crime he has never stopped
19 insisting he had nothing, nothing, to do with.
20 He will die in prison because he cannot show
21 remorse to the parole board, and they require
22 that to grant parole. So he will die in prison
23 for a crime he insists he didn't do.

24 He was represented by the Public

1 Defender's Office. Instead of talking him out
2 of testifying at the Grand Jury, his Public
3 Defender simply didn't tell him about it. That
4 he wrote on the notification that he had told
5 him.

6 MR. ZAYES: Miss Brink, do you know what
7 county?

8 MS. BRINK: Albany County. He refused to
9 plea bargain, which was offering him eight
10 years to something. I don't remember the end
11 of that. It was an eight to something. He has
12 done, as I said, 13 years now.

13 He actually did get to speak to his lawyer
14 several times while he was in jail. I have
15 talked to other people who didn't. They maybe
16 spoke to them once for five minutes.

17 I have read the transcript of his trial.
18 It was over 1,100 pages long. And it would
19 make you cry. I guarantee it. You would cry
20 if you have any conscience. It certainly
21 destroyed my confidence in the justice system.

22 Whether this man really is innocent or not
23 could not possibly have been determined by the
24 jury at that trial. What can be determined by

1 anyone who reads that trial transcript, I will
2 be glad to tell you whose it is, was a
3 travesty. The trial was a travesty of justice.

4 The convicted man appealed on grounds of
5 inadequate -- while I want to say it appeared
6 to me that the lawyer either because he didn't
7 want to or he didn't have the time or the money
8 or the support systems to do it, but he seemed
9 clearly unprepared for this case. He seemed to
10 have done no investigations and he didn't
11 challenge any of the prosecuting statements. I
12 was sitting there reading it, ready to
13 challenge them, and I have no lawyer
14 experience. I have never even attended a
15 trial.

16 The convicted man appealed on grounds of
17 inadequate counsel. His entire family pooled
18 all their money to pay for a private lawyer.
19 His appeal was denied. He is paying with his
20 life for the failure of our system to provide
21 adequate counsel for indigent defendants. And
22 we are paying with our tax dollars to keep him
23 in prison, and the real offender may still be
24 free and continuing to harm people.

(David Mayo, Official Court Reporter)

1 MR. HELLERSTEIN: Can I ask you, how do
2 you determine that you believe he is innocent?

3 MS. BRINK: I don't know if he is innocent
4 or guilty. I have read the trial transcript
5 and there is nothing in that that even makes me
6 think that he is guilty. But I don't know. I
7 can't know.

8 I have talked to him. He makes a
9 convincing argument. I see lots of things
10 wrong in the trial that make me think that he
11 is innocent, because there were things there
12 that should have been examined, it seems to me,
13 in order for me to decide whether he was guilty
14 or innocent. There was exculpatory evidence
15 that wasn't admitted into the trial, but I see
16 the medical records. I know it existed.

17 So, you know, I am not equipped to judge
18 whether he was guilty or not, but I think I'm
19 perfectly capable of determining whether he was
20 given a fair trial and whether there was enough
21 evidence presented at that trial to convict
22 him.

23 MR. ROBERTS: Did he ever appeal his
24 conviction?

1 MS. BRINK: I beg your pardon?

2 MR. ROBERTS: Did he ever appeal his
3 conviction?

4 MS. BRINK: Yes. He has spent every
5 single day of his incarceration in the law
6 library presenting 440 motions, I think they
7 are called. He has been working to prove his
8 innocence the entire time.

9 MR. HELLERSTEIN: Can you tell us his
10 name?

11 MS. BRINK: Yes. Willie James Brown. And
12 I have a fact sheet about this case if anybody
13 wants it. I didn't make copies. But, please,
14 we would love to have some attention given to
15 this case.

16 MR. HELLERSTEIN: Certainly, you can leave
17 it with us and we will look at it.

18 MS. BRINK: Thank you very much.

19 MR. HELLERSTEIN: But you have had contact
20 in your operation with more than one defendant,
21 haven't you?

22 MS. BRINK: Yes. And I had a few more
23 things to say.

24 MR. HELLERSTEIN: Just, since we have

1 limitations on our time, focusing specifically
2 on what you heard from defendants who have now
3 been convicted or if you have talked to them or
4 spoken to them before they were convicted, what
5 are they saying about the representation that
6 they got?

7 MS. BRINK: Well, as I have told you, this
8 man, of course, is despairing about the
9 representation he got. Another man I know --
10 they don't talk that much. I haven't had many
11 conversations about their defense. I told you,
12 most people don't talk about that. They are in
13 prison and they are dealing with other issues
14 now.

15 MR. HELLERSTEIN: Our issue is trying to
16 look at the defense system.

17 MS. BRINK: Right. I just had a couple
18 more examples to give you.

19 MS. BAMBERGER: I just want to ask you.
20 Have you interviewed people who have been in
21 prison and are now out on parole or people who
22 were given probation sentences? Have they been
23 part of the group?

24 MS. BRINK: They are people I talked to,

1 but I actually don't focus on interviewing
2 people about the defense that they got.

3 MS. BAMBERGER: No. I am asking this
4 question for a totally different reason. There
5 are laws on the books which allow the probation
6 division and probation departments to collect
7 what are called supervision fees from people
8 who are out on probation or parole. That
9 requires the payment of a \$30-a-month fee.

10 There is a provision in the statute that allows
11 a person to come to court and ask that the fee
12 be waived because of financial hardship.

13 And I just wondered if anybody ever talked
14 to you about those consequences of conviction,
15 because they would be entitled to a lawyer for
16 those proceedings and I wanted to know if that
17 has ever happened.

18 MS. BRINK: No. I never heard of this
19 before. I am going to look into it. Where can
20 I find out more information about it?

21 MS. BAMBERGER: I will give you the
22 statutes.

23 MS. BRINK: Thank you. Do you want me to
24 continue?

1 MR. HELLERSTEIN: If you could address
2 yourself to what you learned about the defense
3 system.

4 MS. BRINK: I will skip telling you
5 further examples and I will tell you my
6 feelings about what could be done about it.

7 You know, I am just me. I don't know that
8 much. I have sat in court. I have watched
9 harried Public Defenders. I have talked to
10 them. I understand a little bit of the
11 pressures they are under.

12 There are so many problems intertwined
13 here that it is hard for me to say what is
14 needed in order to provide a higher quality of
15 service. Certainly more money is needed. I
16 don't know how you can question that. And that
17 breaks my heart because I believe that funding
18 for Social Services is being cut, not expanded,
19 and I think we should all understand the
20 reasons. But I am not here to discuss that.

21 Nevertheless, we need to fund Public
22 Defenders, I think, to a level comparable to
23 the funding of the prosecutor's office. I
24 think citizens should have as much protection

1 from false imprisonment as they do from
2 criminal harm. I want that just as much. I
3 probably want that more, because that's my
4 freedom that can be taken away. My money, my
5 possessions, don't matter to me nearly as much.

6 We need more Public Defenders. We need to
7 pay them more. We need to pay them salaries
8 that are competitive to the salaries of the
9 prosecutors. And they need to have a support
10 network of clerical and investigative
11 assistants. From what I heard, they don't.

12 From the cases I have heard of, I didn't see
13 any investigations done. When I have made
14 inquiries about that, they say they don't have
15 any investigators.

16 I support the concept of a public defense
17 commission which would be independent of
18 political influence. You are probably familiar
19 with Assembly Bill 6908, which calls for the
20 establishment of such a commission. I am sure
21 you know about it. I am not going to take your
22 time telling you about it. But if you don't,
23 you can go to the State Assembly's website.

24 MR. HELLERSTEIN: We are familiar with it.

1 MS. BRINK: I have not had any experience
2 designing service delivery systems, but I have
3 an imagination. And in my imagination
4 preparations for a more equitable criminal
5 justice system and defense system would begin
6 in public school, where I think every student
7 should be taught about the law and the rights
8 and the responsibilities that confers on all of
9 us in a just world.

10 A booklet such as this one, "New York
11 Criminal Procedure, a Basic Community Guide,"
12 put out by the Center for Law and Justice. I
13 hope you are all familiar with it. I think not
14 only should it be used -- something like this,
15 but why reinvent the wheel? I think they did a
16 really good job. I think something like this
17 should be used as a text in school and I think
18 a course should be offered, should be in
19 schools.

20 And I think at the very least, because we
21 are not going to get more money and we are not
22 going to get more Public Defenders very
23 quickly, I think at the least when Public
24 Defenders meet their clients for the first time

(David Mayo, Official Court Reporter)

1 they should give them this book and I think the
2 Judge should mandate time for them to read this
3 before they proceed any further, because the
4 people I know that I have talked to, I don't
5 think they would be in prison today if they
6 understood their rights to begin with. And
7 their Public Defenders definitely did not have
8 time to give them a course in what their rights
9 were.

10 MR. HELLERSTEIN: Thank you.

11 MS. BRINK: I think I have probably said
12 all you need to hear.

13 MR. HELLERSTEIN: Yes. Thank you.

14 MS. BRINK: You're welcome. With whom
15 shall I leave this fact sheet?

16 MR. HELLERSTEIN: I will take it. Leave
17 it near the table. That lady.

18 MS. BRINK: Did you want to see a copy of
19 this book?

20 MR. HELLERSTEIN: Is that your only copy?

21 MS. BRINK: Yes, it is.

22 MR. HELLERSTEIN: Well, then, no.

23 Mr. Kindlon.

24 MR. KINDLON: Good morning, Judge Roberts,

1 Mr. Hellerstein, members of the committee. I
2 would like to thank you for the privilege of
3 addressing you and for the opportunity to see
4 my wife, who has been working on the committee
5 and things at the law school, has been out
6 working almost continuously.

7 And by way of full disclosure, I must
8 advise you that I am married to Laurie Shanks,
9 who is a member of this committee and the
10 mother of our brilliant children.

11 (Laughter)

12 MR. KINDLON: A few words on my background
13 and experience. I am a criminal defense
14 lawyer. I have been at it for 32 years now.
15 My practice is both state and federal, trial
16 and appeal.

17 In my past I had the opportunity to work
18 for the Albany County District Attorney when I
19 was a law student. After my graduation I was
20 an Assistant Public Defender here for ten
21 years.

22 In the years since then it was my
23 privilege to be certified in capital defense,
24 both in the state courts and in the federal

(David Mayo, Official Court Reporter)

1 courts. And, in fact, I defended the very
2 first capital case that was brought in Albany
3 County under our now defunct law. And I hope I
4 defended the last death penalty case that was
5 brought in the Northern District of New York
6 about a year and a half ago.

7 After I left the Public Defender's Office
8 I continued to do 18-b work because I have
9 always believed that it is important that
10 lawyers who know about criminal law do that. I
11 stopped taking 18-b cases after I was involved
12 in a matter called People against Paul Palmer
13 in Rensselaer County. Judge M. Andrew Dwyer,
14 who was a national treasurer -- I don't know if
15 you knew him, but he was a wonderful guy and a
16 great Judge, asked me to defend a guy named
17 Paul Palmer. It was a five-week murder trial.
18 Mr. Palmer was acquitted of the murder,
19 convicted of some lesser-included offenses.
20 And when I submitted my voucher under the old
21 rate schedule it came to \$12,000, for five
22 weeks of trial, which is to say a big hunk of a
23 year.

24 Judge Dwyer called me up on the phone and

1 said, "Hey, Terry, this is kind of stiff. Can
2 I knock a couple grand off?" And I said, "Yes,
3 sir. Whatever you want to do."

4 He cut it down to \$10,000 and the County
5 of Rensselaer would not pay it, which led to a
6 case called Kindlon v. The County of
7 Rensselaer, 158 AD 2d, which went actually all
8 the way to the Court of Appeals and I won. I
9 got my \$10,000. When I did the math I figured
10 it worked out to about \$3.25 an hour, which is
11 less than I made in high school sweeping
12 floors.

13 Thereafter, I decided that it just wasn't
14 worth the hassle, but we have continued to take
15 cases pro bono. What you may not know is that
16 Laurie took a murder case eight or nine years
17 ago, People v. Marcina Dean, pro bono. And I'm
18 happy to say that her client was found not
19 guilty. And other people in our office
20 continue to do that. So we have very strong
21 feelings about indigent defense.

22 And my practice these days covers a lot of
23 Upstate New York. I don't know, and I say this
24 to Judge Roberts especially and to those of you

1 from the City, I don't know the first thing
2 about how things work in New York City. It is
3 a different world. I do know that. And,
4 consequently, I am going to restrict my
5 comments and observations to things that I have
6 seen in the other 57 counties in New York
7 State, where things are different from the way
8 that they work in the City.

9 Here is my belief. And I just heard the
10 last couple of speakers here complaining about
11 Public Defenders, and there certainly are
12 things to be complained about. There is no
13 question about that. However, and we can't
14 lose sight of this, most of the people, the
15 vast majority of the people who do public
16 defense, are talented and dedicated and very
17 sincere about the work that they do, be they in
18 Public Defender's Offices, assigned counsel
19 plans, or operating under 18-b.

20 So it's not the people who are the
21 problem. Some of the very best trial lawyers
22 that I know, some of the best criminal defense
23 lawyers that I know personally, are Public
24 Defenders. I think many of you know Ray Kelly.

(David Mayo, Official Court Reporter)

1 He will be here later today, according to my
2 schedule. I think some of you may know Gaspar
3 Castillo. These guys, honestly, are brilliant
4 lawyers. They are dedicated. The things that
5 they do for their clients are just
6 breathtaking. And I think that's not unusual
7 in this world of public defense.

8 The problem, as I see it, is in the way it
9 is structured and in the way the services are
10 delivered. I wanted to say it is a poorly
11 designed system, and then I realized that's not
12 a good way to describe it because it is not a
13 system and it doesn't have any design.

14 What happened is that way back when, in
15 the sixties, Public Defenders or 18-b panels
16 were created and they all just kind of evolved.
17 And sometimes they were infected with local
18 politics and sometimes they were sort of
19 neglected and just allowed to roll on.

20 Even though they attracted good people,
21 because of the way they were set up and because
22 of the general lack of resources and funding,
23 they just don't work that well, haven't worked
24 that well. And when they do work well, which

(David Mayo, Official Court Reporter)

1 happens often, it is because of the people who
2 are within the system who unselfishly zealously
3 go above and beyond the call of duty and just
4 knock themselves out to do a good job for their
5 clients.

6 And it happens all the time. It happens
7 all the time. We hang around courthouses. We
8 know this. We go to court. We see these
9 people who are working, some of them with holes
10 in their shoes, usually driving old
11 Volkswagens, or what have you, but doing the
12 best they can and doing frequently quite well.
13 But the system is desperately in need of help.

14 Throughout Upstate New York we have a real
15 lack of organization, a tremendous lack of
16 resources. I was talking to Mark Montayne.
17 Nice guy. Public Defender from Essex County.
18 Essex County, up where Lake Placid is. I think
19 it's approximately the size of Rhode Island.
20 It is a gigantic county geographically.

21 I talked to Mark last week, and Mark told
22 me that for quite some period of time he was
23 the only Public Defender in Essex County. That
24 is ludicrous. It takes three and a half or

(David Mayo, Official Court Reporter)

1 four hours in a fast car to drive from one
2 corner of Essex County to the other. And here
3 is this guy who has responsibility for the
4 whole thing. That's crazy. It can't result in
5 a fair system.

6 There is some good training available.
7 Jonathan Gradess and the New York Defenders
8 provide some good training for public defense
9 lawyers, but it is not required. If you want
10 to go, you can. If you don't want to go, you
11 don't have to. If you don't know about it
12 because you are working too hard, because you
13 are working seven days a week, you haven't got
14 time to go, you don't go.

15 And I think as a consequence, taken as a
16 whole, indigent defendants are not receiving
17 the quality of legal representation, taken as a
18 whole, to which they are constitutionally
19 entitled.

20 Now, my son, Lee Kindlon, is a lawyer. He
21 is about to turn 29. He is a captain in the
22 Marine Corps. He is stationed down in North
23 Carolina. And he said something to me the last
24 time I saw him which struck me as sort of a

(David Mayo, Official Court Reporter)

1 rule we all should live by. He said that the
2 Marines have a saying that the integrity of
3 their justice system depends upon the quality
4 of the defense and the quality of the defense
5 lawyers. Good defense lawyers keep prosecutors
6 honest, and that ensures that just results
7 occur.

8 And, obviously, in order to make this work
9 we have to have that same high quality of
10 defense. In my humble opinion, the ideal
11 solution to the problem is to have a statewide
12 Public Defender, such as they have in Kentucky
13 or New Hampshire. They have one office. There
14 is a head Public Defender. That individual is
15 responsible for placing Assistant Public
16 Defenders where they can do the most good, for
17 providing services, for providing research, for
18 providing training.

19 And you go to Kentucky. We New Yorkers,
20 we say, Kentucky, you know, you think of Daniel
21 Boone or somebody. The fact of the matter is
22 you go down to Kentucky and it is astonishing
23 to see the incredibly high quality of the
24 public defense services that are delivered

(David Mayo, Official Court Reporter)

1 there.

2 Or you think about New Hampshire. New
3 Hampshire, they are pretty cheap in New
4 Hampshire. Let's face it. No state sales tax.
5 I bought a soda last time I was in New
6 Hampshire and I got so much money back I
7 couldn't believe it. No bottle deposit; no
8 sales tax. But they have this wonderful Public
9 Defender's Office there.

10 And the reason I got to meet them was
11 because Laurie, who lectures around the
12 country, gave a talk on a certain kind of
13 cross-examination to their group. And they had
14 all assembled. Everybody from throughout the
15 state had assembled in one place and they spent
16 a couple days in retreat just doing continuing
17 legal education. But this is New York, and the
18 likelihood of our having a statewide Public
19 Defender is probably pretty slim.

20 So being a little bit more realistic, I
21 would like to respectfully suggest that we have
22 statewide standards, that they be published and
23 that they be made well known to everybody who
24 is engaged in the art of public defense. And I

(David Mayo, Official Court Reporter)

1 think that we have sitting right here before
2 our very eyes the most incredibly simple
3 solution to having an effective statewide
4 system and we should take advantage of it.

5 When we brought the death penalty back in
6 1995, one of the things that Article 35B of the
7 Judiciary Law did was it created the State
8 Capital Defender Office. That office was
9 staffed with some of the best lawyers, many of
10 the best lawyers, I have ever met.

11 Kevin Doyle is a Public Defender.
12 Brilliant lawyer. Here in Albany, Barry
13 Fisher, who I understand was first at his class
14 at Harvard undergrad and law school, both; one
15 of those guys. And then when he graduated and
16 could probably step into a job that would be
17 paying him, ten years out, a couple million
18 bucks a year, what he did when he graduated was
19 he went down to Mississippi to work for the
20 indigent defense project doing death penalty
21 work down in Mississippi.

22 These are the kind of guys that we have in
23 the Capital Defenders Office right now. And,
24 of course, as you may or may not know, the

1 Governor saw to it that their funding was
2 pulled. They are about to be cut back to 30
3 percent of their budget, which means they are
4 basically going to wither pretty soon. They
5 have offices throughout New York State.

6 When I trained in capital defense the
7 first thing that I had to do -- and many of us
8 fortunate enough to have that training back in
9 '95 or '96, we went to training sessions that
10 were run by Kevin Doyle, Barry Fisher, and
11 people from around the country who were
12 knowledgeable about capital defense work. The
13 quality of the training that we received there
14 was unparalleled. It was incredible, it was
15 intense, and it was extremely effective.

16 I felt it created among those of us who
17 had the benefit of that training a whole new
18 way of looking at criminal law, a whole new
19 understanding and appreciation of research, a
20 whole new grasp of the importance of doing a
21 good investigation. And I think it raised our
22 zeal level, so to speak, by about 100 percent.

23 Now, what is about to happen here is that
24 because the funding has been pulled, because

1 the death penalty seems to be gone, is that the
2 Capital Defender's Office is going to dry up
3 and blow away, and that's crazy. That
4 shouldn't be allowed to happen, especially at a
5 time when we are trying to figure out how to
6 solve difficulties with public defense
7 throughout New York State.

8 So I say, why don't we take the Capital
9 Defender Office and use that as a nucleus for a
10 statewide system that's analogous to what we do
11 for capital defense? Why don't we make the
12 capital defense lawyers, starring Kevin Doyle
13 and Barry Fisher and Mark Harris and the guys
14 from Rochester and the other people from New
15 York City, why don't we make them the brain of
16 this nervous system that we have to spread
17 throughout New York State and why don't we put
18 them in charge of training and supervision?
19 Why don't we then contemporaneously with that
20 create a system where resources are made
21 available to all public defense lawyers
22 throughout New York State?

23 You know, every single county reinvents
24 the wheel all the time. A guy does a motion to

1 suppress up in Essex County and somebody else
2 may be doing the exact same motion out in
3 Monroe County and they are not talking to each
4 other. That's crazy. That's incredibly
5 inefficient. And it has to cost twice as much
6 to do it twice as it costs to do it once.

7 And why can't you share the resources?
8 And what better means of doing so is there than
9 to use a system which is already in place but
10 now has lost its main focus and purpose? The
11 statewide Capital Defender Office is readily
12 available. It's there. The lawyers are in
13 place. Their kids are in school. Their
14 parking spots are reserved. They are all set
15 to go. Why waste them, especially since what
16 happens if two years from now the death penalty
17 comes back and we have no Capital Defender
18 Office? What do we do then? They're gone.
19 And it would be a crazy neglect of a very
20 valuable resource.

21 I do think also, and I have to emphasize
22 this, that some kind of mandatory training has
23 to become necessary. When I finished law
24 school and went to work as a Public Defender, I

(David Mayo, Official Court Reporter)

1 was given the advice to go to court and make
2 noise like a lawyer and then had to train
3 myself to be a Public Defender.

4 Now, again, we New Yorkers know about
5 people out in the sticks and how they are
6 nowhere near as sophisticated as we are, but
7 when I met Laurie Shanks, her job was to be the
8 training director for the Maricopa County,
9 which is to say Phoenix, Arizona, the Maricopa
10 County Public Defender's Office. And they had
11 an organized program that was ongoing and
12 continual, highly sophisticated and effective.
13 That may be why the name of that famous case is
14 Miranda v. Arizona instead of Smith v. New
15 York. Think about it.

16 That's pretty much everything I have to
17 say on this subject. There is something else
18 that's critically important, and that's this.
19 Use your influence to get the Legislature to
20 give us some decent discovery rules. You know,
21 you make a demand for discovery and a request
22 for bill of particulars and if you are lucky
23 the prosecutor gives you a nice bread sandwich.
24 Nothing. You get nothing. You have to beg and

(David Mayo, Official Court Reporter)

1 scrape and plead, and at the end of the day you
2 have nothing. That's crazy.

3 MR. GOLDMAN: Mr. Kindlon, let me ask you
4 this question. One of our issues is funding,
5 and we are looking for ways to fund better
6 indigent criminal defense services. You, with
7 a great deal of experience.

8 If there was, let's say, not necessarily
9 totally open discovery but reasonable, early,
10 full discovery, with an exception of special
11 circumstances, victims presumably in danger,
12 what percentage of your time would you say
13 would be saved?

14 MR. KINDLON: I bet you 40 percent. I had
15 a case this morning. I came to a conference.
16 The DA made an offer. It was a drug case. It
17 is a simple drug case; a sale. And the
18 District Attorney said there are photographs
19 and there is a tape recording of a telephone
20 call that set it up, and the undercover
21 informant was wearing a body wire and there is
22 a recording of that.

23 And I said, "Great. Can I hear them?" "I
24 don't have them," said the DA. So why are we

1 here? Because now what this means is that in
2 order to do my job properly, I have got to hear
3 the tape. I have to know it exists.

4 And what that means is that this case,
5 which could have very easily resolved this
6 morning, is going to be ongoing for at least
7 another two weeks, maybe longer. You multiply
8 that times as many times as it happens, and all
9 of a sudden you are looking at a gigantic
10 amount of wasted time.

11 And, of course, there is a Judge involved
12 in this. There are two lawyers involved in
13 this. There are court personnel. And all that
14 multiplier effect kicks in.

15 My experience has been that with those --
16 and there are some District Attorney's Offices
17 up here, in the Upstate part of New York --
18 Fulton County is a good example. You go to a
19 conference and the DA says, "Here is my file.
20 What do you need?" And those cases get
21 resolved much more quickly and much more
22 satisfactorily for all concerned.

23 I think to have to depend upon the
24 nobility of a specific prosecutor is a tough

(David Mayo, Official Court Reporter)

1 way to do business when you are trying to
2 standardize things. And I think if we had more
3 realistic discovery -- actually, I spent some
4 time once. I had a case that went up to the
5 Court of Appeals and I had to go up and dig
6 around in the State Library in the stacks and
7 look at the old typewritten version of the CPL,
8 with the blue pencil on it. It was very
9 interesting.

10 Most of the guys who put that together
11 were prosecutors. And it also came from an era
12 when discovery was next to non-existent,
13 anyway. And I think that we really need to
14 modernize it and make it more like you get in
15 Federal Court.

16 Yes, sir?

17 MR. JACOBS: Mr. Kindlon, you mentioned
18 the Capital Defender Office as a model and the
19 pending cuts to that office. You also said you
20 have familiarity from being on the panels.

21 Do you have a view of what funding level
22 is necessary to keep that office functional
23 through the period of this sort of, I guess,
24 somewhat of a twilight period where there are

1 still cases pending, there is a case in the
2 Court of Appeals?

3 MR. KINDLON: I don't think I'm qualified
4 to answer that question. I wish I were. I do
5 know they are being cut back to 30 percent and
6 I know that that's going to have a devastating
7 impact on the office. People are going to have
8 to leave.

9 And these are lawyers who, when they
10 leave, since they do capital defense, they will
11 probably leave New York State and go to states
12 where capital defense is being done. And we
13 are not going to get them back, because they
14 are going to have enroll their kids in some
15 nice school in Virginia and we are never going
16 to see them again. And if we suddenly are
17 confronted by the death penalty in New York
18 State -- we have very strong feelings about the
19 death penalty in my family. My father's cousin
20 got the chair in 1923, and I've got the
21 newspaper clippings to prove it.

22 But if we lose them and we get the death
23 penalty back here we are going to have to start
24 all over again. And I will bet you a nickel if

(David Mayo, Official Court Reporter)

1 we have to start all over again we are not
2 going to be anywhere near as well set up the
3 next time as we were the first time, and that
4 would be tragic.

5 But I do think, I do think, and I cannot
6 overemphasize this, I think that you have the
7 framework in that Capital Defender Office of a
8 magnificent statewide public defense system and
9 it would just be really thoughtless to not make
10 full use of that.

11 MR. ZEIDMAN: Just to take advantage of
12 your experience, both as a private practitioner
13 and the decade you spent as a Public Defender.

14 We have been hearing throughout the
15 hearings of plea rates and trial rates. And it
16 is becoming, I think, pretty apparent, at least
17 to some of us, that Public Defender's Offices
18 seem to have much higher, substantially higher
19 plea rates than the private bar.

20 Two questions. One, I am wondering, in
21 your experience, what you think of the factors
22 that contribute to that; and secondly, what, if
23 anything, can we do by way of standards to
24 perhaps try to address that?

1 MR. KINDLON: Okay. I think the biggest
2 problem that you have is that Public Defenders
3 have way too many cases and way too few
4 resources.

5 The most important resource that I have in
6 my private practice is a good investigator. I
7 have a retired cop, a retired Irish cop. He is
8 from central casting. The guy is wonderful.
9 Gary O'Connor is his name. He is a great guy.
10 He can perform miracles.

11 Gary has been the key to our success in
12 private practice in case after case after case.
13 He finds witnesses that the police missed or
14 that we otherwise would not be able to find.

15 Public Defender Offices need that kind of
16 a resource. They need investigators. Let's
17 face it. We are lawyers, but when we go to
18 trial we are dealing with facts, for the most
19 part, and you have to have the facts. And if
20 you can't get access to the facts, then you
21 really can't do a good job.

22 What was the other part of your question?

23 MR. ZEIDMAN: It was by way of standards.
24 We are trying to think of performance

1 standards.

2 There is some discussion that we should
3 have statewide standards for indigent
4 defendants, but how do you capture the
5 complaints of so many of every study of
6 consumers and defendants who say, "All my
7 Public Defender basically said was plead
8 guilty, plead guilty"?

9 MR. KINDLON: Well, I have seen lawyers,
10 people I know to be magnificent lawyers, and
11 they are in situations where they have five to
12 ten times too many cases. Laurie and I knew
13 the Public Defender in Washington, D.C. What
14 was her name?

15 MS. SHANKS: Kim Taylor.

16 MR. KINDLON: Kim Taylor. Kim Taylor.
17 Maybe 15, 20 years ago, she was the Public
18 Defender in Washington D.C. And, of course,
19 their local court, it is federal but it is
20 really like a state court.

21 And Kim had a wonderful office, but they
22 had a rule there. They hit a certain number of
23 cases and that was it. We are done. Send them
24 out to the assigned counsel list.

1 Here there is no limit. And, of course,
2 you know what happened. When the rates were
3 raised, especially Upstate, and I don't know
4 about Downstate, but I know Upstate what
5 happened was that the 18-b lists were
6 essentially shut down and profoundly
7 underfunded. Public Defender offices were used
8 as the replacement.

9 I was talking to Mark Montayne. Nice guy.
10 Real hard charger from up in Essex County. And
11 here he has this county the size of Idaho.
12 This county, a giant, giant county. It has
13 mountains in it. So it is hard to get around
14 up there, especially in the wintertime. People
15 disappear. I'm not joking. In the wintertime
16 the roads get icy and forget it. He has
17 Saranac. He has Lake Placid. Vast distances.
18 Mountains, snow, you name it.

19 And for a long time he is in this all by
20 himself. He couldn't even get -- he has a
21 little, tiny closet of an office. What on
22 earth is he supposed to do? What is he
23 supposed to do? It's impossible. And that's a
24 rural example.

(David Mayo, Official Court Reporter)

1 I know that in an urban setting, you take
2 Utica or Rochester or Syracuse or someplace, if
3 you have too many cases, I don't care if you
4 are Johnnie Cochran or Oliver Wendell Holmes,
5 there is only so much you can do. And if you
6 are overwhelmed by work, you are not going to
7 do a good job. We all know that. That's why
8 we have to have either an expansion of the
9 assigned counsel lists or bigger Public
10 Defender's Offices, a more efficient way of
11 doing things.

12 Because Larry Goldman's question, my
13 answer to Larry's question, if you have to go
14 back to court four times on a case that you
15 should have gone to court once on, you are
16 wasting all your time. And --

17 MR. HELLERSTEIN: Mr. Kindlon, I hate to
18 cut you off. We are really running very late.

19 MR. KINDLON: I'm sorry.

20 MR. HELLERSTEIN: And I hate to assert the
21 prerogative as co-chair.

22 MR. KINDLON: I'm sorry. I wasn't paying
23 attention. I want to thank you for my 15
24 minutes of fame. It has been a pleasure.

1 MR. HELLERSTEIN: Thank you.

2 Mr. Kouray.

3 MR. KOURAY: Good morning. Terry, thank
4 you. I have a disorderly conduct case I have
5 to try for the Conflict Defender's Office in an
6 hour.

7 MR. KINDLON: Steve is one of the Public
8 Defenders I was telling you about who is really
9 good at what he does.

10 MR. KOURAY: Thank you, Terry. My name is
11 Steve Kouray. I'm the Schenectady County
12 Conflict Defender.

13 A little bit about my life, my career. I
14 have been a lawyer 29 years. Always practiced
15 in Schenectady County, with my parents
16 primarily. Started as an Assistant DA. After
17 four years my father told me, "Stop having fun.
18 You have to come and work for us now." Got on
19 the assigned counsel plan.

20 One thing I have noticed about Schenectady
21 County, where I practice, we are a very
22 reactionary county. When they raised the rates
23 for assigned counsel, which when I was there
24 was \$15 and \$10 an hour, when they raised it,

1 they created a Public Defender Office, looking
2 to save money.

3 And I have been very lucky. I was a
4 member of that office for 16 years. When the
5 rates just went up to \$75, another reaction, we
6 have to create a Conflict Defender's Office.
7 We started on July 1.

8 When I first saw the plan for the Conflict
9 Defender Office of Schenectady County I told
10 them they were crazy. When I saw what the plan
11 was, you have two part-time lawyers -- and
12 thank God we are a small geographic county.
13 Other than Putnam County I think we are the
14 second smallest county geographically.

15 When I saw what the plan was, two
16 part-time attorneys for the local criminal
17 courts, City Court, County Court. For Family
18 Court, which has two full-time Family Court
19 Judges and two support magistrates, I have one
20 part-time attorney.

21 I was told, when I kept an open mind about
22 this, well, your caseload should be no more
23 than 400, 450, tops. We started on July 1st of
24 this year. And, you know, the first couple

1 weeks we had no office space. That was all
2 right. We were able to function out of our own
3 offices. But we are at 423. We have another
4 two months to go. So I know we are way over.
5 I have been bugging them, my Legislature, for
6 the past several months. I need a full-time
7 attorney for Family Court. One part-time
8 attorney just doesn't cut it.

9 MR. ZEIDMAN: Is that 423 pending matters?

10 MR. KOURAY: No.

11 MR. ZEIDMAN: How many are pending?

12 MR. KOURAY: I can subtract. We have
13 pending 155 right now. 155 right now.

14 MS. BAMBERGER: So you have one part-time
15 lawyer?

16 MR. KOURAY: For Family Court, yes.

17 MS. BAMBERGER: With 153 cases?

18 MR. KOURAY: No. He has about 85 cases
19 right now. Part-time, two Judges. It is
20 impossible. It is possible.

21 MS. SHANKS: Do they all have private
22 practices?

23 MR. KOURAY: Yes, we all have our private
24 practices. I am not a micromanager. I am

1 lucky with my county in this respect. They
2 gave me the freedom pretty much to pick who --
3 you know, we are a democratically controlled
4 county. Obviously, I'm a democrat. But they
5 allowed me to pick and choose the staff that I
6 have.

7 I have my deputy who works under me in the
8 criminal courts. Brian is a Republican
9 committeeman. I got a little flak about that,
10 but he is an excellent attorney. I am glad to
11 have him.

12 Family Court, I have Bruce Trachtenberg,
13 who has been a lawyer about 25, 26 years, who
14 practices exclusively in Family Court.

15 I told the county and I told Family Court,
16 "Look, I haven't been in Family Court in 20
17 years. For me to go there is malpractice. So
18 if you want more lawyers for Family Court, you
19 have to spend the money."

20 The observations I have made -- you talk
21 about statewide standards. I do believe that
22 there have to be some minimum statewide
23 standards, especially in the areas of training,
24 education and some oversight. Every county is

1 different. You have 62 counties. They all
2 have their own unique problems and Judges and
3 idiosyncrasies. To make it a uniform statewide
4 system, I don't necessarily agree with Terry on
5 that, but definitely there has to be some kind
6 of minimums or standards that are set.

7 MR. ZAYES: Why don't you agree with the
8 statewide system, assuming that your office
9 would be the conflict office even in a
10 statewide system?

11 MR. KOURAY: Right. The problem I have is
12 because each county has our own individual
13 Judges. I just don't believe you can apply --

14 MR. ZAYES: What if the statewide system
15 employs local attorneys to run the local
16 offices?

17 MR. KOURAY: I don't have a problem with
18 that. The problem is you have a Legislature
19 that you have to deal with. It has been a real
20 problem for us with our Legislature. One of
21 the things I dread and I worry about, I want to
22 discuss this --

23 MR. ZAYES: Isn't this a good thing?

24 MR. KOURAY: If the money was there, yes,

1 I would agree.

2 MR. ZAYES: Lawyers don't have to deal
3 with the Legislature.

4 MR. KOURAY: That would be nice. The
5 thing I worry about, I know there is going to
6 come a time or a case -- and my philosophy is I
7 don't care what it costs to defend somebody
8 adequately. And I know there is going to come
9 a case where I am going to need experts.

10 I have been lucky so far. The county
11 allows me \$10,000 a year for experts in all the
12 fields. That day is going to come when I am
13 going to need more than \$10,000. It is just a
14 matter of time. I'm surprised it hasn't
15 happened yet.

16 So to answer your question, with state
17 funding can I take the county legislature out
18 of it? Because it is a problem for me to get
19 help. I would agree with that.

20 MS. SHANKS: Can you tell us the pay scale
21 in your office? When you say that you need a
22 full-time person and if Mr. Tractenberg were to
23 be made full-time, would you then tell him that
24 he could not have outside practice? And what

1 would that mean to you in terms of your pay
2 scale?

3 MR. KOURAY: He would quit. My deputies
4 are paid \$41,000 a year. I am paid \$53,000 a
5 year. I am asking for a full-time Family Court
6 attorney. She just passed the bar exam. I am
7 very fortunate she had a practice order and she
8 trained under me when I was doing the night
9 courts. And she is very competent. Very
10 bright. She has a great future. I am trying
11 to get the county to at least get her started
12 at \$45,000 a year. I am getting a lot of
13 resistance about it.

14 MR. ZEIDMAN: How many hours a week would
15 you estimate that is?

16 MR. KOURAY: I am not a micromanager. I
17 tell both Brian and Bruce, I say, "Look, guys.
18 You are lawyers. Whatever it takes to get the
19 job done. It doesn't matter. Some weeks you
20 are going to have a good week where you are not
21 going to have to work terribly hard."

22 When I am trying a case, which I did in
23 County Court last month with Judge Giordino,
24 that week I probably spent 75, 80 hours on a

1 Conflict Defender case. I try to say at a
2 minimum you should be working and the county
3 expects about 30, 32 hours a week.

4 MR. ZEIDMAN: And if you had your
5 druthers, if you were able to set up a system
6 -- and I am trying to think. Picking up on
7 Judge Bamberger's question. If there was an
8 opportunity to have one full-time person or two
9 additional part-time, do you have a preference
10 for full-time or part-time work?

11 MR. KOURAY: My reaction to that is I
12 would probably prefer part-time because I get a
13 more experienced attorney. I mean, that would
14 be my initial instinct right when I hear that
15 question put to me. The problem, if they are
16 not available, I would take a new full-time
17 attorney.

18 MR. HELLERSTEIN: Mr. Kouray, when you say
19 you disagree with Mr. Kindlon, was your
20 disagreement based on the fact that you can't
21 think other than within the county legislative
22 system? In other words, is that because you
23 are working within the system and you don't
24 think it is realistic that that change could

1 occur, or do you have a problem with a
2 statewide Public Defender that is state funded
3 and goes from top down and perhaps employs on a
4 regional basis, benefitting from the local
5 connection, but nonetheless is part of a
6 statewide system?

7 MR. KOURAY: Professor, I don't see a
8 problem with the statewide system. The only
9 thing that kind of concerns me is I know how
10 each county -- I mean, Albany County and
11 Schenectady County are like night and day. We
12 really are.

13 I like the idea that a statewide defense
14 system, where we could all draw off and use the
15 resources -- as part of the Defenders
16 Association, I love when I get the newsletters
17 they send. It is fantastic. You can't get
18 that otherwise.

19 MR. HELLERSTEIN: When you say the
20 counties, between Albany and Schenectady, that
21 would seem to me to suggest that it would
22 filter down to delivery of defense attorneys.
23 It would also be disparate based on the
24 counties. And that would be unacceptable,

(David Mayo, Official Court Reporter)

1 wouldn't it?

2 MR. KOURAY: I would agree with that. The
3 state should have A, minimum standards; B,
4 minimum expenditure, minimum levels of
5 staffing. It is a problem that I have. It is
6 just too much left to the counties presently.
7 I do appreciate that each county is different,
8 as Terry said. New York City, that's a whole
9 different world. I wouldn't have a clue about
10 that. I can only speak, Professor, from my
11 experience in my home county, where I have been
12 all my life.

13 I have listened to a lot of other speakers
14 talk about delays and prolonged incarcerations.
15 Two what I would say pet peeves that I have,
16 just to relate some experiences that I have. I
17 think Terry mentioned a very good point about
18 the discovery process in New York. I mean, in
19 our county it is almost, in my line, not
20 existent.

21 I had a case where a fellow has been
22 incarcerated for a robbery that occurred in
23 January of 2004. He is scheduled for trial
24 with a Public Defender, day certain. He didn't

1 wait longer than anyone else who was
2 incarcerated, but ready for trial September 10.

3 The day of the trial, before they bring
4 the jury panel in, they exchange the witness
5 list at that point. Public Defender takes one
6 look at that witness list, sees that the
7 complaining witness, victim, is a client that
8 he represented in August of 2004 in the
9 Rotterdam Town Court.

10 This poor kid -- Judge goes crazy when he
11 hears that. They have to obviously adjourn his
12 trial. He is stuck in jail. I tried his case
13 a month later.

14 But that's one of the problems that we
15 have there, where there is not a quick
16 determination that a conflict does, in fact,
17 exist. I have seen that happen as a Conflict
18 Defender.

19 One of the other problems that we have --
20 yes, sir?

21 MR. GOLDMAN: Let me ask you. I am trying
22 to get an idea of cost savings. If you got
23 quick, early, full discovery, what percentage
24 of your time do you think you would save?

1 MR. KOURAY: I think if they just told the
2 victim in this case is so-and-so --

3 MR. GOLDMAN: That's an extreme case. The
4 average case.

5 MR. KOURAY: Okay. The average case. A
6 lot of times we do have voluntary disclosure,
7 but it's what the DA wants to give you.
8 Normally, in County Court, in Schenectady
9 County, we will sign on arraignment a voluntary
10 disclosure agreement. And usually within two
11 to three weeks we get a pretty good -- they do
12 give us quite a bit of information. I
13 immediately go over with my client, discuss
14 with them, here is what your case is about.
15 And they do it within the 45-day time period
16 for us to file really an intelligent and an
17 adequate motion.

18 MR. GOLDMAN: Have you done work in other
19 counties?

20 MR. KOURAY: Yes, I have; Saratoga,
21 Montgomery.

22 MR. GOLDMAN: Compared to that type of
23 voluntary, I put that in quotes, voluntary
24 discovery and other times you have to go

1 through the motion process, what is the
2 difference in cost, if you could estimate?

3 MR. KOURAY: The difference in cost?

4 MR. GOLDMAN: In time.

5 MR. KOURAY: In time? To go through the
6 formal motion practice, discovery process, I
7 think that really, with voluntary disclosure,
8 you can move a case quicker by at least three
9 to four weeks, right there, right off the rip,
10 because it opens up. You know what they have
11 got. You can talk intelligently about a case.

12 I mean, a lot of problems that we have
13 sometimes is when we -- in Schenectady County
14 we file our motions. The Judge will make a
15 decision and the Judge does two things; set up
16 any hearing date but also sets up a conference
17 date.

18 A lot of times -- and this is just the
19 other area where there is a problem, is with
20 policy. The District Attorney in our county
21 has a policy that anybody caught now with a
22 loaded firearm has to do at least three years
23 in a state correctional facility. That's the
24 policy.

1 The conference is very quick. I have a
2 16-year-old client who is with her boyfriend.
3 They were rifling through cars in the Town of
4 Rotterdam. In the car, somebody leaves the gun
5 in there. Why he does that I will never know.
6 But they get stopped, arrested. In the car is
7 the gun. There is the automobile presumption.

8 Her offer, no priors, 16 years old, three
9 years determinate state prison. Obviously, not
10 a very productive conference.

11 MS. BAMBERGER: How long does it take or
12 do you find that there is difficulty in the
13 District Attorney getting police records, 911
14 tapes, documents that are first in the custody
15 of local police or whatever?

16 MR. KOURAY: I find in our county it is
17 usually not a very big problem. It is just
18 getting it. They are pretty good about it. I
19 have to say that. The sooner they get it, the
20 sooner we can do something constructively.

21 One thing that absolutely drives me crazy,
22 though, I will relate this to you, we have a
23 person who is arrested in a local criminal
24 court on a felony complaint. Preliminary

1 hearing is set for six days, within the 144
2 hours. District Attorney presents the case to
3 the Grand Jury. They give you a piece of paper
4 in Police Court, usually the day of your
5 preliminary hearing. Too bad. We voted an
6 indictment against your client.

7 Now they have, like, two and a half months
8 before they bring this poor client into County
9 Court to be arraigned on that indictment that
10 they said two and a half months ago, "We did
11 vote an indictment against you." What drives
12 me crazy as a private attorney, as well,
13 clients will call me. They are sitting in jail
14 because local criminal court set bail, \$20,000,
15 which no way they are going to make it.

16 MR. ZAYES: Why does it take two and a
17 half months to get that into County or Supreme
18 Court?

19 MR. KOURAY: I have no idea. The District
20 Attorney, they have met their statutory
21 obligation. In the old days when I was an
22 Assistant DA not only did you have to vote the
23 indictment but you had to report it out and
24 arraign the defendant in County Court. But

1 they do have that 90-day window. What really
2 is frustrating to me is a client will call me,
3 "What's happening in my case?" And it's the
4 same answer. "Well, they voted an indictment
5 against you. Hopefully, it will be reported
6 out next week." That's a real problem.

7 MS. BAMBERGER: So they don't file the
8 indictment? Get it but not file it?

9 MR. KOURAY: They vote it, but they don't
10 report it out so a defendant can be brought
11 into County Court and be arraigned and get the
12 process going.

13 In fact, yesterday, Schenectady County
14 Court, there was somebody where they didn't
15 even vote an indictment within 45 days. That
16 person was released on his own recognizance
17 yesterday. But he spent 45 days in jail.

18 MS. BAMBERGER: If there was some other
19 systemic change in the process that would
20 reduce the time and cost of the defense
21 representation, because this is going to be a
22 factor on whatever we propose, like changing
23 discovery rules, is there something else that
24 would help that?

1 MR. KOURAY: Yes. It is very simple, in
2 my mind. Go back to what the existing law used
3 to be, back in the late seventies, early
4 eighties, when I was an Assistant DA.

5 MS. BAMBERGER: Which is?

6 MR. KOURAY: I understand this is a
7 problem in Metropolitan New York. I understand
8 that. But it used to be 72 hours they had a
9 right to a preliminary hearing. If not, they
10 were released on their own recognizance. And
11 within that 72 hours, or even make it 144
12 hours, that indictment not only has to be voted
13 by the Grand Jury but reported out so the
14 defendant is brought into County Court and
15 arraigned on that indictment. Not 90 days
16 later. That's crazy. It is also very
17 frustrating.

18 MR. HELLERSTEIN: Thank you, Mr. Kouray.

19 MR. KOURAY: Thank you very much.

20 MR. ROBERTS: Miss Schreibersdorf?

21 (Thee was no response)

22 MR. HELLERSTEIN: Mr. Ciulla.

23 MR. CIULLA: It's too bad you missed Lisa.
24 She is dynamic. Maybe she is going to make it

1 later, Jonathan?

2 THE AUDIENCE: She's late. She should be
3 here in about five more minutes.

4 MR. HELLERSTEIN: Why don't we take a
5 break after Mr. Ciulla? And then we will
6 resume.

7 MR. CIULLA: I was a little worried I was
8 going to have to follow Lisa. She is really
9 dynamic.

10 Hi. My name is John Ciulla. I pronounce
11 it SU-EL-A, despite the way it's spelled.

12 Don't ask me why. I do what my grandfather
13 says.

14 I want to thank the commission for giving
15 me an opportunity to come before you today to
16 express my views regarding the indigent defense
17 system that's presently in place in New York.

18 What I decided to talk to you about today
19 was to advocate, for lack of a better term,
20 what I call the strong Public Defender forum of
21 indigent defense. By that, I do not mean to
22 exclude the Legal Aid Offices, because I think
23 that they have top level administration that
24 would fit in a strong Public Defender forum.

(David Mayo, Official Court Reporter)

1 I do, however, advocate for the
2 elimination of offices where they have strictly
3 assigned counsel, except for the fact that I
4 believe that the counties that have the
5 Conflict Defenders Offices would be better
6 served continuing their assigned counsel
7 panels, for diversity reasons, for ability to
8 get new ideas into their offices, and to
9 strengthen the Bar.

10 Before I begin I want to give you just a
11 brief bio so that you know who I am. I
12 graduated from Albany Law School in 1974.
13 Entered the practice of law in February of 1975
14 in Saratoga Springs with an attorney in the
15 general practice of law. I spent three years
16 doing law guardian and assigned counsel work
17 and in 1978 became Public Defender. This is my
18 28th year as an Assistant Public Defender and
19 Public Defender.

20 In 1989 I became the third Public Defender
21 in Saratoga County history. In 2001 I became a
22 full-time Public Defender, giving up my private
23 practice in my hometown, which is
24 Mechanicville, New York.

(David Mayo, Official Court Reporter)

1 I have served on a number of panels,
2 lectured throughout the area in the local
3 colleges, at the law school, and on panels as
4 diverse as school board matters to mental
5 health matters.

6 In the spring of 2004 Assistant District
7 Attorney James Murphy in Saratoga County and
8 myself presented to the federated bar of the
9 Third Department, Fourth Judicial District's
10 meeting in Montreal a one-hour seminar on what
11 we call the Saratoga County model of how
12 criminal defense operates in Saratoga County.

13 What I thought I would do for you today is to
14 highlight those portions of that presentation.

15 That presentation was an hour long. Highlight
16 those portions that talk about the Public
17 Defender role in Saratoga County and not
18 specifically address problems. However, I
19 think as I speak you will see that many of the
20 problems that you are concerned about exist in
21 Saratoga County.

22 And I have been sitting back there for
23 about a half hour listening to some of your
24 questions. I think I may address most of them

(David Mayo, Official Court Reporter)

1 as I go. However, if there are some questions
2 that I don't cover, please feel free to ask.

3 And I like to be interrupted if you have
4 questions as I am speaking, so please feel free
5 to do that, as well.

6 In Saratoga County -- well, let me back
7 up. Let me compare the offices in Saratoga
8 County and then tell you some of the
9 characteristics that I believe what I call a
10 strong Public Defender model should have and
11 what you should be striving to look for in the
12 various counties. And I have listened to you
13 speak about the regional model or a statewide
14 defense office, and I believe for the various
15 defense views you are hearing that a hybrid of
16 the two may be what you are actually looking
17 for; a statewide commission with strong
18 administration at the top, controlling what
19 mandates each of these offices should have, but
20 with Public Defenders from the various counties
21 or Legal Aid offices contracted in the various
22 counties to address the various regional needs
23 and county needs and to work with their
24 administrators within the county level.

(David Mayo, Official Court Reporter)

1 MS. BAMBERGER: Who would appoint the
2 local chief?

3 MR. CIULLA: In Saratoga County I am
4 appointed by the Saratoga County board of
5 supervisors and I serve a two-year term. One
6 of the things I was going to talk to you about,
7 you need to be careful, in a strong Public
8 Defender model, you need to make sure that you
9 insulate the Public Defender from political
10 change. Because what happens, and you won't
11 hear -- I have seen the list of people who are
12 going to testify to you today. Many of these
13 people, even though they may be experienced are
14 not Public Defender experienced, because there
15 is constant change in their office and there is
16 constant political change.

17 I serve at the pleasure of the Saratoga
18 County board of supervisors for a two-year
19 term. My term coincides exactly with the board
20 of supervisors. They will be elected, for
21 example, this fall for a two-year term. I hope
22 to be reappointed in January.

23 MS. BAMBERGER: Do you think the term
24 should be longer?

1 MR. CIULLA: I do. I think the term
2 should be longer and I think the Office of the
3 Public Defender should be insulated from the
4 political decisions, because there are things
5 that occur even within a two-year window that
6 are controversial and the Public Defender
7 sometimes has to take controversial stands and
8 promote certain things.

9 For example, the sex offender stuff that's
10 going on now is extremely irritating to some of
11 us that know that most of the sex offenders do
12 not reoffend but yet we are hearing constantly
13 from everybody about what the reoffense rate
14 is. I know I am going to have to take some
15 stand in Saratoga County. I know I am going to
16 be reappointed in January. I don't feel that
17 my job should be in jeopardy because of the
18 stance I am trying to take.

19 MS. BAMBERGER: Are you saying the local
20 board of supervisors or the local executive
21 should not make the appointment?

22 MR. CIULLA: I believe that they should
23 make the appointment, but with criteria that is
24 established by a statewide commission as to

1 what items a person that is being promoted to
2 Public Defender has, what attributes they have,
3 what should be in the job description in terms
4 of their training, background, education, et
5 cetera.

6 MS. BAMBERGER: But that wouldn't insulate
7 them from a controversial position, unless the
8 term of office were long enough to spread it
9 out.

10 MR. CIULLA: Right. And then advocate for
11 a longer term of office than just two years.

12 MR. ZAYES: What is wrong with the
13 appointment happening from the state level?
14 You know, appointing a local person.

15 MR. CIULLA: As long as the money is going
16 to flow from the state, completely fund the
17 office, there is nothing wrong with that model.
18 I am a realist. I don't believe the state is
19 going to step to the plate and put the kind of
20 money that's going to be required to create a
21 great system in place without requiring the
22 counties to put some money into play.

23 When the county puts some money into play,
24 you need to have an advocate there, a Public

1 Defender, who can network with the county
2 supervisors to make sure that that flow of
3 money is not interrupted.

4 I like to talk about it in terms of
5 respect for the Public Defender's Office in the
6 judicial system. If you have a Public Defender
7 who has been there that knows the Legislature
8 that they come to respect, they not only
9 respect that individual Public Defender, they
10 respect the role that the Public Defender plays
11 in the system because over time you can educate
12 the Legislatures as to the value of the roles
13 that the Public Defenders play, as opposed to
14 the overall scenario or overall reputation of
15 Public Defenders a whole as being pretty poor.

16 So you can begin to educate the
17 Legislatures as to the need for the Public
18 Defenders, how valuable we are, and how
19 valuable we are in terms of moving the cases
20 through the system and providing an effective
21 defense against police corruption, police
22 overreaching, District Attorney overreaching,
23 et cetera.

24 MS. ZUFLACHT: Aren't you keeping the

1 office political by having to appoint someone
2 who can schmooze with the Legislature? Then
3 you are really keeping it political.

4 MR. CIULLA: And again, I'm being a
5 realist. If you believe that the state is
6 going to come to the table with all the money
7 necessary to fund this on a statewide level,
8 I'm all for it. I don't think that's going to
9 happen. I don't think it is going to happen
10 anytime soon. I think the state is going to
11 require the counties to continue the funding.
12 At this point the county is funded up. A
13 little bit of money from the state from the new
14 pool they just created for the increase in
15 defense fees, but the counties fund the system.
16 The state isn't going to find the money
17 necessary to completely fund this system. Some
18 political process is going to have to take
19 place.

20 MS. SHANKS: John, are the salaries for
21 the lawyers in your office comparable to those
22 in Jim Murphy's office?

23 MR. CIULLA: Yes. One of the things I was
24 going to advocate for is parity, both in terms

1 of the number of employees and in salary.

2 In Saratoga County all of the attorneys
3 that work for the county are paid the same.
4 That means all the attorneys in the District
5 Attorney's Office, the County Attorney's
6 Office, and the Public Defender's Office are
7 all paid the same.

8 And the only difference in the salary is
9 the number of years of service. Saratoga
10 County has a salary matrix in which the more
11 years you stay in the system, you get some
12 merit raises, and the salary increases in steps
13 for the attorneys that stay in the system
14 longer.

15 The only three salaries that are different
16 are the County Attorney, the Public Defender,
17 and the District Attorney. The District
18 Attorney's salary is mandated by law. The
19 County Attorney and the Public Defender, one
20 grade level below the County Administrator.
21 The salary is set, capped. We will never
22 exceed the salary of the County Administrator.

23 MS. SHANKS: Is everybody full-time, with
24 no private practice?

(David Mayo, Official Court Reporter)

1 MR. CIULLA: No. But that's the way we
2 are going. Saratoga County in the late
3 eighties began to realize the value of
4 full-time attorneys versus the part-time
5 attorneys. And it is a bit of a political
6 process, so that those part-time attorneys that
7 had jobs prior to that will continue to have
8 them, but as they leave office they are being
9 replaced by full-time people.

10 For example, my office now, we have four
11 full-time Public Defenders, including myself,
12 and three part-time Public Defenders. The
13 District Attorney's Office has nine full-time
14 District Attorneys and five part-time Assistant
15 District Attorneys. That's partially because
16 the State of New York has chosen to give grants
17 to the District Attorney's Offices for
18 specialized areas; domestic violence, sex
19 crimes, car thefts, DWI, and Saratoga County
20 has taken advantage of those grants to create
21 full-time District Attorney positions. That
22 has created an imbalance in my office, as those
23 District Attorneys are trained to specialize in
24 the prosecution of those matters and I have no

(David Mayo, Official Court Reporter)

1 funds to provide extra training to my
2 assistants, as we are structured vertically,
3 meaning when the attorney gets a case he stays
4 with the case until the end of the case.

5 Now, of my four full-time people, two of
6 my full-time people are exclusively in Family
7 Court. We have two Family Court Judges. One
8 each to each of the Family Court Judges. They
9 do some minor other things.

10 So I believe that one of the things that a
11 strong Public Defender system should have is
12 salary parity with the District Attorney's
13 Office. What it does is it takes out of the
14 system all those jealousies that you can
15 imagine occur in most of the other systems and
16 you probably heard plenty of discussion about.

17 One of the things about Saratoga County is
18 that money really isn't an issue in Saratoga
19 County. Unlike most of the counties that you
20 hear about, my budget is set by the board of
21 supervisors and the county administrator based
22 on the three-year rolling average of what we
23 have spent over the last three years. However,
24 if I run out of money at the end of the year, I

(David Mayo, Official Court Reporter)

1 just ask for more money. It's not a problem.

2 It has never been a problem.

3 That gives me the freedom that if I need
4 an expert, I hire an expert, whether that
5 budget line has been exhausted or not. If I
6 need to assign cases because my caseload is
7 getting too high, I assign cases. Nobody
8 questions it.

9 So money is a big factor. We don't
10 overwhelm the budget very frequently, but
11 occasionally we do in a bad year. However,
12 even in that system, I do not have any
13 investigators. I have money. I can contract
14 with investigators. I have contracts with
15 three or four investigators. But it is a whole
16 different world when you have an investigator
17 on staff that you can meet with every day and
18 you say to the investigator, "I've got this
19 matter. Can you look into this? Can you look
20 into that?"

21 It is another complete matter when you
22 have to have your secretary call an
23 investigator, have that investigator make an
24 appointment, come in to see you, and then have

(David Mayo, Official Court Reporter)

1 that investigator assigned contractually to do
2 this case or that case.

3 MR. HELLERSTEIN: Is there a reason why
4 you can't have a full-time investigator?

5 MR. CIULLA: Excuse me?

6 MR. HELLERSTEIN: Is there a reason why
7 you can't have a full-time investigator?

8 MR. CIULLA: We put it in the budget
9 process and the position gets eliminated every
10 year. It is political with the board of
11 supervisors.

12 MR. HELLERSTEIN: But you said the money
13 is always there for you.

14 MR. CIULLA: The money is there. I can
15 hire an investigator anytime I want.

16 MR. HELLERSTEIN: Is that because you
17 can't justify that you need a full-time
18 investigator on the staff with all the fringe
19 benefits and et cetera?

20 MR. CIULLA: That's correct.

21 MR. HELLERSTEIN: Can you justify it?

22 MR. CIULLA: I think I can. The problem
23 is that the amount of use of the investigators,
24 when you contractually use them, does not

1 justify putting an investigator on staff with
2 the fringe benefits. And that's because you
3 have a tendency to limit your use of
4 investigators when you have to go through the
5 process of bringing them in on a case when you
6 need them. So you don't use the investigative
7 services as frequently as you should use them.

8 MR. KAMINS: Are you also the assigned
9 counsel administrator?

10 MR. CIULLA: I am the assigned counsel
11 administrator. In Saratoga County -- and this
12 is something else you may well want to consider
13 as a cost savings, because I think it does save
14 money. In Saratoga County the Public Defender
15 makes the decision regarding who gets our
16 services and who does not. The Judges have
17 taken themselves out of the process.

18 The Public Defender, for the most part,
19 also when the assigned counsel reviews the
20 vouchers and decides if the money and the
21 vouchers is the appropriate amount of money or
22 not, the Judges have again removed themselves
23 from the process.

24 That's not to say the Judges do not have a

1 role. They have a role. They make the
2 assignments ultimately if there is a dispute
3 between a particular individual and the Public
4 Defender. They also have review over the
5 vouchers if we are exceeding the statutory
6 caps.

7 Other than that, they are paying me as a
8 professional administrator to know the role of
9 Saratoga County's budget process, the auditor's
10 positions, and how these vouchers get paid and
11 submitted on a timely basis and the attorneys
12 are paid. The Judges have long ago realized
13 that their time is much more valuable spent
14 doing the other role of Judges and not the role
15 of administrators in a county system that they
16 may or may not be aware of.

17 MS. BAMBERGER: How much time does that
18 take from your responsibility as a Public
19 Defender?

20 MR. CIULLA: Well, I consider it to be
21 part of my responsibility as a Public Defender.

22 MS. BAMBERGER: I should say in the
23 representation of clients.

24 MR. CIULLA: About a third of my time is

1 spent administering.

2 MS. SHANKS: You do that on a case where
3 there is a conflict, where you represent a
4 codefendant?

5 MR. CIULLA: Yes. That's the problem.
6 And the way we handle that, you know, we have
7 Chinese walls. When it really gets to be a
8 problem is when I am monitoring that attorney
9 that I have assigned. And then I have to set
10 up a Chinese wall in my head, which is not
11 always easy to do.

12 It is a bit of a problem. I don't
13 advocate this system to exist. I have been
14 trying to convince people for years that this
15 is a conflict. There should be someone else
16 making the assignment decisions.

17 The way we handle it is we have a -- it
18 just rolls over from attorney to attorney. The
19 secretary does it all the time and at the same
20 time keeps strict notes as to how she does it.
21 And I've taken myself completely out of the
22 process of what attorney is going to be
23 assigned to what case.

24 So we declare the conflict. Nobody gives

1 us any difficulty in declaring the conflict.
2 Then it goes to the secretary, who just goes to
3 the next attorney on the list. We maintain
4 three different lists for the attorneys, and
5 the attorneys that come on to our panel decide
6 if they want to be on one, some, or all.

7 We maintain a list for attorneys in Family
8 Court, for local court in felony criminal
9 matters, and then for appeals. So some of the
10 attorneys are on all three and some pick and
11 choose.

12 MR. CHAN: Is there a great need for
13 translators up in Saratoga?

14 MR. CIULLA: There is some need for
15 translators in Saratoga, but it is not a
16 tremendous need.

17 MR. CHAN: Does it delay the case in any
18 way, shape or form?

19 MR. CIULLA: It can but usually it
20 doesn't. It can delay the cases in the initial
21 stages, especially if there is going to be a
22 preliminary hearing in a felony case because we
23 get a delay in getting the interpreters in.
24 But at the county level there really isn't any

1 delay because they are readily available. And
2 again my office contracts with the
3 interpreters.

4 MS. BAMBERGER: Can you tell us how the
5 village and town courts work?

6 MR. CIULLA: Yes. In Saratoga County
7 there are 22 village and town courts with 44
8 Judges. That's why in Saratoga County the
9 Public Defender makes the decision regarding
10 whether someone is indigent or not for the
11 purposes of our services. The Judges in the
12 county, through their magistrates association,
13 although they maintain ultimate role over
14 deciding if there is a dispute, have advocated
15 to allow a professional administrator, trained
16 staff, to make a consistent decision regarding
17 indigency and whether or not we are going to
18 represent people, rather than having 44
19 different decisions across the county with
20 regard to the standards of indigency.

21 MR. EPPLER: Did I hear you say you think
22 there should be parity as to the number of
23 lawyers on the DA's side?

24 MR. CIULLA: I didn't mean to say lawyer

1 for lawyer. I mean parity in terms of the
2 cases. That's why I think a statewide defense
3 commission is necessary to finally decide what
4 is a number --

5 MR. EPPLER: You mean caseload?

6 MR. CIULLA: Caseload number. And then
7 using those caseload numbers and making the
8 comparison with the District Attorney's Office,
9 decide what the parity should be in terms of
10 the number of people on the Public Defender's
11 side and the number of people on the District
12 Attorney's side.

13 But I will caution you that the Public
14 Defenders themselves across 62 counties do not
15 count a case the same way. The District
16 Attorneys count cases completely different than
17 the Public Defenders do, and the 62 of them do
18 not count cases the same way. And the courts
19 all count cases in a completely different way.

20 So when you are looking now at numbers and
21 trying to do comparisons, it is absolutely
22 meaningless to you unless you know how that
23 count is being made from an individual office.

24 My office counts a client as a case. I

1 know some of the District Attorney's Offices
2 count top counts of an indictment. So if they
3 have a 15-count drug case and they have 15 B
4 felonies, that's 15 cases, as far as they're
5 concerned.

6 Our Family Court counts every time there
7 is a filing for a child as a case. So if there
8 is a neglect case and there are five children,
9 Family Court counts that as five cases. And
10 every county, every court, every District
11 Attorney's Office and Public Defender's Office
12 count them differently.

13 One of the things you need to do is define
14 what a case is and get a consistent count so
15 the numbers mean something. Yes, ma'am?

16 MS. ZUFLACHT: You said you count clients.
17 What if a client is arrested for a crime, a few
18 weeks later arrested for another crime? Is
19 that still one?

20 MR. CIULLA: We will count that as two.

21 MS. ZUFLACHT: That's two?

22 MR. CIULLA: Right. We count that as two,
23 if my attorneys bother to let me know about it,
24 because what happens is we centrally control

1 the assignment of the cases.

2 And this is a good time to talk about
3 technology and the importance of technology in
4 running these offices and why it is so
5 important that you support that these Public
6 Defender's Offices get technology.

7 MR. ELMORE: In town courts where you have
8 non-lawyer Judges, do you have jury trials?

9 MR. CIULLA: Actually, we probably have
10 more jury trials in town courts than we have in
11 County Court.

12 MR. ELMORE: Are there any difficulties
13 with the non-lawyer Judges?

14 MR. CIULLA: There are difficulties with
15 them. Sometimes, being honest with you,
16 sometimes the Public Defenders have more
17 influence over that Judge than the District
18 Attorneys do and sometimes the Assistant
19 District Attorneys have more influence over the
20 than the Public Defenders. It is always a
21 problem. You need to make sure you keep a
22 record of all the cases that are going on in
23 those local justice courts.

24 MR. HELLERSTEIN: Thank you.

1 MS. KHASHU: Just one question. If there
2 was a resource center that had investigators on
3 staff, where you could call up and get an
4 investigator without a voucher, without having
5 to enter a contract, do you think you would
6 increase the number of investigations you do?

7 MR. CIULLA: Probably not, because you
8 still have the same problem, in terms of making
9 an appointment with the investigator to go over
10 that case, as opposed to having the
11 investigator right there on staff.

12 MR. HELLERSTEIN: Thank you.

13 MS. BAMBERGER: Thank you very much.

14 MR. CIULLA: You're welcome. Thank you
15 for inviting me.

16 MR. HELLERSTEIN: We are going to take a
17 half-hour recess and reconvene at 1:20.

18 (A luncheon recess was taken in the
19 proceedings.)

20 (The proceedings were reconvened as
21 follows:)

22 MR. HELLERSTEIN: All right. Miss
23 Schreibersdorf.

24 MS. SCHREIBERSDORF: Thank you. First of

1 all, I'm sorry I'm late and I'm sorry that I
2 missed you in New York, but I was explaining my
3 odyssey. And I will save it for another day.
4 Let's say a lot of forces conspired to keep me
5 from getting up here to speak to you guys.

6 I am the Executive Director of Brooklyn
7 Defender Services, sort of well known as one of
8 the alternate providers in New York City. My
9 office is about nine years old. It is a fairly
10 moderate size office for New York City. We
11 handle about 15,000 cases per year, a mix of
12 felonies and misdemeanors.

13 I think I just want to say I, first of
14 all, appreciate everything you guys are doing.
15 I know it is a lot of hard work to be on these
16 kinds of commissions and not a whole lot of
17 gratitude coming back at you. But for those of
18 us who do indigent defense work, we appreciate
19 the fact somebody is actually taking the time
20 to look at what is being done in indigent
21 defense and to try to improve it, because we
22 feel like it is in crisis. So I appreciate the
23 work you are doing and I hope something good
24 can come of it. That's why I worked so hard to

1 get here.

2 The thing that makes public defense
3 offices work are good, hard-working attorneys.
4 I think that's just your bottom line. If you
5 have committed attorneys who are really
6 dedicated to the work, who have made it their
7 mission to care about the work, who are
8 basically well trained, well supervised, and
9 have the resources to do that work, you will
10 have excellent Public Defender offices. There
11 is no question in my mind.

12 Of course, getting to a point where you
13 have an office that is well supervised, well
14 trained, has the support services that it needs
15 to run well, is a big step from where we are in
16 general in most of the state, and even to some
17 extent in New York City.

18 And I have two ideas that I think are
19 important at least to consider. I know this
20 committee is looking at obviously the public
21 defense commission, which I fully support. And
22 I know you have also been asking a lot of
23 questions about the possibility of a statewide
24 defenders system. And I just wanted to say,

(David Mayo, Official Court Reporter)

1 from my opinion, that I really do believe a
2 state defenders system is warranted.

3 I'm on the American Council of Chief
4 Defenders, which is a national organization of
5 chief defenders; various offices around the
6 entire country. And I happen to be pretty well
7 informed about the way that offices are run in
8 other states. I know a lot about states that
9 have state defender systems and I know a lot
10 about states that have crazy systems like we
11 have. And there are other places where there
12 are elected Public Defenders. There are a lot
13 of different systems. But in my view the
14 statewide systems work the best.

15 The problems that we have in New York
16 State would not be easily remedied even if we
17 had a state system. It would take a very long
18 time. But ultimately I do think a state system
19 would remedy that.

20 Let me just tell you what I think the big
21 problems are. There is no accountability in
22 our system at all for how people do their work.
23 If you -- I will give you an example. I think
24 my office is fabulous. I hope our reputation

(David Mayo, Official Court Reporter)

1 precedes us and that you know how fabulous we
2 are. My lawyers are wonderful. We run a great
3 office.

4 There is no one willing to watch my office
5 but me. If I decided I didn't really care
6 about how hard they were working or what a good
7 job they were doing, there would be nobody to
8 step in and say, "You know what? Lisa should
9 not be in charge of that office anymore."

10 There is just no accountability at all for the
11 heads of the offices, and I don't think that's
12 appropriate.

13 A good example of that is financial
14 responsibility. And I didn't come up here to
15 pick on Legal Aid, but I think the recent
16 experience that we had with how they became so
17 far into debt is a good example of how the lack
18 of oversight can lead to a crisis within the
19 organization, either a financial crisis, crisis
20 in the quality of the services, or a crisis in
21 employment practices. We are not only
22 providing a service to the community but we
23 also are employers. And those things, there
24 needs to be accountability for that.

(David Mayo, Official Court Reporter)

1 I respond to my board of directors, but I
2 can tell you, as I am sure every other Legal
3 Aid Society type organization, our board of
4 directors cannot micromanage what happens in my
5 office on a daily basis. You are really
6 relying on the one person who is the boss of
7 that to really care about the mission of the
8 organization, to really follow through on it.

9 And you have heard from wonderful people.
10 And some of my colleagues around the state are
11 phenomenal; some of them are really bad. Some
12 of them won't come here. You won't see them
13 because they are just hiding. So I think so
14 there is a problem with accountability.

15 I think a statewide system would do a
16 better job of stepping up to the plate in
17 circumstances where systems and services can be
18 improved. And I could give you many examples.

19 Because I am in Brooklyn, we have every
20 special court. Mental Health Court, Drug
21 Court. We are getting our new integrated
22 domestic violence court. We have forgery
23 courts. So basically the DA has to be very
24 innovative and open-minded about starting new

(David Mayo, Official Court Reporter)

1 programs.

2 And we usually get the first one. We are
3 very rich in resources. We have a wonderful
4 opportunity. And when they start that new
5 court they usually start a committee, and it
6 usually includes Barry Kamins and myself and
7 someone from the DA's Office, someone from the
8 courts. A number of people get together to
9 discuss how this court is to run or how a new
10 program could do well, do what it is intending
11 to do.

12 They can call me on the phone and say,
13 "Lisa, we would like you to be on a committee
14 about jury reform," for example. And I could
15 say, "I don't have time." The truth is I don't
16 have time, as you all know. You are on this
17 commission. You don't have time. I feel it is
18 my obligation as a chief defender to step up
19 and do all these committees. They are very
20 time consuming.

21 But I can tell you that it is not always
22 true that every defender office does that. So
23 a lot of programs are formed without the input
24 from the defense bar. It is a big mistake. A

(David Mayo, Official Court Reporter)

1 lot of court initiatives fail because they
2 didn't get input from the other side. It is a
3 three-legged type chair. If you don't have any
4 input from the defense side, your program is
5 going to fail. Ours have succeeded in great
6 part because of such involvement from the
7 private bar, public bar, and legal services and
8 everyone else who is asked.

9 I also think that a state defender system
10 would be better able to coordinate problems
11 that come up that are, I would just want to
12 say, ignored for the most part at this point.
13 A good example was in the eighties when the
14 crack epidemic hit New York City and there was
15 a huge number of drug arrests. It changed the
16 entire court system. There were more cases,
17 the way that we just needed more felony
18 attorneys when there used to be more
19 misdemeanor attorneys. Now we have more
20 misdemeanor attorneys. Things just kind of
21 change, and there is nowhere to pull your
22 resources from.

23 Let's say you really want to address a
24 problem in your particular jurisdiction. I

(David Mayo, Official Court Reporter)

1 don't have anywhere to pull a resource from. I
2 can't say, well, you know what? Brooklyn has
3 this special court, so maybe they don't need as
4 many attorneys as Manhattan, where they try a
5 lot more cases. I am going to pull two
6 attorneys from Brooklyn and put them in
7 Manhattan. But I think it can be dealt with on
8 a much bigger level in the state.

9 MR. HELLERSTEIN: At the New York hearing
10 your compadres or colleagues from other
11 defender providers in the City of New York
12 expressed substantial opposition to a statewide
13 defender. Do you separate yourself from that?

14 MS. SCHREIBERSDORF: I guess that's why I
15 was lucky I broke my leg and didn't get to
16 testify at the last one. I know they do not
17 agree. I can tell you exactly why they don't
18 agree and Legal Aid doesn't agree. I think it
19 is self-serving. I am speaking to you from the
20 point of view of somebody who has dedicated my
21 life to public defense work. I really care
22 about what is going to come out of the
23 committee, for my benefit or not.

24 MS. SHANKS: I would like to hear why you

1 don't agree.

2 MS. SCHREIBERSDORF: I think nobody wants
3 somebody else looking over what they are doing.
4 If you said you are going to have a state
5 defender system and you are pushing and the
6 Legislature passed it, I personally would not
7 have my job anymore. I am the executive
8 director for a not-for-profit which would no
9 longer exist if there is a state office.

10 So you are going to find most of the Legal
11 Aid Societies are going to oppose it because
12 they don't want somebody watching over them.
13 They don't want the accountability that they
14 would have to respond to. And some of them are
15 running wonderful offices. I could tell you
16 right now you might have a Public Defender
17 system and put a person in Brooklyn, it could
18 be me or somebody else, and might do a worse
19 job. It could happen.

20 MR. KAMINS: Some people have suggested a
21 hybrid system, where you have something at the
22 top but still allow for some regional
23 independence and have something down in New
24 York City and other regions around New York

1 State.

2 MS. SCHREIBERSDORF: I have heard that. I
3 would not agree that New York City is as safe
4 from these problems as you might think. I
5 mean, I just think if you look at what happened
6 with Legal Aid, how they got \$40 million in
7 debt. You have to worry. How could that have
8 happened and what could you do to prevent that
9 from happening again? Because \$40 million
10 could fund my office for ten years. And you
11 just have to wonder how is it that you are
12 going to leave responsibility in the city when
13 they, first of all, allow that to happen,
14 didn't do what they needed to do to prevent
15 that from happening, and then really did, you
16 know, leave all of us sort of at the whim of
17 any particular mayor or any particular criminal
18 justice coordinator and whatever their agenda
19 might be.

20 MS. SHANKS: I do have a question. I live
21 up here and I have been to all of the hearings
22 and I keep hearing, this is how it is in New
23 York and this is how it is in another vast
24 wasteland that's anywhere north of White

(David Mayo, Official Court Reporter)

1 Plains.

2 And I don't pretend to know much about New
3 York City, but what has concerned me is that I
4 have heard extremely disparate views. And many
5 of the people who testified in New York said
6 there are not problems, for instance, with
7 attorneys seeing their clients, that all of the
8 attorneys see their clients on a regular basis,
9 that they go to the jails, that they see their
10 clients.

11 We then had a couple of clients who
12 testified and a couple of other attorneys who
13 said you can't even get to Rikers Island and
14 back in a day, so that's just not true.

15 Can you tell me what your sense is of this
16 issue of people being in jail and not having
17 access to their Public Defender or assigned
18 attorney? What is your sense?

19 MS. SCHREIBERSDORF: We spend as much time
20 as we can when our clients come to court. And
21 they do come to court more frequently in New
22 York City than I think in the Upstate counties.
23 So that's an important thing to keep in mind.
24 But, no, I don't think attorneys, geneally

(David Mayo, Official Court Reporter)

1 speaking, go to Rikers Island.

2 When they closed the Brooklyn House of
3 Detention -- our attorneys used to be there
4 more because it is right around the corner.
5 But to go to Rikers, it is so difficult and
6 time consuming. It doesn't make sense most of
7 the time. We have video conferencing in
8 Brooklyn and we use it a lot.

9 MS. SHANKS: Is there a place in the court
10 -- when you say they come to court often, is
11 there a private, secure place that you meet
12 with them at court?

13 MS. SCHREIBERSDORF: It depends which
14 court, but I think for the most part, yes.
15 Brooklyn is pretty good that way. Some of the
16 other counties are much worse.

17 MR. ZAYES: You could always get, even if
18 a case is not on the calendar, you can always
19 get a defendant produced for the purposes of an
20 interview?

21 MS. SCHREIBERSDORF: Yes. We do that from
22 time to time. When they opened the video
23 conferencing system they discouraged us from
24 doing that because it is sort of a burden on

1 the court and on Corrections to bring a
2 defendant for counsel visits. But we do it
3 when we really need a private conversation.
4 There are many good interview facilities.

5 MS. BAMBERGER: That's also true in other
6 counties. You can bring a defendant in for an
7 interview. I would suspect that it is more
8 difficult now with the elimination of IAS. But
9 the procedure is there.

10 MR. KAMINS: Many of the attorneys who
11 testified in New York City also said that
12 everything was fine with Legal Aid, everybody
13 was fine with the defender groups, but many of
14 them criticized assigned counsel. Do you share
15 or have different views about the assigned
16 counsel representation?

17 MS. SCHREIBERSDORF: You know, it is hard
18 to generalize anything. As with anything,
19 there are some wonderful, really talented
20 people who happen to do 18-b work, and then
21 there are some horrible ones. Same thing with
22 Legal Aid and same thing with the defender
23 offices.

24 But in general I am a big fan of

1 accountability and supervision and training.
2 And I think, for the most part, I think we all
3 have to understand that 18-b attorneys do not
4 get the kind of training -- they probably get
5 training, but not supervision and
6 accountability that you would get in a defender
7 office.

8 I mean, I have seen things happen in court
9 that, you know, really are horrifying
10 sometimes. And generally speaking, I think an
11 18-b attorney can kind of go about their way,
12 maybe not even know what they are doing or not
13 care, and nobody really is going to stop them,
14 where if you are in a defender office the
15 chances are at some point someone is going to
16 stop you from continuing to do malpractice.

17 I just wanted to add that I have two
18 examples of things that happened recently that
19 I think would just sort of impact the way you
20 see how New York City really runs. In December
21 the Legislature decided they were going to
22 change the drug laws and they decided that if
23 you were charged with an A-1 felony and had
24 been sentenced to 15 to life or 25 to life that

1 you would have the opportunity to have your
2 sentence reduced.

3 Wisely, they gave you the right to counsel
4 for that purpose. It is built right into the
5 statute. What was not built into the statute
6 was, how would you go about getting that
7 attorney, because the system in the county is
8 already set up and they don't involve taking
9 people from upstate prisons and giving them an
10 attorney. I feel like I have to tell you that
11 so far to this date, despite the efforts of the
12 State Defenders Association, many Bar
13 Associations who kind of try to coordinate an
14 effort, that there is yet to have been any sort
15 of concerted effort by anybody to really make
16 sure that every one of these people have an
17 attorney.

18 Now, I took a few of these cases in
19 Brooklyn and I can tell you that most of them,
20 most of the clients that I took, actually got
21 out of jail. So every person sitting in jail
22 waiting for somebody to decide to volunteer to
23 be their attorney, every single one of those
24 people could probably be out. Not everybody.

1 Probably 50 percent of those people could be
2 out. They have done 15 years, ten years.
3 That's an example of something where the lack
4 of coordination is really a horrifying
5 disaster.

6 MR. HELLERSTEIN: Did your office review
7 your own files to see which clients would
8 benefit from the change in the law?

9 MS. SCHREIBERSDORF: We didn't have any
10 clients who were sentenced on an A-1 felony to
11 either --

12 MR. EPPLER: Because you have only been in
13 business for nine years.

14 MR. HELLESTEIN: Do you know if the Legal
15 Aid Society in New York set up any internal
16 review of any clients they have?

17 MS. SCHREIBERSDORF: They reviewed the
18 cases they had represented on appeal and they
19 agreed to handle those cases. But you just
20 feel it took them almost two months to make
21 that decision. So the law had already come
22 into effect before they finally decided which
23 ones they were going to help represent. And
24 they didn't make an effort to make sure the

1 other people were represented, as well.

2 The majority of the defendants in that
3 circumstance were represented by private
4 attorneys because they were very serious drug
5 cases. There was usually some money available
6 at that time. So most of the defender offices
7 did not have access to any of those cases.

8 But, of course, right now the clients are
9 indigent. They have been in jail for a long
10 time, so they needed that.

11 So, for example, this is just an example,
12 if there was a state defender, that would have
13 been the end of it. They would have said,
14 "Okay. You are going to do the ones in
15 Brooklyn. You do the ones in Manhattan. I
16 will move you off the regular caseload and take
17 care of it." On a basic efficiency level,
18 there is no system set up. And people are hurt
19 because of that.

20 Another recent example -- and these are
21 things that are on my mind that just happened.
22 The state had that legal services fund, which I
23 am sure you know about. They gave a check to
24 New York City for \$30 million about a week ago,

(David Mayo, Official Court Reporter)

1 two weeks ago. About a year and a half ago I
2 came to know that fund was going to be in
3 existence. I approached the city and, in fact,
4 I approached my colleagues.

5 We had some meetings to discuss amongst
6 ourselves what we thought we would like to say
7 to the city about how to spend that money.
8 That's a lot of money for indigent defense.
9 And the 18-b rates have just gone up. We
10 thought, look, does it make sense to give that
11 money just to 18-b attorneys? Not really. It
12 makes sense, for example, in Family Court to
13 finally put together an institutional provider
14 for Family Court, which has been recommended in
15 New York City for years by many different
16 agencies and it is clearly something I think
17 that should be done. And honestly, the city
18 hears us out, but they would not really sit
19 down with all of us. They would not, let's
20 say, form a planning committee to say how to
21 best spend this money, how would we improve
22 indigent defense by using this money
23 effectively. And essentially the people who
24 know most about indigent defense have no input

(David Mayo, Official Court Reporter)

1 how that money is going to be spent.

2 My understanding when I probe a lot is the
3 city is going to use it to basically cover the
4 cost of the increase in 18-b. To me, that's a
5 phenomenal waste of that opportunity to really
6 evaluate your services.

7 MS. SHANKS: Do you do training for the
8 lawyers in your office? And if you do, is it
9 open to other lawyers in Brooklyn?

10 MS. SCHREIBERSDORF: We do training, but
11 it is not really open because we do very
12 intense, sort of one on one, very intense
13 supervision of our new attorneys. Almost like
14 a mentoring/apprenticeship program.

15 MS. SHANKS: With any particular cases?

16 MS. SCHREIBERSDORF: The new attorneys.
17 Most of the attorneys in my office are very
18 senior. So the training that we do, I mean,
19 people would be welcome, but they wouldn't know
20 about it.

21 MS. SHANKS: Do you send them to the
22 Defender Institute?

23 MS. SCHREIBERSDORF: Four of them are
24 going to go to the State Defender training in

1 June, the four new attorneys. My senior
2 attorneys can go to any training they want and
3 I pay for it. To me, that's the best way to
4 spend my training budget because of the
5 seniority. So they go to New York City defense
6 lawyers training. I have sent some of them out
7 of town if it looks promising.

8 MR. ROBERTS: Do you second seat a
9 newcomer to your particular office?

10 MS. SCHREIBERSDORF: Yes.

11 MR. ROBERTS: After they second seat, do
12 you then have a senior attorney second seat
13 that person before she tries a case?

14 MS. SCHREIBERSDORF: Yes, a supervisor
15 second seats all the new attorneys --

16 MR. ROBERTS: Pardon me?

17 MS. SCHREIBERSDORF: A supervisor second
18 seats every new attorney.

19 MR. ROBERTS: And then does the new
20 attorney the supervisor seconds seats, and
21 before that, the new attorney --

22 MS. SCHREIBERSDORF: Second seats a senior
23 attorney.

24 MR. ROBERTS: And you got that program

1 from whom?

2 MS. SCHREIBERSDORF: That's how I was
3 trained at Legal Aid.

4 MR. ROBERTS: Legal Aid has that program;
5 is that correct?

6 MS. SCHREIBERSDORF: Yes, they do. Or
7 they did. I don't know if they still do. And
8 I think that's a good program. To tell you the
9 truth, the best things I do in my office I
10 learned at Legal Aid. I am not saying that's
11 not true.

12 MR. HELLERSTEIN: You don't know if they
13 have that kind of same training program in
14 existence, do you?

15 MS. SCHREIBERSDORF: I don't know. I left
16 Legal Aid in the mid nineties. In my opinion,
17 it's not the same place it was.

18 MR. ROBERTS: And you don't really know
19 whether or not Legal Aid goes to Rikers or
20 doesn't?

21 MS. SCHREIBERSDORF: I honestly don't
22 know.

23 MR. ROBERTS: You don't know, do you?

24 MS. SCHREIBERSDORF: I don't know, no.

1 MS. SHANKS: How much are your attorneys
2 paid?

3 MS. SCHREIBERSDORF: My attorneys?
4 Starting attorney makes \$45,000. Top level
5 attorney with, like, 20 years experience makes
6 close to 90, maybe 89 or so. And everything in
7 between.

8 MS. SHANKS: Is that on parity with the
9 DAs?

10 MS. SCHREIBERSDORF: It is probably pretty
11 close. It is probably pretty close, I'm
12 guessing.

13 MR. HELLERSTEIN: Thank you.

14 MS. BAMBERGER: Thank you very much.

15 MS. SCHREIBERSDORF: Thank you.

16 MR. ROBERTS: Mr. Bongiorno?

17 (There was no response.)

18 MR. HELLERSTEIN: He is not here.

19 Bongiorno?

20 (There was no response.)

21 MR. HELLERSTEIN: No luck. Mr. Donohue,
22 welcome.

23 MR. DONOHUE: Good afternoon, Professor,
24 Judge.

1 MR. HELLERSTEIN: Good afternoon.

2 MR. DONOHUE: My name is Brian Donohue. I
3 am the Conflict Defender for Rensselaer County,
4 just across the Hudson River here. I hope I
5 can provide a little bit of unique insight
6 here.

7 My background is basically that I cut my
8 teeth being an assigned attorney when I was
9 fresh out of law school and I also practiced
10 with Mr. Frost, who I understand was a witness
11 here this morning. And for financial reasons I
12 think after about seven years I gave that up
13 and just this year I took on the job of the
14 Conflict Counsel in Rensselaer County.

15 I have had about 22 years to observe how
16 things work. I have also been struck by the
17 very high quality of assigned representation,
18 particularly the Public Defender's Offices, and
19 not just Rensselaer County but the surrounding
20 counties; Albany County, Saratoga, Schenectady.
21 I have also been struck, I think, for as long
22 as I have practiced, by a lot of the
23 difficulties inherent in the system. And it
24 really struck home a lot more now that I am so

(David Mayo, Official Court Reporter)

1 intricately involved in it.

2 I'm not sure if Rensselaer County is
3 unique in this way. I get the idea that
4 perhaps it is, in that the person who decides
5 whether a defendant is going to receive an
6 assigned attorney generally in my county is the
7 Judge, as I understand it. In other counties
8 it is someone who works in the Public
9 Defender's Office. They make the evaluation.

10 When one considers that particularly in
11 the Upstate counties, where most Public
12 Defenders, Assistant Public Defenders, and
13 Conflict Defenders are part-time, since our
14 time is limited, what has struck me the most is
15 that there are an awful lot of abuses in the
16 system just in terms of who is assigned
17 counsel. I know that's a question that the
18 Judges don't like to grapple with. I know
19 whenever there is any doubt as to whether there
20 should be or should not be assigned counsel, it
21 is resolved in favor of assigning counsel.

22 I think we have to face it, ladies and
23 gentlemen, particularly when you have part-time
24 attorneys, which is the predominant practice in

1 Upstate New York, and you have limited time,
2 those people who are taking advantage of the
3 situation, and I could give you a lot of
4 anecdotal evidence, people are making \$40,000,
5 \$50,000, \$60,000 a year and falsely fills out
6 an application to receive assigned counsel and
7 whose applications are not scrutinized at
8 all --

9 MR. ZAYES: How prevalent do you think
10 that is?

11 MR. DONOHUE: I would estimate a good
12 third of my caseload is people who clearly are
13 not entitled to assigned counsel. If I were
14 able to focus on the percentage of people who
15 are actually entitled to assigned counsel, I
16 wouldn't have any problem in sitting here and
17 saying I can provide each one of those people
18 with a competent defense.

19 The fact of the matter is I have had
20 discussions with some clients who expressed
21 dissatisfaction and I have had to say to them
22 that it is an unfortunate arithmetic fact that
23 I don't have the time to put into your case. I
24 have a client -- yes, Laurie.

1 MS. SHANKS: Wouldn't that be involved if
2 you were a full-time Public Defender and you
3 weren't trying to have a private practice at
4 the same time? I mean, that's one of the
5 things that we have discussed, is that there is
6 a conflict if you have to leave to go for a
7 paying case.

8 But isn't the answer to that instead of --
9 I don't know where you got the one-third
10 figure. Perhaps you can discuss that. But if
11 you had full-time lawyers in your office, where
12 you were full-time, there wouldn't be that
13 conflict and you certainly wouldn't be saying
14 to a client that you essentially didn't have
15 the time to spend on their case.

16 MR. DONOHUE: I think you are absolutely
17 right, Professor. If that were the case, there
18 wouldn't be that problem. And I think it
19 becomes really kind of an ethical dilemma that
20 one sees in the Upstate counties. If an
21 assigned client is being ignored because that
22 attorney has to focus on a private case, you
23 stop to think about it. It really is
24 ludicrous.

1 I am not sure if you would get the talent
2 level that you have right now, and maybe you
3 could. I am not saying you wouldn't. But I'm
4 not sure if you would get the level of talent
5 as assigned counsel, whether they be Assistant
6 Public Defenders or Conflict Defenders, if you
7 made it a full-time job.

8 MS. SHANKS: That's one of the questions
9 we asked. And that would be a question I would
10 ask you. I am assuming you have no full-time
11 people; right?

12 MR. DONOHUE: Correct.

13 MS. SHANKS: And if you could tell us the
14 salary range and if you could tell us if you
15 think those people would take the job if it
16 were a full-time job.

17 MR. DONOHUE: I personally would probably
18 not. I believe my salary is in the
19 neighborhood of \$48,000. I have two
20 assistants, they are both part-time, and they
21 make approximately \$46,000.

22 I believe if those people were made
23 full-time and that salary were doubled or close
24 to doubled, they probably would serve. And

1 they would be able to do a much better job. If
2 there were someone else in my position and it
3 were full-time, I am not really sure if that
4 would fill the bill, Laurie, because the way it
5 works in our county is we have two assistants
6 in my office. I have to deploy them almost
7 exclusively to Family Court work, and I am it
8 as far as the criminal end of things goes.

9 MR. HELLERSTEIN: Mr. Donohue, you said
10 you yourself have told a client that you didn't
11 have the time to do what you thought had to be
12 done in defense, if I understood you correctly.

13 MR. DONOHUE: That's not quite what I
14 said, Professor. What I have said to clients
15 who have expressed frustration, let's say, with
16 a proposed plea bargain is this: When they
17 have said to me, "Well, should I get a private
18 attorney?" I make it a point to be as honest
19 as I can with them, Professor. I say the fact
20 of the matter is if you retain a private
21 attorney, that attorney will be able to devote
22 much, much more time to your case than I can.

23 MR. HELLERSTEIN: But at that point, from
24 your assessment of the case, is it that you

1 think there would be further work to be done or
2 that it is simply a judgment you made that the
3 case doesn't merit that and you are just being
4 kind to the client?

5 MR. DONOHUE: I think there can always be
6 more work done on a case, Professor. I
7 probably have at this point 30 felonies pending
8 in Rensselaer County County Court right now.
9 One is a murder case which I will have to try
10 in the next couple of months. And for those
11 two weeks I frankly can't tell you who is going
12 to be serving my other clientele because I will
13 be working 18 or 20 hours a day on that case.

14 MR. EPPLER: Have there been any
15 situations where there are more than, say, two
16 defendants and, therefore, you still need to
17 farm out to someone outside your office?

18 MR. DONOHUE: That does happen
19 occasionally. What happens in that instance is
20 the Public Defender will have one, my office
21 will have one, and assigned attorneys will be
22 assigned.

23 MR. EPPLER: The creation of your office
24 did not entirely shut down the 18-b panel?

1 MR. DONOHUE: Not entirely, but I would
2 say about 95 percent. I think there were only
3 last year seven cases that had to be assigned
4 to private counsel.

5 MR. HELLERSTEIN: When you said there was
6 about a third of the clients that you didn't
7 think qualified for indigent representation,
8 are there particular characteristics of that
9 cohort that you could tell us about? I mean,
10 that's a large number.

11 MR. DONOHUE: I will give you a couple of
12 examples, Professor. In one case I took a look
13 at the application after I was assigned and the
14 man and his wife, who had no children, had a
15 net income of \$1,000 a week. And I said,
16 "Judge, frankly, I don't think the man
17 qualifies." And the Judge just kind of
18 sloughed me off and said, "Well, he's in jail
19 right now so he is not getting paid." That's
20 just one example.

21 I will give you another example. Just
22 this morning I saw a man assigned to the Public
23 Defender. I had run out to another court and
24 come back. I saw this gentleman getting into a

1 brand new Hummer and drove it away. Now, maybe
2 it was a borrowed car, but I doubt that man was
3 entitled to an assigned attorney.

4 MS. SHANKS: I just find that stunning. I
5 remember when the last District Attorney left
6 Rensselaer County, commenting on his salary not
7 being sufficient, there were lots of articles
8 in the paper that the median salary or the
9 median household income in Rensselaer County
10 was somewhere in the mid twenties.

11 So it would be shocking to me to think
12 that a third of the people who were assigned to
13 the Public Defender or the Conflict Defender
14 would not be entitled. I don't understand
15 where you got those statistics.

16 If most of the people in the county have a
17 family income of \$20,000, are you just getting
18 the really rich people in Rensselaer? Both of
19 them.

20 MR. DONOHUE: Obviously, I am just making
21 an estimate. Some of that is based on what
22 people put on their applications.

23 One problem is when I started this job I
24 called the County Attorney and I asked him,

1 "What are the actual standards?" And he told
2 me there are none, really. I understand that
3 the U.S. poverty guidelines are advisory, but
4 in terms of an actual standard that a Judge is
5 supposed to use, at least in Rensselaer County
6 it's "Whatever you think, Judge."

7 I have come up with that estimate based on
8 what people actually put down on their
9 applications, what people have said to me in
10 private, which I suppose is privileged, and I
11 certainly wouldn't divulge it. But just as a
12 general matter, I have had many clients tell
13 me, accidentally or otherwise, "Well, I do work
14 and I make \$40,000 a year."

15 The one third, I am not saying it is a
16 scientifically arrived at figure, but I think
17 it is pretty close. And the real problem I
18 have is the fact that it is those people who
19 are taking away from the time that could be
20 devoted to other people who really do deserve
21 it.

22 MS. BAMBERGER: I have two questions. Do
23 you serve in village and town courts?

24 MR. DONOHUE: Yes.

1 MS. BAMBERGER: And how many courts are
2 there in your county?

3 MR. DONOHUE: I was talking to Mr. Frost
4 about this the other day. I think he mentioned
5 -- I'll take his word for it. I think there
6 are 22 or 23.

7 MS. BAMBERGER: Are they spread around,
8 scattered around?

9 MR. DONOHUE: They are scattered around.
10 That has been a pet peeve of mine for years;
11 the fact that we have not implemented a more
12 efficient system, such as a district court
13 system. I think it would be very easy in
14 Rensselaer County to consolidate about 15 town
15 and village courts into two district courts,
16 which would make the job of attorneys, and not
17 just attorneys, a lot easier and a lot more
18 economical. But you wouldn't have what you see
19 out in a town court on a Wednesday night, with
20 two guards from the jail being paid overtime,
21 bringing in one prisoner who is charged with a
22 felony DWI.

23 Typically, you see in a town or a village
24 court at least a couple of guards from the jail

1 to bring a prisoner or prisoners, a probation
2 officer, an Assistant Public Defender, a
3 Conflict Defender, numerous clerks. It is so
4 inefficient. If we just made this system more
5 efficient we probably would have the money to
6 solve the problems that you folks are looking
7 at right now.

8 MS. BAMBERGER: My second question is: We
9 have heard a great many people tell us that
10 they service the Family Courts. What is your
11 view about having the Public Defender for
12 criminal cases or Legal Aid for criminal cases
13 also having to serve as advocates in the Family
14 Court? Do you think there should be two
15 systems?

16 MR. DONOHUE: I think it depends on the
17 system. I know in Rensselaer County, what I do
18 and what my Public Defender counterpart does is
19 assign an attorney or attorneys who are
20 specialized in family law in Family Court. So
21 it is not really a matter of a criminal defense
22 specialist serving the clients in Family Court.
23 We at least specialize to that extent.

24 MS. BAMBERGER: Well, if we are trying to

1 decide what is the best defense system to set
2 up, couldn't we legitimately take a position
3 that Family Court is a different issue and
4 somebody else has to look at that and the PDs'
5 offices shouldn't have that responsibility but
6 somebody else should?

7 MR. DONOHUE: I'm not sure you wouldn't
8 just be creating another bureaucracy to deal
9 with that.

10 MS. BAMBERGER: If you have enough money,
11 you can do both? I don't mean you personally.
12 I mean defender offices.

13 MR. DONOHUE: I think you can, as long as
14 the Public Defender or the Conflict Defender,
15 as the case may be, has the necessary
16 experience in both areas. I know Mr. Frost
17 does and I do. I don't find that a problem in
18 our county, no. But I think we really have to
19 look to some other ideas here. I am not saying
20 it is at a crisis level, but it is pretty
21 close.

22 I read quite often about how there is an
23 awful lot of pro bono work being done
24 throughout the state. Frankly, I see a lot of

1 the big firms patting themselves on the back
2 about all the pro bono work they do. I have
3 never seen a pro bono attorney in a criminal
4 court in the 21 or 22 years I have practiced.
5 Frankly, I don't think it would be a bad idea
6 to have some firms and maybe even make this
7 mandatory and say, "You have to help the
8 situation out."

9 I know typically the big firm is going to
10 say, "Well, we don't do that sort of work."
11 Frankly, the big firms have young attorneys who
12 just passed the bar who know at least as much
13 as the young Public Defenders starting out.
14 And if the entire bar would make just a little
15 bit of a contribution occasionally, it would
16 mean a world of difference in solving this
17 problem.

18 MR. HELLERSTEIN: Thank you, Mr. Donohue.

19 MR. DONOHUE: Thank you.

20 MR. HELLERSTEIN: Mr. Caruso?

21 MR. CARUSO: Good afternoon.

22 MR. HELLERSTEIN: Good afternoon,
23 Mr. Caruso.

24 MR. CARUSO: My name is Mark Caruso. I'm

1 the Public Defender in Schenectady County,
2 about 20 minutes down the road.

3 Let me tell you a little bit about my
4 office. I became Public Defender in March of
5 2004. Prior to that I was in the Albany County
6 District Attorney's Office, trying cases in
7 this courtroom exactly a few years back. A
8 little bit warmer when I remember trying cases
9 here. It is actually very pleasant in here
10 today. Prior to that I was in the Schenectady
11 District Attorney's Office as a prosecutor. So
12 I have, I would say, about ten years of
13 prosecutorial experience and now 14 months of
14 Public Defender experience. Prior to that I
15 was in private practice for a year, where I did
16 did some defense work.

17 Amongst having a whole bunch of people
18 come out in opposition to me getting this job
19 that I am now in, we have made some substantial
20 strides in the past year. I inherited an
21 office that was in turmoil, that was being
22 looked at by the New York State Defenders
23 Association, that had a couple of speak-outs
24 before I took over the office, mainly clients

(David Mayo, Official Court Reporter)

1 complaining about the way the office was run,
2 no communication with their attorneys, too many
3 attorneys involved in each case.

4 In the way that the office was run, we did
5 not have vertical defense. We had one attorney
6 that would pretty much do your arraignment, you
7 would have a new attorney for Grand Jury, a
8 second attorney for your second arraignment in
9 County Court, perhaps attorney number 4 or 5 at
10 your suppression hearing and maybe attorney 5
11 or 6 at your trial.

12 Needless to say, it wasn't a very good way
13 to run an office. And probably the first thing
14 I did, the first weekend I was there, I
15 immediately went to vertical defense.

16 My office has 13 total attorneys. Six of
17 us, including me, are full-time. The other
18 attorneys are in varying degrees of part-time,
19 anywhere from three-fifths time, which will be
20 a 21-hour, three-day commitment, all the way up
21 to nine-tenths time, which is I guess the way
22 that they can still have a private practice on
23 the side. But I still have them for 31 hours a
24 week. Most of my part-timers don't actually

1 work in my office. They actually work out of
2 their own offices.

3 I have instituted a system where they need
4 to give me timesheets every week and show the
5 time that they are working for the county. In
6 fact, they didn't have to do that prior to me
7 coming into this position.

8 We handle six night courts; Scotia,
9 Glenville, Niskayuna, Rotterdam, Duaneberg and
10 Princetown. The furthest one away from us is
11 probably 30 minutes from the county seat. We
12 also handle the biggest court in Schenectady,
13 the City of Schenectady, where we generate the
14 bulk of our cases, County Court. I personally
15 handle parole matters. We also handle Family
16 Court. We no longer do appeals. That was one
17 thing I was able to convince our Legislature to
18 let me out of, because, quite frankly, when I
19 came to the office there were probably 20
20 appeals in varying states of prosecution. And
21 we ended up finishing off three or four of them
22 and ultimately we were able to get relief from
23 the other ones and they have gone out to people
24 on the assigned counsel panel.

(David Mayo, Official Court Reporter)

1 Would I be able to get a drink of water?

2 I apologize.

3 MR. EPPLER: Sure.

4 MR. CARUSO: Thank you.

5 (A pause was taken in the proceedings.)

6 MR. CARUSO: Thank you. We have about

7 5,000 cases a year. Just under 5,000 last

8 year. I can tell you typically what I do, I

9 handle all of the parole cases every month,

10 which turns out to be anywhere from 20 to 40

11 new clients. I meet with each one of them at

12 least one time before their hearing, sometimes

13 two times. I take on the more serious felonies

14 that come in, so I will take the murder cases,

15 the higher profile types of cases. I will

16 handle them myself.

17 And then I will handle what I will call

18 the special needs types of case. I may get a

19 call from one of our local agencies. I may

20 have a particular group give me a call about a

21 particular case. Rather than assign one of my

22 attorneys, I will handle it myself.

23 So I will tell you right now I probably

24 have a caseload every month of about 50 cases,

1 and the 20 to 30 change every month with my new
2 parole clients. I have what I would classify
3 as a very comfortable caseload. Probably a
4 little bit more than I am used to handling as a
5 prosecutor, but manageable.

6 In addition to that, I am the sole person
7 that is responsible for all the administration
8 in the office. Right now towards the end of
9 the month I know I have two suppression
10 hearings coming up and I also have to work on
11 the budget. This will be my second budget. So
12 I know towards the end of the month it is going
13 to be very busy into the beginning of the month
14 of June.

15 I could tell you the biggest problem that
16 I have seen over the past year, in terms of I
17 know you are looking for -- I don't know if
18 there is an easy solution for the public
19 defense system in the state, but one of the
20 concerns I have obviously is funding. I am in
21 the process of going through my second budget
22 cycle and I can tell you what I often do is go
23 to the county management and say, "This is what
24 I need." And I try to base it upon what is

(David Mayo, Official Court Reporter)

1 going on in the District Attorney's Office, how
2 many attorneys they have. They are in, I
3 believe, the low 20 range, so they have a few
4 more attorneys than us.

5 We have calculated numbers. We handle
6 about 85 percent of the criminal cases in the
7 county. We also handle Family Court, and
8 District Attorney's Offices don't have any,
9 typically, any role in Family Court.

10 So my position has always been I think
11 that we should have equal funding as the DA's
12 Office does or at least close to equal funding.
13 The usual response from county management is,
14 "Well, if you add your office and the Conflict
15 Office and the 18-b office all together, then
16 you get your close-to-equal funding."

17 The second answer I get most of the time
18 is, "Well, the DA's Office has more revenue
19 coming in. That's why they get more money."
20 The DA's budget last year was \$2 million. My
21 budget was \$800,000. And again on that I was
22 able to administratively reassign different
23 people, go to a vertical defense system,
24 basically, have a lot of attorneys step up and

(David Mayo, Official Court Reporter)

1 do a good job for me, more probably in fear of
2 losing their jobs than anything. But
3 ultimately a lot of people have been working
4 very hard for me, including myself, including
5 my support staff, including my investigators.

6 I was able to convince the County
7 Legislature, as well as the county management,
8 to give me two part-time attorneys last year.

9 I was able to get a paralegal when I came into
10 the office, as well. And since then I have
11 actually convinced them to give me overtime for
12 our investigators. But I chose to put that
13 overtime and combine it with an open position
14 and create a third investigator position.

15 So now I have one investigator dedicated
16 to investigating our felony cases and I have
17 two other investigators that primarily work in
18 our busiest court and assist that other
19 investigator when needed with regard to felony
20 investigations.

21 That was another big area of turmoil in my
22 office. People were complaining that their
23 cases weren't being investigated, nobody was
24 going out to talk to witnesses to contradict

1 what the people have said, and that is
2 something that I have changed in the past year
3 in office.

4 Again, my big concern is with regard to
5 funding. I have attorneys that are making less
6 money than their counterparts in the DA's
7 Office. I have seen in DA Offices that I have
8 been associated with the use of grants to allow
9 new positions to be created, and then when the
10 funding source dries out three, four years down
11 the road, which is very common with grants, you
12 have a great argument now to go to your
13 Legislature, go to your county seat, and tell
14 them, "This is a position I just cannot afford
15 to lose. We have been using this attorney to
16 prosecute X amount of cases per year and I just
17 cannot give up that attorney."

18 My County Legislature gives the DA
19 anything he wants. My County Legislature has
20 been grateful to me. They have been helpful to
21 me over the past year, and I hope that they
22 will continue that spirit of helpfulness in the
23 coming budget year.

24 So I have seen and I have heard my County

1 Legislature tell me if I had more revenue
2 coming in that I would do better every year
3 with the budget cycle. I have an aid to
4 defense grant. I have an alternative to
5 incarceration grant. Those are the two grants
6 I believe that my office has.

7 I have personally approached our Stop DWI
8 coordinator in our county and had asked them
9 when they go and put together a new funding
10 cycle or funding year, ask them to consider my
11 office with regard to that funding because I
12 have a dedicated Public Defender that is
13 assigned to defending DWI cases. And the
14 response I got back was, "That's not what this
15 grant is for. These grants are to keep your
16 clients off the streets," some kind of words to
17 that effect. I know in my conversation with
18 the Defenders Association that funding is also
19 allocated to defense firms, such as mine.

20 So I meet with resistance when I try to go
21 out there and look for new initiatives. We
22 have planted a seed that has become more
23 prevelant in our county, more so than it is in
24 Albany County, and I have reached out to my

1 leaders and friends at NAACP and asked them
2 when they are putting together a project.

3 Again, the bulk of the clients that we have can
4 benefit from these programs, as well, and I
5 want to be considered when they are talking
6 about when they are funded again.

7 District Attorney's Office, they have a
8 DWI prosecutor, a domestic violence prosecutor,
9 grand theft auto prosecutor, white collar
10 crimes prosecutor. I mean, they have these.
11 They have funding sources for all of those.
12 They have these grants coming in. They don't
13 consider public defense when they are putting
14 together those grants.

15 MR. HELLERSTEIN: Do you have any concerns
16 about training?

17 MR. CARUSO: Excuse me. I do have
18 concerns about training. That is something
19 that I have been working with the New York
20 State Defenders Association with. I have been
21 able to hire two new attorneys since I took
22 over. And, quite honestly, the training that
23 they went through -- I guess I am embarrassed
24 to even call it training.

1 I was down in the court with both of these
2 attorneys for two weeks, showing them how
3 Police Court worked. Quite honestly, they
4 probably learned more from watching other
5 people than they did me. But that pretty much
6 was the training that they had.

7 One of them is in a trial. She is in a
8 trial by herself. A more experienced attorney
9 is sitting with her. I went over the facts
10 with her. I went over the case with her. I
11 told her how I would prep the case. I went
12 over the defense. I know exactly where she is
13 going. I think we have a very defensible case.
14 I think she is going to do a good job. That is
15 pretty much the only training that they have.

16 At least two of my new attorneys are going
17 to the training that is put on by the New York
18 State Defenders Association in June. So they
19 will go there.

20 We have talked about having afternoon CLE
21 classes for my attorneys, some people in the
22 Conflict Office and the 18-b attorneys, as
23 well. And the New York State Defenders has
24 worked with me. We put together a date -- it

(David Mayo, Official Court Reporter)

1 was scheduled for tomorrow but it is going to
2 be rescheduled. One of the teachers could not
3 make the commitment.

4 So we do a limited amount of training. I
5 have convinced the Legislature to give me about
6 \$3,000 this year to send my attorneys to CLE.
7 That turns out to be about \$300 per attorney.
8 My full-time and part-time attorneys could go
9 out and get some additional training.

10 MR. ELMORE: Could you explain why you
11 chose to hire two part-time lawyers rather than
12 one full-time?

13 MR. CARUSO: It wasn't much of a choice.
14 I was told that's what I was getting. I had
15 asked for attorneys. Would I rather have
16 full-time attorneys? I have talked to the
17 county management about that.

18 In fact, I had a part-time position last
19 year and an attorney that actually I never met
20 since I was his boss, he was sick, he hurt his
21 back. When he finally resigned toward the end
22 of the year I was able to take the money left
23 over from that position and convert it into a
24 full-time entry-level position.

(David Mayo, Official Court Reporter)

1 Would I much rather have full-time
2 attorneys? I get more productivity out of
3 them. I get more work out of them. I know
4 where they are every day. I can actually
5 supervise them. I can assign them to cases
6 immediately when they come in. The two
7 attorneys that were given to me, basically,
8 they were two people that have private
9 practices that were looking for jobs in the
10 public sector.

11 I interviewed both those people. I
12 thought they were adequate people to hire, and
13 I hired them. But, again, they were looking
14 for part time jobs and that was what the
15 Legislature was giving to me.

16 MR. HELLERSTEIN: Would you say that was
17 for a political reason? I will ask a naive
18 question.

19 MR. CARUSO: No. Basically, they were
20 sent to me. I had resumes sent to me for
21 political reasons. I got a lot of resumes sent
22 to me, And two of the people I actually did
23 hire. One person had 14 years experience. The
24 other one had more than that, in the public

1 sector, as well. And I was satisfied with
2 their job, the work they had done, and the
3 references.

4 MR. HELLERSTEIN: Would you support a
5 system that would eliminate the County
6 Legislature from the process of telling you how
7 much funding you were entitled to?

8 MR. CARUSO: I would support a system that
9 would certainly improve the funding. I would
10 certainly -- yes, I would. I would approve
11 that. Right now that's what I do. I go and
12 try to convince them, this is what I need, and
13 I do it by a numbers game. These are the
14 numbers that we have. These are dangerous
15 numbers, in terms of me having one attorney,
16 one full-time attorney, having 40 cases at a
17 time, when they are all felony cases. In my
18 opinion, those are dangerous numbers. I have a
19 lot of attorneys that I don't get complaints
20 on. I have a few attorneys that I get a lot of
21 complaints on, and those seem to be the people
22 that I am supervising the most.

23 We instituted this concept called jail
24 night, which is not new to me. New to our

1 office but not new to the other public defense
2 systems in the state. We go to the jail one
3 night per week for a two-hour block and I have
4 anywhere from four, five, six attorneys that go
5 over, and we are meeting with three, four, five
6 clients that night.

7 I know at the jail we are servicing at
8 least 20 to 30 clients. That is something
9 positive. It was looked upon as positive by
10 the community, looked upon as positive by the
11 jail. Now the jail doesn't have to answer
12 questions of, who is my attorney? Why haven't
13 I seen my attorney? Where is he or she? What
14 are they going to be doing for me?

15 MR. ELMORE: Is there much diversity
16 admitted to practice law in your county? Is
17 there any diversity on your staff?

18 MR. CARUSO: You mean agewise or racewise?

19 MR. ELMORE: Racewise, yes.

20 MR. CARUSO: Before I came into the office
21 we had one female attorney. The rest were
22 white males. Since then I have hired an
23 African-American attorney as a full-time
24 attorney. I have hired a female of Asian

1 descent. The first attorney speaks Spanish. I
2 have hired a support staffer out front who is
3 bilingual; speaks Spanish as well as English.
4 We have an intern who is bilingual, speaks
5 Spanish, who is up in my Family Court unit.

6 Most of the attorneys I hired have been
7 females. Two of the part-timers I have hired
8 have been females.

9 So I have diversified the office in terms
10 of sex and race. We have at least one attorney
11 who can sign and speak Spanish, and I have two
12 support staff that speak Spanish.

13 MR. HELLERSTEIN: Thank you, Mr. Caruso.

14 MS. BAMBERGER: Thank you very much.

15 MR. CARUSO: Thank you very much.

16 MR. HELLERSTEIN: Mr. Murphy? Good
17 afternoon, Mr. Murphy.

18 MR. MURPHY: Good afternoon. I am Jim
19 Murphy. I am a staff attorney with Legal
20 Services of Central New York, which is a civil
21 legal services program, which has been serving
22 the Central New York region since 1966. That's
23 a different position from most of the folks you
24 have been hearing from today.

1 The reason I am here is because our office
2 and the Cortland office in which I have worked
3 since 1978 has traditionally viewed assigned
4 counsel rights to be a priority which our
5 office should take some responsibility for
6 enforcing in our county. That's why I am here
7 today, to talk to you about some of those
8 problems that we have seen and the problems
9 that continue to exist.

10 I would like to begin by thanking the
11 commission for undertaking these hearings. It
12 would have been all too easy to assume that the
13 increase in the assigned counsel rates had
14 solved all of the assigned counsel issues in
15 New York. Unfortunately, it has only solved
16 one; that's the availability of anyone to be
17 able to represent folks charged with a crime.
18 Unfortunately, however, I am afraid that this
19 commission's mission, at least as it is
20 defined, is too narrow.

21 Just a short time ago you spoke about the
22 Family Court operation and assigned counsel in
23 Family Court. Family Court representation
24 Upstate is essentially that same patchwork

(David Mayo, Official Court Reporter)

1 quilt of assigned counsel that exists across
2 the board in Upstate New York on the criminal
3 side. In fact, in many counties it is the same
4 process, the same players, that are involved
5 with both.

6 Back on February 15, 1977, the Third
7 Department issued a memorandum. That
8 memorandum was sent around to all of the
9 Supreme- and County-level Judges, all the
10 magistrates, all of the courts, all of the
11 magistrates associations, Public Defender's
12 Offices and Bar Associations in the Third
13 Department. As far as I am aware, that's the
14 first time that New York State ever set
15 financial guidelines to be used across a
16 service area. At that time those rates were --
17 excuse me. That eligibility guideline was \$75
18 for a family of one per week. From -- excuse
19 me. If I might back up.

20 At that time the courts were undergoing
21 reorganization in New York. The Third
22 Department in that memo advised that the Office
23 of Court Administration was in the process of
24 reviewing how assigned counsel was working and

(David Mayo, Official Court Reporter)

1 should work, the eligibility guidelines and the
2 operation of the system, and that presumably
3 shortly Office of Court Administration would be
4 issuing some memo and rules which would
5 supplant that memo.

6 Unfortunately, we have been waiting since
7 1977 for that to happen. Unfortunately as
8 well, many of the counties took to heart those
9 standards that were issued by the Third
10 Department and began using the \$75-per-week
11 standard for an individual.

12 In 1989, some 12 years later, by which
13 time the cost of living had cut in half the
14 purchasing power of that \$75, Cortland County
15 was still using that \$75 standard. At that
16 time the Cortland County Bar Association led an
17 initiative to address some of these issues.

18 This committee has heard about people
19 complaining that folks who are not eligible for
20 assigned counsel are receiving it. I would
21 suggest to you that the opposite is true.

22 The \$75 figure in 1989 meant that folks
23 who were eligible for Medicaid, food stamps,
24 SSI and public assistance benefits had income

(David Mayo, Official Court Reporter)

1 which placed them over the assigned counsel
2 standards that were being used by counties in
3 Upstate New York. While --

4 MS. SHANKS: What were they doing then?
5 Were the clients then unrepresented in court?

6 MR. MURPHY: Ofttimes they were
7 unrepresented. Sometimes the courts would
8 intervene. As I am sure the committee is
9 aware, Judges typically do not like to be
10 involved in this process, and often they
11 abrogate the responsibility that we believe
12 should fall on them to make those
13 determinations, administrative determinations,
14 made by Public Defender's Offices or assigned
15 counsel systems.

16 MS. SHANKS: In Cortland there is a Public
17 Defender?

18 MR. MURPHY: There is in Cortland County,
19 yes.

20 MS. SHANKS: So who was making this
21 determination as to who was eligible? Was the
22 Judge or was the Public Defender's Office?

23 MR. MURPHY: The Public Defender's Office
24 was in the first instance. For folks who came

1 into our office, we would have them, in turn,
2 apply to the Court, normally copying a copy of
3 their application. And the Court would
4 subsequently find them to be eligible. That,
5 in part, was why the county eventually went
6 along with increasing the standards. You will
7 find that Upstate many of the County
8 Legislatures think they have the authority to
9 set what those guidelines should be.

10 The Third Department memo, I believe, does
11 a very good job of talking about the fact that
12 you don't have a set target. It should be a
13 moving target, depending on the nature of the
14 case, how much time is going to be involved in
15 the representation, what is going to be
16 involved in terms of investigative services,
17 those sorts of things. That falls totally out
18 of the picture when the eligibility
19 determinations are made by Public Defender
20 Offices or a secretary in an assigned counsel
21 program.

22 MR. KAMINS: Do you have a view about a
23 statewide Public Defender Office?

24 MR. MURPHY: I think it is necessary.

1 Frankly, there is no one in the system now, no
2 player in the system, that has any incentive to
3 look at things like these eligibility
4 guidelines. Even underfunded Public Defender
5 Offices have no interest in increasing the
6 eligibility guidelines for their programs when
7 they have inadequate staff to meet those
8 probably most in need because of the lower
9 income guidelines. If the Court permits those
10 other agencies to not be involved, there is no
11 watchdog on the system.

12 Additionally, there is no uniform method
13 or instrument for determining eligibility. In
14 the past six months I have convinced my office
15 that we should be looking regionwide within our
16 service area, which is thirteen counties in
17 Upstate, to look at the way assigned counsel is
18 working in those offices.

19 As a starting point we thought we would
20 request copies of the applications that are
21 used in each of the counties. One would think
22 that would be a relatively simple request.

23 In one of our counties we were informed
24 that the countywide Judge made a decision as to

1 who should get an assigned counsel application.
2 They were not generally available. And if he
3 decided that someone could apply, he would
4 offer it to them, but no one outside that
5 process could be given an application.

6 Others of the applications we have now
7 begun placing on a website. Others of those
8 applications include authorizations on the
9 application to disclose all of the financial
10 information to the Court, the District
11 Attorney, the County Attorney, as well as the
12 Public Defender's Office.

13 Some of the applications require that
14 individuals applying give general
15 authorizations to each of those entities to be
16 able to obtain whatever financial information
17 they would like from employers, banking
18 institutions, and others.

19 MS. SHANKS: It goes to the DA?

20 MR. MURPHY: Including the District
21 Attorney, yes. It goes to the District
22 Attorney's Office in one of the counties.

23 MS. BAMBERGER: The Judge has directed
24 this is the form that is used?

1 MR. MURPHY: Ofttimes the Judges are not
2 involved at all in the instruments that are
3 used.

4 MS. BAMBERGER: What are the entities that
5 created this particular form which requires
6 such disclosure?

7 MR. MURPHY: That I can't answer you. I
8 would have to go back and look at the
9 particular document. All of the applications
10 that we have collected to date are available at
11 www.lscny.org/ascoun.applications. All of the
12 applications are there. I do have a hard copy
13 of the applications with me today if you would
14 like me to leave that.

15 MR. HELLERSTEIN: If you would, that would
16 be very helpful. Thank you, Mr. Murphy. We
17 are running a little behind schedule.

18 MR. MURPHY: Okay. Thank you for the
19 opportunity to appear.

20 I would suggest to you there are far more
21 issues on this eligibility, things like the
22 courts, even the courts, counting the income of
23 estranged spouses as available, even in cases
24 in which the adverse party is the estranged

1 spouse. And that happens in one of our larger
2 counties in the region.

3 There are issues in which ownership of a
4 home automatically precludes assignment of
5 counsel, without consideration of the value of
6 the home, equity in the home, or the ability to
7 obtain a loan against the home, without looking
8 to the time. And that home can even be a
9 mobile home.

10 MR. HELLERSTEIN: Thank you.

11 MR. MURPHY: Thank you for your time.

12 MR. HELLERSTEIN: Darryl King? Good
13 afternoon, Mr. King. Welcome.

14 MR. KING: Good afternoon. I would like
15 to thank you for this opportunity to testify
16 before you. I see some old communication
17 friends, like Ms. Bamberger years ago,
18 Mr. Roberts.

19 I am going to first introduce myself. I
20 am a victim of poor representation. In 1970 I
21 was arrested for killing a police officer and I
22 faced the death penalty, where I argued with
23 the Judge not to assign an 18-b lawyer, that I
24 wanted Legal Aids to represent me because they

1 appeared to have been fighting my case. And
2 the Judge ordered that the Legal Aids couldn't
3 defend anybody in my particular case and then
4 wound up apologizing to Legal Aids in the
5 court.

6 But anyway, I was assigned an 18-b
7 attorney, which I fought every day to try and
8 get this lawyer from being assigned to my case.
9 He didn't come visit me. He didn't write me.
10 And when I went to trial for a death penalty
11 case he was not prepared.

12 I was convicted. And after my conviction
13 I had a death penalty trial, which I refused to
14 participate in because the Judge would not
15 relieve this lawyer even representing me for my
16 life or death.

17 MR. MURPHY: What county was this in?

18 MR. KING: Kings County. I served 25 in
19 prison for something I didn't do. An ATF agent
20 was assigned to the case. ATF agent had an
21 informant who knew the people that committed
22 the crime and the police department shooed him
23 away and my attorney knew nothing about that.
24 25 years he sat on that information.

1 But I am not here to talk about Darryl
2 King. I am here to talk about the other Darryl
3 King and the future Darryl Kings, because the
4 same thing that I was subject to is still going
5 on today. I am a member of the client advisory
6 board for the Defenders Association and I am
7 here to speak on behalf of the board.

8 First, let me give you some background
9 about the Defenders Association bylaws, which
10 required the board to get clients involved with
11 the decision-making of the Defenders
12 Association. So between 1998 and '99 the legal
13 -- no. The League of Women Voters, in
14 conjunction with the Defenders Association
15 advisory board, held hearings throughout the
16 New York State, which these hearings enriched
17 and were very valuable about some of the issues
18 that people have gone through with Public
19 Defenders and Legal Aids. These hearings are
20 on our website, www.nysda.org. After the --
21 I'm not a reader. I have a written speech.

22 After those hearings the client advisory
23 board was reconstructed with a statewide
24 mission of helping to reform the public defense

(David Mayo, Official Court Reporter)

1 system. With funding from Open Society, we
2 hired a community organizer and in 2003, in
3 cooperation with the League of Women Voters,
4 commenced the process of holding hearings
5 throughout New York State.

6 MS. SHANKS: Mr. King, would it be easier
7 if you give us that and we will have
8 photocopies made and you tell us what you
9 think?

10 MR. KING: Yes. The transcripts were
11 given to the commission. That's true. Our
12 organization held hearings in various parts of
13 New York State; Schenectady, Schoharie County,
14 Albany, and New York. And we also did some
15 filming on the streets of Brooklyn of people's
16 experience of dealing with their Legal Aids
17 attorneys, which we found was very sad and yet
18 interesting. And it promotes that some
19 organized group needs to be in control of the
20 Public Defenders for New York State.

21 And we recommend this commission and we
22 recommend there be standards. Rules and
23 regulations, like they have standards in the
24 hospital of the rights of the client and that

1 they understand these rights. And that if
2 these rights are not being followed, there is
3 some process, some fair process, that people
4 like myself could appeal to that they could
5 investigate it and look at it and say, you're
6 getting public funding and you are not
7 providing the kinds of service that people like
8 myself should be provided with. Then you won't
9 get this funding anymore unless you go through
10 this training.

11 And everybody in the State of New York
12 should be on the same page. It shouldn't be 62
13 counties with 102 ways of administering Public
14 Defenders' rules and regulations.

15 In many conversations and my experience
16 working in the law library with people who are
17 incarcerated, many complaints was about the
18 lawyers not visiting, the lawyers not knowing
19 the community, the lawyers not communicating
20 with the families. They take a very long time
21 for them to respond. They don't share
22 documents.

23 And I had the opportunity to have -- I had
24 a bad attorney and I had a good attorney. And

1 most of you know the good attorney, who is
2 Myron Beldock, who represented Hurricane
3 Carter. Myron treated me like a human being.
4 Every document that he filed I read and
5 approved. If there was any discussion or any
6 disputes, he listened. In fact, we got into a
7 serious dispute about my sentencing, which I
8 won. And he filed the papers. And I was
9 resentenced from 25 years to 20 to life.

10 And that was because my attorney listened
11 to me. And, I mean, I am not a lawyer. I
12 never professed to be a lawyer. But I was
13 forced to learn how to read and write, and how
14 I learned how to read and write was through the
15 law books. And I used that knowledge to help
16 negotiate my way out of prison, even though I
17 did the entire time. But I did it honorably.

18 So it is important that we have a unified
19 system that would respect who the lawyer is and
20 also who the client is and that this system
21 works best for the freedom and equal protection
22 of the law.

23 Any questions?

24 MR. HELLERSTEIN: In all of your years

1 serving that sentence, you had many
2 conversations, I would assume, with your fellow
3 inmates about their representation.

4 MR. KING: Yes.

5 MR. HELLERSTEIN: Beyond what you have
6 already said, do you have any characteristics
7 that you say has universal qualities that
8 emerged from all those years of conversing?

9 MR. KING: I mean, for the most part it is
10 that a lot of lawyers -- I guess it is because
11 so many cases attorneys have, and there is no
12 fault of mine. I mean, I tell attorneys, if
13 you can't represent a person properly, then you
14 should not be an attorney. You should turn
15 down the case. Because if you take on this
16 case and you send this person to prison and
17 what comes out of your mouth is, "If I only had
18 what the District Attorney had, I could have
19 gotten this person freed," I would not have
20 represented him.

21 MR. HELLERSTEIN: You said in your own
22 case you were very satisfied with your Legal
23 Aid attorneys but that they were relieved I
24 guess back in '77.

1 MR. KING: Yes, 1970.

2 MR. HELLERSTEIN: Were not allowed to do
3 homicide?

4 MR. KING: They were allowed to do
5 homicide -- I mean, there were two special --

6 MR. HELLERSTEIN: But you were satisfied
7 with your Legal Aid attorneys?

8 MR. KING: Yes.

9 MR. HELLERSTEIN: You would have liked --

10 MR. KING: I would have liked to have
11 continued with those attorneys, but I was
12 denied and assigned an 18-b attorney.

13 MR. ALTMAN: How did you get to
14 Mr. Beldock?

15 MR. KING: Got knows how. It was an act
16 of God. He was assigned in a death penalty
17 case. I am automatically getting an appeal.

18 MR. ALTMAN: What stage was it?

19 MR. KING: First stage in the appeal;
20 Appellate Division. And he has been with me
21 today.

22 MS. KHASHU: I'm sorry. When you were
23 filming in Brooklyn, were there any
24 observations you made? There have been a lot

1 of people who have made statements that things
2 are okay downstate, and I just wanted to see if
3 you made any observations.

4 MR. KING: Things are not okay downstate.
5 I mean, you have a bullpen therapy. I don't
6 know if you're familiar with that terminology.

7 MS. SHANKS: What?

8 MR. KING: Bullpen therapy is when you are
9 sitting in the bullpen to see your lawyer.
10 They usher you in court and the lawyer speaks
11 to you for a few minutes and then he is
12 representing your life and he keeps on going
13 out and you go back into the bullpen, and you
14 are back in Rikers Island, or at that time in
15 the other county jails.

16 A lot of lawyers in that kind of situation
17 are insensitive. And I can't say they mean to
18 be insensitive. It is because of the caseload
19 and this rush, rush, rush, rush, rush, is that
20 they are.

21 MS. SHANKS: Where do you live now?

22 MR. KING: I live in Brooklyn, New York.

23 MS. SHANKS: Is it your sense now that
24 things have changed? Would you say that the

1 majority of people who are in custody, say at
2 Rikers Island, do their lawyers come to see
3 them or do they have an opportunity to talk to
4 their lawyers on a video conference or are they
5 brought to court to talk to their lawyers, or
6 is this bullpen therapy, where they are spoken
7 to for a minute or two before court, the more
8 prevalent?

9 MR. KING: I'm glad you asked that. I am
10 on the commission -- I'm on the panel with
11 Marty Hunt and Linda Gibbs. Marty Hunt is the
12 Commissioner of Corrections and Probation. And
13 Gibbs is Commissioner of Homeless Services.
14 One of the issues that came up is about
15 attorneys coming to prisons.

16 A lot of attorneys don't come to Rikers
17 Island because they don't want to go through
18 the hassle. And then to have a man or woman
19 get up at 7:30 in the morning, go through strip
20 search before they leave, go through strip
21 search when they come back, just to see a
22 lawyer for five or ten minutes or half an hour
23 -- it just totally is dehumanizing and it will
24 exacerbate the problems of people pleading

1 guilty as opposed to going to trial, because
2 they want to get this thing over with.

3 Still, there are cases we are working on
4 where an attorney, I mean, just met some people
5 and tried to get them to plead guilty at the
6 first day of court appearance.

7 I mean, we had a lawyer called "Cop Out
8 Reeks" back in the days. I don't know if you
9 remember this attorney, Mr. Roberts, but he was
10 well known in Brooklyn. Named "Cop Out Reeks"
11 because when he met them he tried to get them
12 to cop out.

13 MS. ZUFLACHT: Was he Legal Aid?

14 MR. KING: I don't know if he was Legal
15 Aid or 18-b, but he was in between both of
16 them.

17 MR. HELLERSTEIN: Thank you.

18 MR. KING: Thank you.

19 MR. HELLERSTEIN: Mr. Kelly?

20 (There was no response.)

21 MR. HELLERSTEIN: Mr. Whiteman?

22 MR. WHITEMAN: Good afternoon, your Honor.
23 Classmate.

24 MR. HELLERSTEIN: How are you?

1 MR. WHITEMAN: Nice to see you again.
2 Other friends.
3 What is the future of public defense
4 services in New York State? Having Chief Judge
5 Kaye ask you to address that question, and
6 having you seek comments on that issue, are
7 welcome recognitions of the importance of
8 public defense. I am honored to be here in
9 response.
10 How should New York State in the 21st
11 Century go about providing counsel to those
12 financially unable to hire counsel when the
13 state seeks to constrain their lives and
14 liberties? My thoughts on this question are
15 based on observations of the way New York has
16 attempted to carry out this constitutionally
17 and morally required task over the last several
18 decades.
19 As many of you know, I was counsel to
20 Governor Nelson Rockefeller for a number of
21 years. It was in his administration that our
22 current public defense system was born. The
23 Legislature enacted County Law Article 18-b in
24 1965 on the recommendation of Attorney General

(David Mayo, Official Court Reporter)

1 Louis Lefkowitz and with the vigorous approval
2 of Governor Rockefeller.

3 We had great faith and hope that the
4 process we envisioned would breathe life into
5 the guarantee of the right to counsel, that
6 through our efforts New York would be a
7 vanguard state in enforcing the rights of poor
8 people. We sought to create a model for the
9 nation that would provide the independence of
10 defense lawyers and zealous representation of
11 clients necessary to a fair criminal justice
12 system.

13 That was a long time ago. In the interim
14 New York State has neglected the public defense
15 system that was created in 1965. 40 years have
16 passed without a serious governmental analysis
17 of how that system works in practice. I hope
18 that you are about the business of changing
19 that.

20 We now have an outdated system on the
21 verge of collapse. Patches, fashioned and
22 applied with no comprehensive look at the
23 overall plan, have sometimes helped a little
24 and often made things worse. Year in and year

(David Mayo, Official Court Reporter)

1 out the state has added to the responsibilities
2 and workload of public defense lawyers,
3 criminalizing more behavior, increasing
4 penalties, without adding resources to meet
5 those defense responsibilities. The state has
6 increased funding for prosecution and law
7 enforcement a great deal more than it has
8 increased funding for those who enforce
9 constitutional rights.

10 The increase in assigned counsel fees that
11 became effective last year and the small amount
12 of state funding that was divided among
13 localities at the very end of the last state
14 fiscal year were important but in no way
15 sufficient efforts toward providing decent
16 public defense services in New York State.

17 The crisis in public defense that led to
18 the fee increase continues to deepen. Counties
19 faced with increased assigned counsel fee costs
20 scramble to put in place cheaper systems with
21 little or no thought to quality. Public
22 defense lacks sufficient funding. It also
23 lacks standards, resources for recruitment,
24 training, supervision and support services,

1 statewide accountability, and most importantly,
2 political and professional independence.

3 There are over a hundred different
4 indigent defense programs operating in the 62
5 counties of this state, counting some assigned
6 counsel programs that are programs in name
7 only, with no structure beyond a method for
8 handling vouchers. Each locality is free to
9 select any one or more of the methods listed in
10 Article 18-b for providing defense services,
11 resulting in a variety of programs.

12 Insofar as such variety reflects the
13 state's wide geographic and historical
14 differences, it is not bad. The programs
15 differ, however, not just in form but also in
16 the ways in which client eligibility is
17 determined, the amount of support services,
18 such as investigative staff that are available
19 to help attorneys prepare cases, and the
20 efforts that are made to ensure quality.

21 Potential clients may get different
22 services or no services at all, depending on
23 which side of the county line they are on. Too
24 many of our public defense programs are the

1 same, however, in suffering a tremendous lack
2 of resources. This terrible sameness obtains
3 from Plattsburgh to Newburgh, from Buffalo to
4 Binghamton, and in Metropolitan New York.

5 There is an imbalance between the
6 resources available to public defense lawyers
7 and those available to their adversaries who
8 represent the state's efforts to imprison or
9 otherwise take away client's liberties.

10 Typically, and even in the case of local cuts,
11 the prosecution receives sufficient resources
12 for staffing, investigative support,
13 supervision and training. The state provides
14 aid to prosecution in every county, funds the
15 New York Prosecutors Training Institute, and
16 subsidizes District Attorney's salaries, as
17 well as providing undercounted resources
18 through the Division of Criminal Justice
19 Services, the State Police and local police,
20 and other resources which are also available to
21 the prosecution.

22 Meanwhile, defense services are fiscally
23 starved and suffer the annual agonies of
24 threatened or actual cuts that make planning

1 impossible and turnover high. Aid to defense
2 is provided only in some counties and has been
3 cut from just over \$20 million distributed to
4 those counties in fiscal year 1988 -- that's 17
5 years ago, \$20 million -- to about \$11 million,
6 slightly more than half, in fiscal year 2004.
7 And that's in nominal dollars, without taking
8 into account any inflation factor. Direct
9 state funding for defense services simply
10 doesn't measure up to what the prosecution
11 gets.

12 Public defense caseloads are astronomical,
13 with cases per lawyer per year in some cases
14 reaching 1,000, 1,600, or even higher. If the
15 annual billable hours for lawyers in all
16 fields, which range from 1200 to 1900 hours,
17 hold for public defense lawyers, as well, that
18 amounts to about one hour per client. That is
19 barely enough time to do the paperwork to enter
20 an appearance and close the case. Assuredly,
21 it is not time sufficient in addition to meet
22 the client, hear the client's story, obtain and
23 read initial papers and talk to potential
24 witnesses to evaluate the case. A fortiori, it

(David Mayo, Official Court Reporter)

1 is not enough time to investigate, as well, the
2 client's background and situation as they
3 relate to possible defenses or sentencing,
4 negotiate with the prosecutor, discuss offers
5 with the clients after establishing a
6 relationship of sufficient trust that relaying
7 a settlement offer doesn't immediately strike
8 the client as a betrayal. That's too much to
9 do in an hour or even two. And, of course, it
10 is only the beginning of what effective
11 representation entails.

12 MS. ZUFLACHT: Mr. Whiteman, I think we
13 realize that there are many, many problems with
14 the current system. Do you have suggestions
15 for fixing the system?

16 MR. WHITEMAN: I certainly do. Most
17 importantly, at the state level, we need an
18 independent public defense commission to
19 establish and monitor statewide standards for
20 the provision of defense services, to evaluate
21 and improve methods of providing defense
22 services, to administer state funding for
23 defense services, and to report regularly to
24 the Governor, to the Legislature, to the

1 judiciary, and to the people of this state on
2 the condition of public defense services.

3 Such a commission must stand apart from
4 any agency of the Executive or Judicial branch.
5 It must be insulated from fiscal, professional
6 and political conflicts in such a way as to
7 protect the ethical standards that defense
8 lawyers must meet as they represent individual
9 clients.

10 MS. BAMBERGER: Do you think the state
11 should pay for the whole system or do you think
12 there should be county contribution?

13 MR. WHITEMAN: I think that's a judgment
14 that the state can make in the face of fiscal
15 reality. I would favor 100 percent state
16 funding. The bill that the Committee for an
17 Independent Public Defense Commission, which I
18 chair, proposed a number of years ago and
19 continues to propose this year calls for a 40
20 percent state contribution.

21 That 40 percent was developed several
22 years ago, at a time when it would have been
23 enough money to fund the increase in the cost
24 of defense services that we foresaw and yet

1 require counties to maintain their efforts.

2 Costs have gone up since then. I don't
3 think there is any magic in that 40 percent.

4 It is a state responsibility, and the state
5 ought to be paying for it. But anywhere
6 between maintenance of local effort and 100
7 percent funding would seem to me to be a vast
8 improvement over what we have today. Yes?

9 MS. SHANKS: Could you talk to us a little
10 bit about what you would do with what is there
11 now? Would you scrap that and start over with
12 the statewide office? When you say the
13 commission, we heard two models. One,
14 statewide Public Defender where everyone would
15 be hired by one entity. Or another, where
16 local offices would remain in place or be
17 created but there would be statewide standards
18 and there would be an enforcement sort of from
19 on top.

20 MR. WHITEMAN: The committee from which I
21 speak has proposed the latter, a statewide
22 commission that establishes standards,
23 monitors, requires accountability, and itself
24 reports to the Governor and the Legislature and

1 the judiciary.

2 MS. SHANKS: Why did you prefer that model
3 over the other model?

4 MR. WHITEMAN: Because we preferred not to
5 disturb systems that are working, to the extent
6 that they are working. We preferred not to
7 have a large statewide administration.

8 Frankly, I think there are some counties
9 that would probably like the state to take over
10 the actual provision, direct provision, of
11 legal services. In the bill that we initially
12 proposed we provided for that and said that the
13 county that wasn't measuring up and couldn't
14 manage somehow to bring its services up to
15 standard could ask the commission that we have,
16 the creation of which we have proposed, to take
17 over and to provide those services.

18 We have subsequently come to the view that
19 the auditor who is setting the standards and
20 then measuring whether the standards have been
21 met and enforcing those standards in some way
22 ought not to be also in the business of
23 providing services. It seemed to us a conflict
24 of interest.

1 If there were to be a separate office, if
2 the Capital Defender Office were to be created
3 as an office available to provide services on a
4 local basis from a central spot, that I think
5 would be highly desirable.

6 The commission I am talking about is a
7 standard-setting, monitoring, enforcing agency
8 and an administrator of state funds. That's
9 the carrot.

10 MR. HELLERSTEIN: You said enforcing. In
11 what way do you contemplate? How would that
12 enforcement take place?

13 MR. WHITEMAN: Largely through -- and this
14 would go back to the question I suppose of
15 whether the state would be paying for
16 everything or not. But largely through the
17 administration of state aid and through
18 affirmative declarations; if you are not
19 measuring up, you are not to get your full
20 state aid. That's kind of a tough stick to
21 apply because if you take away state aid it
22 potentially makes things more difficult.

23 But it seems to me there are mechanisms
24 that can be developed. We were a committee to

1 recommend a commission. I would leave it to
2 the commission to work out the details of how
3 its standards would be enforced.

4 MS. BAMBERGER: Would you have the local
5 service provider, whether he is called a Public
6 Defender or whatever we want to call the
7 person, designated by the County Executive or
8 the County Legislature? Now, we heard a very
9 interesting approach from a Public Defender who
10 said that as long as we have mixed funding,
11 that is, the state and the counties, in order
12 to make sure that the counties fulfill their
13 obligations they should be allowed to have a
14 role in this selection process, but that the
15 appointment of the defenders should be for a
16 period of time which exceeds the term of either
17 the Legislature or the Executive, whichever
18 does the appointing, so that to the degree
19 possible politics is removed from the
20 appointment.

21 Is that something that you would find
22 satisfactory?

23 MR. WHITEMAN: I think my answer would be
24 two parts. As to who the appointing authority

1 ought to be, our committee did not take a
2 position and we have not taken a position on
3 whether local services are to be organized as a
4 Public Defender office, provided on a contract
5 basis with an institutional provider, or
6 provided by appointed counsel, or some mix of
7 the three.

8 Likewise, we haven't taken a position on
9 how, if it is a Public Defender office, the
10 Public Defender ought to be appointed.

11 As to the second part of your question, if
12 there is an appointment or if there is a
13 contract, should it be long enough to increase
14 the insulation of the provider from the local
15 politics and local emotions, that idea is
16 entirely consistent with our very strong view
17 that the maximum insulation possible should be
18 provided.

19 We do not think that the provision of
20 defense services should be swayed by the fact
21 that a particular crime has aroused public
22 emotion in a community. A defendant is
23 entitled to a capable, competent, energetic,
24 zealous defense, and with all the resources

1 that are necessary to support that. And that
2 should not vary because the crime is one that
3 arouses public emotion. Indeed, one could
4 argue it is just those particular crimes where
5 it is even more important to provide zealous,
6 competent defense, backed by the necessary
7 resources.

8 MR. KAMINS: Mr. Whiteman, you mentioned
9 before that the state has an obligation to do
10 the funding. I think those were your words. I
11 am just curious. From what is it directed? Is
12 it constitutional? Is it fairness?

13 MR. WHITEMAN: I said the state has an
14 obligation -- or what I meant to say was the
15 state has an obligation to assure a defense for
16 those who cannot afford to pay for their own
17 defense. That derives from both the federal
18 constitution and the state constitution.

19 Does that translate into a constitutional
20 mandate that the state provide first and last
21 dollar for that defense? I'm not sure. I
22 haven't developed that argument myself, nor
23 have I seen the development of that argument.

24 MR. ROBERTS: Mr. Whiteman, assume that we

1 find or you find that some systems are working
2 well. For example, let's say you might find
3 that Legal Aid Society in the City of New York
4 may be doing a good job. And they are being
5 funded by the city as opposed to the state.

6 Could we not work out a plan whereby there
7 would be a statewide commission, an overseer,
8 for that particular commission to see that
9 training and the supervision and the standards
10 are all upheld, including he could also find
11 what is happening in the city, as well, but the
12 city operates a separate entity, rather than
13 joining a brand new system in the state?

14 I am fearful that if we suddenly throw out
15 the baby with the bath water, we might be
16 losing something that's functioning well. And
17 then if the state program was also functioning
18 well -- we have five counties. I think most of
19 the crime occurs in those cities and they are
20 prepared to handle it at this time.

21 MR. WHITEMAN: Well, I would suggest that
22 there are several reasons why the commission
23 should be statewide and it should extend into
24 New York City.

1 The first reason is the reason of
2 principle. To be meaningful for everyone, we
3 need uniform statewide standards. It doesn't
4 make sense to me that we have one set of
5 standards in New York City and another set of
6 standards in New York State.

7 MR. ROBERTS: I didn't say that. I said,
8 number 1, the standards that are established
9 and have been utilized by the Public Defender
10 system in the past can be utilized again. And
11 those standards and the training programs that
12 they have could be utilized by the other 57
13 counties.

14 MR. WHITEMAN: Well, I'm not sure that
15 your question is different from the one I am
16 answering. If the Legal Aid Society or the
17 other providers in New York City meet the
18 standards and if they are as good as they say
19 they are, they will meet the standards and
20 there is really no problem.

21 If they don't meet the standards, upon
22 review and examination, I refer you back to
23 proposition one. We ought to have uniform
24 state standards and they ought to meet them.

1 And finally, I think the third leg of it
2 -- actually, there are four legs to this stool.
3 The third leg is the question of resources.
4 Legal Aid, by its own testimony, is getting
5 squeezed all the time. It is finding that
6 increasing caseloads are being imposed upon it
7 without comparable increases in the resources.

8 It would seem to me that the Legal Aid
9 Society and other providers in New York City
10 would want a statewide advocate for resources,
11 would want a statewide advocate for standards.

12 And then I suppose that the fourth leg,
13 frankly, New York City is not going to turn
14 down increased state aid, but I think it is
15 only realistic to think that there is a quid
16 pro quo there. If you are going to get the
17 money, you are going to take the standards and
18 the review.

19 As to whether we are going to require New
20 York City to join an operating system, that's
21 not within the confines of our proposal. We
22 have not proposed to take over operations or to
23 merge operations. We have only proposed a
24 commission that would oversee by establishing

1 standards, requiring accountability, and
2 administering the state aid.

3 MR. HELLERSTEIN: Was the reason for doing
4 that more pragmatic than thematic? In other
5 words, is it the optimal system that if you had
6 a blank check to write that would still be your
7 recommendation, or is it within the context of
8 what you perceive as the reality of our state?

9 MR. WHITEMAN: Well, there is certainly a
10 lot of pragmatism in that choice. If you gave
11 me my choice and said you can have either one,
12 which one do you want, there is a lot that
13 would be attractive about a statewide system.

14 On the other hand, it seems to me that a
15 statewide system could conceivably become
16 cumbersome and it is certainly -- I think there
17 is a lot of interest. Maybe it comes back to
18 pragmatism. There is a lot of interest in
19 maintaining the opportunity for local
20 innovation, for local effort.

21 MR. HELLERSTEIN: I wasn't thinking of
22 necessarily exclusive, but Chief Judge Kaye
23 gave us a charge to design a blueprint that
24 would design the optimal system.

1 MR. WHITEMAN: In our original proposal,
2 as I said, we did have a provision for this
3 commission to take over the direct provision of
4 legal services county by county, where
5 requested. We have withdrawn that proposal,
6 not that we think it is wrong to have a state
7 office engaged in the direct provision of legal
8 services where a county is unable to meet the
9 standards, doesn't seem to be able to figure
10 out how to do it, and would like to be relieved
11 of that burden.

12 Our withdrawal of that proposal was a
13 reflection of our view that it ought not to be
14 this oversight commission that we have
15 proposed. It ought to be somebody else.

16 That was why I alluded to the Capital
17 Defenders Office, where there is an
18 established, experienced, well-trained cadre of
19 lawyers who had been providing defense
20 services, working together. And that happens
21 to be a resource which seems to me in jeopardy
22 and I would like to see not lost.

23 MR. ROBERTS: The problem of funding
24 exists. And isn't it more practical to try to

1 sell this particular proposal by saying that
2 standards that are utilized by Legal Aid
3 Society, assuming that those standards are the
4 standards that are going to be adopted by the
5 rest of the state, to have Legal Aid continue
6 and as it goes along, being funded by the city
7 as opposed to the state, and reducing the
8 amount of funds that the state would have to
9 give and at the same time creating a situation
10 which can exist? And suddenly it does not put
11 an organization which has been around for I
12 think over 100 years, the Legal Aid Society, go
13 down the drain.

14 MR. WHITEMAN: I see no reason why the
15 Legal Aid Society should be down the drain
16 under the proposal that I have advanced today.
17 I would expect the Legal Aid Society to
18 continue to function, to thrive, and maybe to
19 even flourish more with the oversight of a
20 state commission.

21 MR. ROBERTS: But they would continue to
22 draw their funding from the city as opposed to
23 the state. And we could possibly sell that
24 particular program far more easily. To make a

1 point, they are doing maybe not a magnificent

2 job but they are doing a good job.

3 MR. WHITEMAN: Perhaps it would be more

4 saleable in Albany, but I question whether it

5 would be more saleable in City Hall.

6 For the reasons I stated, I feel strongly

7 it ought to be a single statewide commission.

8 I would expect a thousand, to draw upon perhaps

9 a poor metaphor, but a thousand beams of light

10 out there working under that.

11 In response to the question that Professor

12 Shanks offered, that's our specific proposal.

13 I have copies of my testimony, not enough for

14 each member of the commission, but eight or ten

15 copies, which I would be happy to leave. The

16 advantage of those is it has what I didn't say

17 and also has the 20 or so footnotes that I

18 never was going to say out loud, either, but

19 provides detail. And attached to it is a copy

20 of the proposal as we made it.

21 I would let you know that it has been

22 picked up in the Assembly by Assemblyman

23 Lentol. When he first put it in it still had

24 the commission providing direct service in

1 certain cases. We suggested to him that that
2 should be changed.

3 He amended his bill within the last day or
4 so. I just got a copy about 20 minutes before
5 I came down here, so I haven't been able to
6 review it to be able to say what changes he
7 made. I think the changes he made conform to
8 our proposal, but I left you our proposal in
9 its original form. And there is a copy of it
10 attached to each copy of the remarks I prepared
11 for today.

12 MR. KAMINS: Is there any chance this bill
13 he is picking up is going anywhere?

14 MR. WHITEMAN: I'm sorry. I couldn't hear
15 you.

16 MR. KAMINS: You say Lentol has picked
17 this up?

18 MR. WHITEMAN: Yes.

19 MR. KAMINS: Is he going to be submitting
20 this as a bill?

21 MR. WHITEMAN: It has been introduced.
22 The form in which it was introduced, maybe I
23 didn't make that clear, did not quite match our
24 proposal, even though we had understood that he

1 meant to. We called that to his attention.

2 He has now amended his bill, and I am
3 given to believe that he amended his bill to
4 conform to our proposal. I just have not
5 verified that that's precisely what has
6 happened. The bill is now in print. I might
7 even have a bill number here somewhere.

8 MR. DUNNE: What is the situation in the
9 Senate?

10 MR. WHITEMAN: My last report is that the
11 bill has not yet been introduced this year. In
12 prior years Senator Voelker sponsored the bill.
13 He said not only that he would sponsor it but
14 he was supportive of the idea. But it hasn't
15 gone anywhere in either house since we started
16 proposing the bill, which I think was in -- I
17 don't remember the year in which we first
18 proposed a statewide commission.

19 MR. HELLERSTEIN: Thank you, Mr. Whiteman.

20 MR. WHITEMAN: Thank you all. And thank
21 you for the work you've done.

22 MR. HELLERSTEIN: Ms. Coleman and
23 Ms. Jordan and Ms. Marsh? Since you are from
24 the same group, can we have a panel?

1 MS. MARSH: Yes.

2 MR. HELLERSTEIN: That woule very helpful
3 to us.

4 MS. COLEMAN: My name is Alison Coleman.
5 I am director and founder of Prison Families of
6 New York, Incorporated, an Albany-based
7 not-for-profit agency that works with prison
8 families statewide. I am a prison family
9 specialist. I am not an attorney.

10 Over the last five years I have addressed
11 about 20,000 calls, e-mails, or face-to-face
12 inquiries from prisoners, families, and friends
13 about concerns about prison, parole, and other
14 criminal justice issues.

15 While PFNY does not assist with legal
16 representation and presentence issues, they are
17 a normal topic of concern. And I would
18 estimate that I have discussed these matters
19 about 300 times during the last five years. In
20 almost every case the concerns were around
21 indigent defense.

22 While some prison family members
23 acknowledge the skill, caring, and attention
24 paid to their loved one's case by an assigned

1 lawyer, it is unfortunately far more frequent
2 that prison families express frustration,
3 anger, and even anguish about the legal
4 representation afforded their loved ones by a
5 Public Defender or assigned counsel.

6 In gatherings of prison family members,
7 mention of indigent defense results in jokes,
8 moans, or derision. Easily the consensus is
9 that indigent representation is all too close
10 to no representation.

11 In preparation for this hearing, I
12 inquired of hundreds of prison family members
13 who were not able or willing to be here to
14 speak with you. A number of themes came up,
15 including Public Defenders hanging around with,
16 eating lunch with, the Assistant District
17 Attorney, thereby making the relationship
18 appear cozy, inappropriate, and suspicious.

19 A lack of interest in evidence, the
20 production of which would require time and
21 money. A reluctance to challenge possible jury
22 misconduct. Resistance, sometimes
23 overpowering, to defendants who want to
24 withdraw pleas. Little communication with the

1 defendant. Poor or no communication with the
2 family, even in the case of teenage defendants;
3 in other words, children. An attitude on the
4 part of Public Defender borne out throughout
5 the process that poor equals guilty and that
6 prison is inevitable.

7 A strong belief that anyone who has had a
8 Public Defender better go straight to the law
9 library because they are going to need to do a
10 lot of the legal work themselves. And the
11 conviction that deals are made in back rooms
12 where no poor defendant or their family can
13 have any influence.

14 A Warren County woman related a sorry
15 story about her 16-year-old son, never before
16 in trouble, whose probation officer and
17 counselor recommended YO status. She reported
18 that the Public Defender refused to pursue that
19 issue and told her he would drop the case if
20 the family did not stop asking about it. The
21 son is now serving seven years.

22 Another family related behavior akin to a
23 temper tantrum from the Public Defender when
24 pressed by the family for a closer inspection

1 of their loved one's case.

2 This morning I sat with a friend who is
3 headed into major surgery. Her husband is
4 serving a life sentence. He was represented by
5 a Public Defender in Rensselaer. And in an
6 effort to distract her, I asked for her
7 thoughts about the Public Defender system. She
8 said that she believes that many Public
9 Defenders, especially those who do that work
10 part-time, take the job simply for the
11 excellent county medical benefits.

12 Well, that's a new thought to me. I know
13 it is one that thousands of prison families
14 statewide would believe. Thank you.

15 MS. SHANKS: Can I ask you what -- I'm
16 sorry. I have one question first. What
17 population is this that you are interviewing?
18 Is this from all over the state?

19 MS. COLEMAN: Statewide.

20 MS. SHANKS: Have you done any analysis?
21 We have heard a lot of testimony about whether
22 or not the system in the city is broken as
23 opposed to Upstate. Do you have a sense of
24 what the people who you were talking to, how

(David Mayo, Official Court Reporter)

1 they feel about Public Defenders, say, from
2 Legal Aid or in the city as opposed to Upstate?
3 Is there a difference?

4 MS. COLEMAN: I have no analysis to refer
5 to. Just anecdotally there is discontent
6 statewide.

7 MS. SHANKS: I'm sorry. You see the same
8 discontent?

9 MS. COLEMAN: Discontent statewide. But
10 that's based on anecdote.

11 MS. SHANKS: Okay. Thank you.

12 MR. HELLERSTEIN: Where is your office
13 located?

14 MS. COLEMAN: Albany.

15 MR. HELLERSTEIN: Can I ask, what are your
16 sources of funding?

17 MS. COLEMAN: Contracts with agencies who
18 need to have a prison family perspective in the
19 work that they do and training providers to
20 work better with prisoners' children and prison
21 families.

22 MR. HELLERSTEIN: So these are
23 governmental funding?

24 MS. COLEMAN: Not governmental at all.

1 MR. HELLERSTEIN: All private?

2 MS. COLEMAN: All private. If you have
3 any thoughts about governmental funding, I
4 would like to hear about that.

5 MR. HELLERSTEIN: I have many thoughts.
6 Not for you.

7 MS. COLEMAN: We think it should be
8 governmental. Prison families just aren't on
9 the governmental map right now.

10 MR. HELLERSTEIN: Thank you. Miss Jordan.

11 MS. JORDAN: My name is Tanya Jordan and
12 I'm a member of Prison Families of New York.

13 I tried to gather up some people that I
14 know to come here but they were totally against
15 it. So I have a couple of brief statements
16 from some of them and something from my own
17 personal experience.

18 Thomas G of Schenectady County says, "The
19 day I was arraigned I was assigned a Public
20 Defender. At that time I was given a new court
21 date that was approximately two months later.
22 Despite the fact that calls were made to the
23 Public Defender's Office numerous times and
24 letters were sent, I received no response. The

1 first time I seen my assigned counsel was the
2 morning of my new court date. When I
3 questioned him about his lack of communication,
4 he simply brushed me off and said it was
5 because he was busy. I think he failed me
6 miserably."

7 MS. ZUFLACHT: Was he in custody?

8 MS. JORDAN: He was in custody at that
9 time.

10 MS. ZUFLACHT: And what county was this?

11 MS. JORDAN: Schenectady. Lajuan J of
12 Schenectady County had a Public Defender
13 assigned to him in a drug case. The Public
14 Defender did nothing. The defendant looked up
15 more cases than the Public Defender did. The
16 defendant asked the Public Defender to file
17 motions that the Public Defender didn't mention
18 were possible. Eventually, the Judge decided
19 that it was in the defendant's best interest to
20 dismiss the Public Defender and assign him
21 outside counsel.

22 From what I have gathered from other
23 people is that the Public Defender's Office
24 fails the people that it is supposed to defend.

1 Everyone is entitled to counsel, and the Public
2 Defender's Office is set up to help those who
3 can't afford it. Unfortunately, the manner in
4 which it represents its clients is
5 unsatisfactory.

6 I know that there are a number of clients
7 who have become jailhouse lawyers while in
8 county jails because they knew that that's the
9 only way they had a chance at somewhat fair
10 representation.

11 In my own personal situation, in 1993 I
12 was arrested. My arrest was bogus and I knew
13 that, but unfortunately, because of the
14 neighborhood I was arrested in, which happened
15 to be the same neighborhood I lived in, and
16 because my charge was criminal sale of a
17 controlled substance, the Public Defender
18 pretty much told me that I was guilty but that
19 he would do his best to defend me.

20 His best became not good enough, because
21 it wasn't anyone's best. In my opinion, he
22 only appeared in court because he had to. When
23 it came time for me to enter a plea, I was
24 adamant about pleading not guilty. But my

(David Mayo, Official Court Reporter)

1 public pretender, as they are commonly referred
2 to, kept urging me to plead guilty. I pled not
3 guilty because in my heart I knew that if I
4 went to trial I would be acquitted.

5 After that court appearance a Public
6 Defender did everything he could to get me to
7 plead guilty before the preliminary hearing was
8 scheduled. At this point he had me convinced
9 that if I was found guilty I would be sentenced
10 to seven years in prison. I was 18 years old
11 and the mother of a two year old.

12 Seven years for something that I didn't do
13 was not something that I wanted to face, so I
14 told him that if he spoke to the ADA and
15 arranged it so I could be released to spend
16 Christmas with my son I would be more than
17 willing to accept a plea. My assigned counsel
18 became rude and belligerent towards me and told
19 me that I was in no position to offer my own
20 deals and don't ever question his ability
21 again.

22 At this point I knew my defense had to be
23 in my own hands, so I had no choice but to have
24 my family contact the ADA on my behalf. I may

1 have been 18 but by no means was I naive.
2 After severing three months' county jail time,
3 I was released and then did some subsequent
4 research and discovered that if I was found
5 guilty I would have received no more than a
6 one-to-three-year sentence. I think he wanted
7 me to plead guilty so that it would free up
8 some of his time.

9 In my opinion, the Public Defender system
10 is not helpful or not always beneficial to the
11 people who fall into the low economic bracket.
12 I think there should be some sort of panel of
13 some sort where a defendant who has a problem
14 with the Public Defender's Office can complain
15 to. Outside of complaining to the highest
16 person in that office, there is no one that the
17 defendants can complain to, or at least no one
18 that we are told that we can complain to.

19 MR. ZAYES: Miss Jordan, what happened to
20 your case ultimately?

21 MS. JORDAN: I received six months, which
22 was actually three months, and five years
23 felony probation.

24 MS. SHANKS: That was because your family

1 contacted the ADA?

2 MS. JORDAN: My family contacted the ADA.

3 Otherwise, at that point, as I said, I was 18

4 with a two year old. I would have pretty much

5 taken whatever they were willing to offer.

6 MS. SHANKS: So you didn't get another

7 attorney appointed to you?

8 MS. JORDAN: I didn't. As soon as it got

9 to -- as I said, as soon as it got to the stage

10 where we were going to set the preliminary

11 hearing and I told the Public Defender, "Let me

12 out to spend Christmas with my son," and I will

13 take pretty much anything at that point. And

14 that's when he --

15 MS. SHANKS: What year was that?

16 MS. JORDAN: 1993.

17 MS. SHANKS: That was with the last

18 Schenectady Public Defender; is that correct?

19 MS. JORDAN: Yes.

20 MS. SHANKS: Do you still live in Albany?

21 MS. JORDAN: I live in Albany now, but I

22 talk to many people.

23 MS. SHANKS: Do you think things have

24 changed in any way in Schenectady?

1 MS. JORDAN: I don't think so. I'm not
2 sure how it is in Albany, but I know
3 Schenectady, if you are incarcerated already,
4 you can call the Public Defender's Office
5 collect. And sometimes -- pretty much the
6 receptionist will always accept the call, but
7 you may call for a month before you actually
8 get who is assigned to you on the phone. You
9 could write letters and you get a standard form
10 letter; "We're working on it. We will be
11 there." I have known people who don't have any
12 contact with their Public Defender --

13 MS. SHANKS: We have heard testimony today
14 that the Schenectady Public Defender and all of
15 the assistants go to the jail at least once a
16 week and see the clients.

17 MS. JORDAN: No.

18 MS. SHANKS: That's not what you --

19 MS. JORDAN: That's not true. I know in
20 Schenectady County, the courtroom, when they
21 bring you -- the court is connected to the
22 jail. I mean, no. I'm sorry. The court is
23 connected to the police station. And when you
24 come from the jail, they bring you to the

1 police station -- well, the men go kind of in
2 the bullpen and the women are right across in
3 the cells. And literally, about, if you are
4 lucky, ten minutes before your name is called,
5 the Public Defender will come in there and
6 briefly speak to you, the person next to you on
7 the bench, next to you, and the person next to
8 you and the person across the hall. That's
9 sometimes the only contact that you have with
10 them.

11 MS. SHANKS: Okay.

12 MR. HELLERSTEIN: Miss Marsh?

13 MS. MARSH: I am Charlene Marsh. I am
14 here as a parent. Two years ago, my daughter
15 is 19 now, she was 17. She has had a history
16 of mental health problems. She has been in and
17 out of psychiatric hospitals since she was ten
18 years old.

19 What she does, she is manic-depressive,
20 bipolar, axis 1, 2, 3, 4, 5. She will steal.
21 And what she does, she might steal \$25 or \$50
22 and go buy \$25 or \$50 worth of T-shirts or
23 candy if she is not on her medication.

24 So what she did this last time, she wanted

1 to go to Washington D.C., so she went and stole
2 -- it came to about \$300 in credit cards and
3 about \$400 in some cash. Went into some cars.
4 And what she wanted to do was go visit her
5 friends in Washington, D.C. The police came to
6 our house. I found out where she was.

7 And my daughter is a federal police in
8 Washington. I had her go get her. I told my
9 daughter, "You have to come back here and work
10 this out." I notified the Albany County
11 Police. They met her at the airport and they
12 arrested her.

13 She was appointed, the next day, from the
14 Judge -- the Public Defender was there. I
15 brought down a briefcase. And it weighs about
16 50 pounds --

17 MS. SHANKS: Can I interrupt you? What
18 county is this?

19 MS. MARSH. Albany County. This
20 particular Public Defender saw all this
21 information. The City Court, Judge Regan --
22 one of the Judges was trying to help her. They
23 said, "We are going to work with her. We
24 understand this." I said, "She needs mental

1 help. She is not on her medication. When she
2 is on her medication, she is fine. When she is
3 not, she gets manic."

4 They took her back and then we didn't see
5 another Public Defender for four months. As a
6 matter of fact, the day of the court, when she
7 did see the Public Defender, she didn't know --
8 the lady had been sitting next to her one day
9 talking to another person. She didn't even
10 know it was her Public Defender.

11 I tried to call and I couldn't get past
12 press one, press two, press three. I even
13 tried to go in as a Judge. When they said are
14 you a judge or lawyer, I even pressed that.
15 When they found out I wasn't a lawyer or Judge,
16 they didn't speak to me.

17 To make a long story short, when she did
18 get in front of the Judge the lawyer that day,
19 the lawyer went behind, spoke to the Judge -- I
20 did get to chance to talk to the lawyer the day
21 before. I went to the Judge's office and said,
22 "Could you please have this Public Defender
23 call me so I can talk about my daughter?"
24 Well, so which they did. They got on the phone

(David Mayo, Official Court Reporter)

1 and she did.

2 So the day of the court she told my
3 daughter, told both of us, "You are going to
4 get youth status," because she was 17. "You
5 say that you are guilty." And my daughter
6 said, "Well, I want to talk." "No, you say
7 that you are guilty and I explained everything
8 to you." I said, "You didn't explain
9 everything to us." She said, "You say that or
10 she gets seven years." This was new to me. I
11 didn't want her to get seven years. I say,
12 "Yeah, when the Judge asks you did I explain
13 everything, you say yes."

14 So this was a good example, under oath,
15 for my daughter to perjure herself. As far as
16 I am concerned, it was perjury. And she had to
17 say yes. So when we left there she got youth
18 status, sealed records, five years felony
19 probation.

20 And then what was such weird -- really
21 another awful thing, the next day the
22 New York Times had her in the newspaper for
23 identity theft; that the DA had called and told
24 the Times. I called the reporter. I said my

(David Mayo, Official Court Reporter)

1 daughter is 17. This is supposed to be sealed.
2 This was her first. Brought up here on
3 criminal. She apologized and said the DA told
4 her, had called.

5 I called back to the Public Defender and I
6 said, "Did you see this thing in the paper?
7 What are we supposed to do?" And she said,
8 "Wow! He should not have done that."

9 Right now my daughter goes to Four Winds
10 every day. She just got out of Columbia. We
11 are still fighting. She is still on probation.
12 I am trying to get her removed out of
13 probation, which Alison helped me to find. I
14 am speaking to the director there to help her
15 try to get out of that system. My daughter is
16 mentally ill. She takes a lot of medicine just
17 to keep herself calm.

18 MR. HELLERSTEIN: Did there come anytime
19 in this whole involvement with the Public
20 Defender where that mental illness issue was
21 presented front and center to anybody?

22 MS. MARSH: The girl DA looked at it -- I
23 mean, the first Public Defender looked at it.
24 And then I guess the DA wanted to take this in

1 -- took it out of one court, because she was in
2 Family Court with Judge Maney. Took it out of
3 the one court and brought her into this other
4 Judge's court, which is in here, Albany County
5 Court. And they didn't even want to look at
6 her mental health anymore.

7 MR. HELLERSTEIN: Do you have any medical
8 records in your possession?

9 MS. MARSH: Like this (indicating). They
10 would not look at them. The other Public
11 Defender wouldn't even recognize them. The
12 first one did. He was removed. The other one
13 wouldn't even consider it at all.

14 And when I left there, I felt that ordeal
15 -- I said, "Wow! It seems to me like they want
16 the easy way." And I just felt she was
17 supplementing her income. She was not
18 represented at all.

19 MR. HELLERSTEIN: Thank you very much.

20 MS. JORDAN: Thank you.

21 MR. HELLERSTEIN: Miss Zeligler?

22 (There was no response.)

23 MR. HELLERSTEIN: Is Miss Zeligler here?

24 (There was no response.)

1 MR. HELLERSTEIN: Mr. Putney? Good
2 afternoon, Mr. Putney.

3 MR. PUTNEY: Good afternoon. My name is
4 John Putney. From 1994 until 2000 I was the
5 Public Defender of Livingston County. The
6 county is about 65,000 people, just south of
7 Rochester, New York.

8 And I bring to you a cautionary tale of
9 what has happened and what will continue to
10 happen as long as the localities are permitted
11 to make all the decisions and provide justice
12 to the lowest bidder.

13 About the beginning of 2000 or the end of
14 1999 my county board of supervisors decided
15 that they would make my part-time position
16 full-time because I was at the time carrying a
17 caseload of 150 to 200 felonies per year.
18 Under the ABA standards that would be a
19 full-time non-supervisory caseload.

20 The position was advertised in the local
21 Penny Savers, the local newspapers. There was
22 no search outside of Livingston County. We
23 have maybe 40 lawyers, 50 lawyers in the
24 county.

1 Three people were interviewed. I was one
2 of them. Nothing was done until July 26, 2000,
3 while I was at a meeting of the New York State
4 Defenders Association in Kerhonksen. As the
5 last item of business, not on the agenda, it
6 was presented to the board to appoint another
7 person as the full-time Public Defender of
8 Livingston County. This person had no criminal
9 experience in her nine-year career in Florida
10 and New York. She had represented three
11 felonies in Livingston County, none of which
12 went to trial.

13 When I left I was making \$43,000 a year.
14 She was hired at \$60,000 a year. The only
15 conclusion that I can draw is that the reason
16 she was hired is because they could get her for
17 less.

18 What we have in Livingston County now are a
19 number of problems. One is immediate or prompt
20 access to counsel. The Public Defender's
21 Office provides applications to people when
22 they come into the jail or people who come to
23 the office to apply. Those applications are
24 returned if they were not complete, including

(David Mayo, Official Court Reporter)

1 tax returns for both of your parents if you are
2 under 21. The applications are sent back as
3 incomplete. It could be two to three weeks
4 before you are assigned an attorney.

5 If you are in jail and charged with a
6 felony, you probably will only see your Public
7 Defender in court. To get from the Public
8 Defender's Office to court you have to walk by
9 the jail. They are all within 100 yards of
10 each other, but the Public Defender is rarely
11 seen in the jail.

12 I have spoken with attorneys who have
13 handled assigned cases under 18-b since the
14 transition and one in particular has told me
15 that he needed transcripts from prior
16 proceedings. One was a trial he was conducting
17 which had a prior Article 10 proceeding in
18 Family Court and he needed the transcript for
19 the purposes of cross-examination.

20 Another one, there had been a codefendant
21 whose trial preceded his client and he needed
22 the transcript of that trial. And the Public
23 Defender refused to pay for those. He fronted
24 for one of those in excess of \$800 from his own

1 pocket, and it required the intervention of the
2 County Judge to get reimbursed for that.

3 This Public Defender has been in office
4 now for almost five years. She has tried three
5 felonies. Most recently was a Class C violent
6 felony, a Burglary in the Second Degree. Jury
7 selection started on Monday morning. There was
8 a verdict by Tuesday noon. I don't see how it
9 is possible to select a jury in less than a day
10 in a case such as that, but she got the whole
11 thing done in a day and a half.

12 Anecdotally, I am understanding that when
13 there are conflicts and 18-b counsel needs to
14 be appointed, she will not go to attorneys who
15 have trial experience and who are not afraid to
16 try trials. She will go to those who have
17 never tried a case and whose option is to take
18 the quick plea and get out and get a voucher
19 paid.

20 MS. ZUFLACHT: She makes the assignments?

21 MR. PUTNEY: Yes. She is the assigned
22 counsel administrator.

23 MS. SHANKS: Is it just a one-person
24 office?

1 MR. PUTNEY: There is a full-time Public
2 Defender. She now has a three-quarters time
3 assistant -- we have two County Judges. They
4 now split the Judges because she assumed the
5 Drug Court responsibilities. So she was quite
6 overworked. So she takes one Judge, the
7 part-time assistant takes the other. There are
8 three assistants who handle the justice courts
9 in the 17 towns in the county and the four or
10 five villages within those towns.

11 MR. HELLERSTEIN: What is the county seat?

12 MR. PUTNEY: Geneseo. There are two
13 assistants who handle Family Court.

14 I probably have the dubious distinction of
15 being the first domino in the chain in New York
16 State of part-time assistants who were knocked
17 over and replaced by inexperienced full-time
18 Public Defenders. After me came Chemung
19 County, Seneca County. You heard from Greg
20 Lubo in New York. Greene County. Steuben
21 County.

22 MR. HELLERSTEIN: Did you have any
23 discussion with the County Executive about
24 their dissatisfaction with you, fiscally or

1 otherwise?

2 MR. PUTNEY: None whatsoever. I wasn't
3 even aware that this was taking place. I was
4 on the other end of this state on a county-
5 paid seminar.

6 MR. HELLERSTEIN: When you returned?

7 MR. PUTNEY: No. The way I found out is
8 the new appointee was at the time an Assistant
9 Family Court Public Defender in Genesee County,
10 where my associate also works. My associate
11 came down to the seminar on Wednesday evening
12 and she brought word that the Public Defender
13 had come in, resigned from that position
14 because she had been appointed the Public
15 Defender of Livingston County. And so I found
16 out from my associate.

17 MR. HELLERSTEIN: And did you ever make
18 inquiry of the county folks who made that
19 decision as to why and how that happened?

20 MR. PUTNEY: No.

21 MS. SHANKS: Would you have taken that job
22 as a full-time job?

23 MR. PUTNEY: I had offered to take it for
24 -- I think my request was \$72,000 and the

1 ability to maintain a small interest in my
2 private practice.

3 MS. SHANKS: That's one of the questions
4 that we are trying to grapple with, is that in
5 many counties there are part-time lawyers who
6 also have a private practice and whether or not
7 that is a conflict in terms of time or interest
8 or competing interests.

9 And I would like your thoughts on your
10 county and counties surrounding you. If there
11 was either a statewide Public Defender or there
12 was a statewide commission and that one of the
13 standards that was mandated was that Public
14 Defenders, or whatever we call them, are
15 full-time employees who are prohibited from
16 private practice, whether or not there would be
17 people who are competent and experienced and
18 could try a case, spend more than 15 minutes I
19 guess of jury selection, whether it would be
20 difficult to find those types of people to
21 serve.

22 MR. PUTNEY: Not if you were offering
23 somewhat more than \$60,000.

24 MS. SHANKS: You think it was the amount

1 of compensation. You don't think it would be a
2 problem in general to get someone. We heard
3 that in some counties there are very few
4 lawyers, much less few experienced criminal
5 defense lawyers.

6 MR. PUTNEY: Absolutely. It comes down to
7 compensation. If you are paying entry-level
8 salaries, that's what you are going to attract.
9 Your compatriot on the other side, the District
10 Attorney, is making \$120,000 a year.

11 MS. SHANKS: So if there was salary equity
12 with the District Attorney's Office you think
13 we would be able to attract or the statewide
14 office could attract --

15 MR. PUTNEY: Certainly.

16 MS. SHANKS: Is there any training in the
17 Public Defender's Office? Was there when you
18 were there?

19 MR. PUTNEY: When I was there all of my
20 assistants were at county expense members of
21 both the New York State Defenders Association
22 and the New York State Association of Criminal
23 Defense Lawyers, and we paid for training as
24 they were available in the area.

1 My successor, I understand, has canceled
2 the memberships of the part-timers and does not
3 provide that training. If they want it, they
4 get it on their own. And it could be divorce
5 CLE. It is whatever it takes to meet your
6 state requirements.

7 MR. HELLERSTEIN: Thank you, Mr. Putney.
8 Mr. Toomey?

9 MR. TOOMEY: Good afternoon.

10 MR. HELLERSTEIN: Welcome, Mr. Toomey.

11 MR. TOOMEY: My name is Paul Toomey. In
12 the 1990s I served as law clerk to Associate
13 Justice Edward Spain from the Third Department.
14 In 1999 I had an opportunity to move within the
15 Office of Court Administration as supervising
16 counsel of the city, town and village courts
17 resource center. In that capacity I went from
18 being a law clerk to one Judge to the 2200
19 city, town and village Judges throughout the
20 state.

21 Having met the city, town and village
22 Judges through this new job that I had -- I met
23 them out in the field. I traveled the state.
24 I understood from meeting them that the Judges,

1 75 percent of whom are non-attorneys, that the
2 Judges were doing it for the right reason.
3 They are very community oriented, they want to
4 make a difference in their community, and they
5 run for Town Judge.

6 Having met those Town Judges and never
7 believing that I would be interested in being a
8 Town Judge myself, I then decided to run for
9 Town Judge in my town, the Town of Sand Lake in
10 Rensselaer County, right across the river. So
11 now I am finishing my first term at the end of
12 this year as Judge in the Town of Sand Lake.

13 In that capacity, as the supervising
14 counsel, my office receives approximately
15 20,000 phone calls per year, from mostly the
16 Town and Village Judges. Some City Court
17 Judges, but mostly Town and Village Court
18 Judges. We receive phone calls, from dangerous
19 dogs, from local zoning violations, through
20 capital murder cases, because obviously the
21 town and village courts have preliminary
22 jurisdiction over those issues. So we run the
23 gamut in my office.

24 It came to my attention at one point,

1 probably about three years ago, as I was
2 talking to these Judges and asking some of the
3 Judges where the defendants were. I arraigned
4 at 2 o'clock in the morning. I issued a
5 securing order. The defendant is incarcerated.
6 And I asked, "Well, what did you do about
7 assignment of counsel?"

8 Well, in my particular county they have to
9 make their application to the assigned counsel
10 pool or to a Public Defender's Office. Judge,
11 did you discuss the right of counsel with that
12 defendant at 2 o'clock in the morning? Well,
13 in our county we don't do it that way. Well,
14 Judge, that's incorrect. And you have to make
15 those determinations immediately.

16 Oh, but the assigned counsel pool or the
17 Public Defender's Office, they are under fiscal
18 constraints from the County Legislature.
19 Judge, that is not our issue. That is not an
20 issue that we in the judiciary are going to
21 worry about.

22 Having learned about some of the problems,
23 I contacted John Amodeo from Judge Lippman's
24 office, who is the counsel to the CPL

1 committee. And we talked about what 170.10
2 meant when we talked about a Judge must not
3 only accord him the opportunity to exercise
4 such right but must itself take such
5 affirmative action as is necessary to
6 effectuate that.

7 What does that mean? What does that mean
8 when I have a Judge that's saying it is the
9 fiscal constraints of the County Legislature
10 that's taking that out of my hands?

11 So John and I -- John happens to be in the
12 room. John and I discussed it. And John went
13 on a long journey to come up with a rule that I
14 am sure you are all aware of that was
15 implemented on March 25, 2005, by Judge Lippman
16 in regards to assignment of counsel at
17 arraignment.

18 MR. KAMINS: Let me just ask a question.
19 We have been told that the Town and Village
20 Judges or Justices are not accountable in some
21 respects to OCA. Could you just explain the
22 relationship between them?

23 MR. TOOMEY: The relationship is, the
24 courts themselves are not funded. They are not

1 state funded. They are funded by the
2 municipalities. The Office of Court
3 Administration, through the Judge, the
4 non-attorney Judges, when elected cannot sit on
5 the bench until they go through a basic
6 program. The basic program is a six-day
7 program. Only the non-attorney Judges have to
8 go through that. We encourage the attorney
9 Judges to go through that, as I did.

10 And then subsequent to that they have to
11 take 12 credits per year of advanced training.
12 I happen to be on that staff, where we provide
13 that statewide. They have to complete 12 hours
14 per year of advanced training, an attorney or
15 non-attorney Judge. The non-attorneys Judges
16 have to pass a test. The attorney Judges do
17 not have to pass a test.

18 We certainly have administrative -- Judge
19 Plumadore has administrative responsibilities
20 for those courts. The fiscal problems in
21 regards to courtrooms, space, security, are
22 things that we can't mandate. We certainly can
23 suggest and educate.

24 MR. FAHEY: One of the other features

1 along the lines that Barry was asking you
2 about. Because you are not accountable the
3 same way as OCA, and maybe only accountable to
4 the JCC, that as a result of that there are no
5 standards and goals requirements in justice
6 court.

7 MR. TOOMEY: There have not been any
8 standards and goals requirements.

9 MR. FAHEY: Therefore, you could have a
10 trial in a justice court be adjourned for many,
11 many months beyond what it could be adjourned
12 in a superior court.

13 MR. TOOMEY: Yes. And that does occur.
14 And if the Commission on Judicial Conduct gets
15 involved, many times if they don't make a
16 determination, the commission does not make a
17 determination to discipline, unfounded, what
18 they do is they forward those concerns to Judge
19 Plumadore, the administrative concerns, and
20 then they come to my office and then we go out
21 in the field and meet those Judges and explain
22 to those Judges what the problem is and somehow
23 to resolve it.

24 MR. FAHEY: But you don't have the same

1 basic mechanism where I, sitting in County
2 Court in Syracuse, if I have a case that goes
3 over six months I start getting phone calls
4 about why it is not disposed of and what is
5 taking place with it.

6 MR. TOOMEY: Those phone calls, the
7 complaints sometimes come to Judge Plumadore's
8 office. And we deal with those more formally
9 to the commission than they would get to us.

10 MR. FAHEY: But there is no mechanism by
11 which those statistics are regularly reported?

12 MR. TOOMEY: Absolutely correct.

13 MR. FAHEY: Okay.

14 MR. TOOMEY: Absolutely correct. So John
15 Amodeo did a great job on that rule and now the
16 Judges will in the next educational cycle --
17 they have all gotten the rule and they all now
18 know what the rule is. But in the next
19 educational cycle -- it could be part 2 -- this
20 will be on this educational agenda and all the
21 Judges will have to deal with this issue.

22 MR. KAMINS: What if a Judge doesn't
23 comply with that rule, just as if they don't
24 comply with standards and goals? In what way

1 can that rule be enforced?

2 MR. TOOMEY: What we would do, if we found
3 out they weren't enforcing this rule, we would
4 certainly continue to try to educate them. We
5 tell people in my office all the time, people
6 that complain, we tell them that they have
7 every right to go to the Commission on Judicial
8 Conduct.

9 We may go to the Administrative Judge in
10 that particular district, also, make he or she
11 aware of the problem existing, and then
12 intervene that way. But we are very active in
13 not only accepting the phone calls from the
14 Judges but we also reach out to them when we
15 find out if there are any problems.

16 Yes, Professor?

17 MS. SHANKS: We have heard different
18 testimony from lawyers about town and village
19 Judges, that sometimes they only meet once a
20 week or once every other week or once a month,
21 trading off with their co-judge. That
22 sometimes if a Public Defender has to cover
23 three or four courts that are very far away,
24 they can't make it to the court that's meeting

1 once every two weeks. And then the person
2 stays in custody essentially sometimes on a
3 minor crime for a very long time without bail
4 being set, without motions being heard,
5 anything like that.

6 I would like you to comment on whether or
7 not you think those are valid observations.

8 And then I would also like you to share with
9 us, if you feel that you have information, any
10 comments that you hear from the Judges with
11 respect to how they feel the Public Defender or
12 court-appointed lawyers system is working.

13 MR. TOOMEY: I think that's the exception
14 -- to answer your first question, it would be
15 the exception rather than the rule that we
16 would have a defendant that was sitting in jail
17 on a misdemeanor, presumably, without having
18 bail set, because that is certainly something
19 that we explain to these Judges constantly, the
20 need to set bail on misdemeanors. So that
21 would be the exception. I may very well find
22 that out.

23 In regard to felonies, you may have a
24 remand, but they are going to have to have

1 their preliminary hearing within that timeframe
2 if they are in jail and request that
3 preliminary hearing.

4 So I don't think that's a major problem.
5 It is a major problem that the -- it is a
6 problem with courts meeting once a month. We
7 have to understand if they meet once a month,
8 though, they have very few cases.

9 MR. ZEIDMAN: Along those lines, I am
10 trying to figure out what sort of, I don't
11 know, reporting or record keeping there is. Do
12 things have to be filed? Is there someone at
13 some point checking to see how many cases were
14 heard, what were the results? What records are
15 there and where do they go?

16 MR. TOOMEY: The records in regards to
17 standards and goals, which the Office of Court
18 Administration does not have for Town and
19 Village Judges, we would have to look -- the
20 commission goes right to the court itself. But
21 we could go to DCJS --

22 MR. ZEIDMAN: I'm sorry. If I was a Town
23 and Village Justice and I handled three or four
24 cases this month, what paperwork, if any, am I

1 filling out and where does it go?

2 MR. TOOMEY: Lots of paperwork. We are
3 filling out lots of paperwork. We are filling
4 out paperwork that's going to DMV
5 electronically. We are filling out paperwork
6 that goes to DCJS electronically. We are
7 filling out paperwork that goes to the state
8 comptroller on a monthly basis, electronically,
9 hopefully. Most of them are electronically.

10 So there are reports, and you could see a
11 a court calendar by these reports. So we know
12 who is dealing with the majority of the
13 criminal cases or the V&Ts. It is very easy to
14 find out.

15 MR. KAMINS: Based on your relationship
16 with this group of 2200?

17 MR. TOOMEY: About 2200.

18 MR. KAMINS: Do you think if there is a
19 major overhaul in the defender system in the
20 state that this group of 2200 Judges would
21 cooperate, for the most part, in trying to
22 achieve the goals that are set?

23 MR. TOOMEY: I absolutely think -- one of
24 the other hats I wear, I am on the executive

1 committee of the New York State Magistrates
2 Association.

3 MR. KAMINS: You wear a lot of hats.

4 MR. TOOMEY: A lot of hats. And President
5 of the Rensselaer County Magistrates
6 Association. Yes, I think they would because,
7 as I stated from the beginning, our role here
8 is not to make the determination as to who it
9 will be. Our role is to make sure that the
10 assignment occurs.

11 And that's where I am. And that's the
12 struggle that I have some days. It is to make
13 sure that the defendants' rights are being
14 protected, right from arraignment.

15 So in regards to whether it be a Public
16 Defender, funded by the county, state
17 commission, I don't think there would be any
18 problem with the support from the State
19 Magistrates Association in regards to that.
20 Our focus is on protecting those rights from
21 arraignment. And I believe -- not only do I
22 believe, I know from my six and a half years
23 experience that we do a pretty good job at it.

24 MR. KAMINS: Okay.

(David Mayo, Official Court Reporter)

1 MR. TOOMEY: Set?

2 MR. HELLERSTEIN: Thank you.

3 MR. KAMINS: Thank you.

4 MR. HELLERSTEIN: That concludes our
5 testimony for today. Thank you. And we are
6 adjourned.

7 (The proceedings in the above-entitled
8 matter were concluded.)

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

In the Matter of the New York State Commission on
the Future of Indigent Defense Services

CERTIFICATE

I, David Mayo, a Sr. Court Reporter in the
Unified Court System, Third Judicial District, do hereby
certify that the foregoing is a true and accurate
transcript of the proceedings reported stenographically
by me in the above matter held at Albany, New York,
commencing on May 12, 2005.

Dated: _____

(David Mayo, Official Court Reporter)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24