

1 STATE OF NEW YORK
UNIFIED COURT SYSTEM

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3 In the Matter of a Public Hearing Regarding the

4

5 COMMISSION ON THE FUTURE OF CRIMINAL INDIGENT

6 DEFENSE SERVICES

7 -----

8 March 23, 2005
9 Old Tompkins County Courthouse
Ithaca, New York

10 B e f o r e :

11 Hon. Burton B. Roberts, Co-Chair (Not Present)

12 Professor William E. Hellerstein, Co-Chair

13 Lawrence Goldman, Esq.

14 Hon. Patricia Marks

15 Hon. Martin Murphy

16 Christopher Chan, Esq.

17 Hon. Phylis Bamberger

18 Professor Laurie Shanks

19 Paul Crotty, Esq.

20 Michele Zuflacht, Esq.

21 Hon. Robert Russell, Jr.

22 Hon. Martin Smith

23 Hon. Joseph Fahey

24 Aaron R. Alweis, RPR, CRR, CSR, Senior Court Reporter
Rena Bonczek, Senior Court Reporter

NYS Commission on the Future of
Indigent Defense Services
March 23, 2005

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CO-CHAIRMAN HELLERSTEIN: Good morning,
ladies and gentlemen.

Welcome to the public hearing of the
New York State Commission on the Future of
Indigent Defense Services.

We thank you, very much for appearing,
those of you who are testifying and for
being here.

We have a fairly lengthy schedule
today. We'd like to hold those testifying
pretty close to the time allotted.

So, without any further adieu -- first,
let me state that our Co-Chairman, the
Honorable Burton D. Roberts, was not able to
be here today. So, I will chair the
hearing. I'm William Hellerstein. And I
think everyone is properly identified by our
sign plates.

So, I'd like to welcome as our first
witness, Mr. Norman Reimer.

MR. REIMER: Good morning.

CO-CHAIRMAN HELLERSTEIN: Good morning.

Norman Reimer

1 MR. REIMER: All members of the
2 Commission, thank you for giving me this
3 opportunity to come to the Finger Lakes
4 region at the tail end of winter, at the
5 beginning of spring. As some of you know,
6 when the hearing was held in New York City,
7 which might be the logical place for the
8 president of the County Lawyers to appear,
9 it was during the A.B.A. mid-year meeting
10 and our board had not completed the approval
11 process for our testimony. So, I'm actually
12 very delighted to have the opportunity,
13 wherever it is.

14 And one of the reasons why I am giving
15 the testimony is to underscore the
16 commitment of the County Lawyers to indigent
17 defense reform by having the president
18 appear in person.

19 I also have, just by way of a little
20 bit of background, because I think it might
21 be of some interest to you, quite a bit of
22 involvement in the indigent defense system
23 over the last almost, well, twenty-five
24 years. I began literally working side by

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1 side with some of the finest Legal Aid and
2 assigned counsel through a clinical program
3 in New York. I began my career that way.

4 And I have fulfilled many different
5 tasks in conjunction with indigent defense,
6 such as overseeing the entire
7 recertification of the felony panel in the
8 First Department as the Vice-Chair and later
9 as Chair of the central screening committee.

10 As Chair of NYCLA's Criminal Justice
11 Section, we established a task force on
12 indigent defense which has been active in
13 the indigent defense field for over a dozen
14 years. We were original proponents of the
15 Indigent Oversight Committee in the First
16 Department when the city went to new
17 providers, to ensure there would be quality
18 standards. We were the proponents of
19 assigned counsel reform. And I'm sure the
20 commission is well aware of the work that we
21 did in conjunction with NYCLA versus New
22 York, the rate suit.

23 I also want to underscore the
24 prospective that the County Lawyers brings

Norman Reimer

1 to this issue. We are an organization that
2 was founded with a mission of expanding
3 access to justice, particularly for people
4 who cannot afford counsel, and we were
5 involved in, literally, in the 19 teens with
6 what was called the Lawyer Committee to
7 provide free counsel for indigent accused,
8 initially in capital cases, but then
9 expanding from that. I say that because I
10 think it is important when you understand
11 our formal written testimony, which has been
12 made available to you now, I know,
13 electronically. I have several hard copies
14 of it if the Commission would like those
15 copies.

16 CO-CHAIRMAN HELLERSTEIN: Very helpful.

17 MR. REIMER: Those copies, I can
18 certainly provide them.

19 But you have to put the context of our
20 position and our testimony, you have to put
21 it into the context of an organization that
22 does not believe that it speaks on behalf of
23 lawyers, but rather, that it speaks on
24 behalf of the indigent accused. That has

Norman Reimer

1 been our guiding mission throughout this.
2 We are enormously supportive of the Legal
3 Aid Society, of other institutional al
4 providers, certainly of the assigned counsel
5 plan. But our preeminent interest and what
6 underlies these recommendations is our
7 belief that the fundamental responsibility
8 of our profession is to meet the needs of
9 poor people, particularly in cases where
10 there is constitutionally or statutorily
11 mandated counsel.

12 So, the testimony -- which I am only
13 going to touch on briefly and then take some
14 questions, if there are any -- should be
15 looked at in the context of where we stand.
16 Ladies and gentlemen, the system is broken.
17 It has been broken for years. Everyone who
18 has anything to do with the indigent defense
19 system knows that. And to say otherwise is
20 to belie reality. It is inadequately
21 funded. It is balkanized. One component
22 has consistently been played off another
23 component. As we talked about in our
24 testimony, and as you all know, for years

Norman Reimer

1 that's been the case in New York City. We
2 now see that being replicated around the
3 state. In the wake of what should have been
4 a wonderful reform. Modest increase in the
5 assigned counsel rate, we've seen a
6 deterioration, a further degradation of the
7 system.

8 It is also in the context of a court
9 system which legitimately has a interest in
10 disposing of cases. Those are legitimate
11 concern for the administrative arm of the
12 court, but they are not necessarily an
13 interest which coincide with quality
14 defense. And I might say we are just
15 beginning to see a recognition of the
16 tremendous collateral consequences that flow
17 from conviction. So, I think maybe in time
18 the Court's own view of what constitutes
19 efficiency may somewhat evolve, but for the
20 foreseeable future, and certainly in the
21 recent past, the court system has primarily
22 been interested in moving cases along.

23 We also are in a context in which the
24 constitutional standard for effective

Norman Reimer

1 assistance of counsel is clearly not an
2 adequate standard for assuring systemic
3 quality. The kinds of cases which result in
4 reversal are so dramatically, there is such
5 dramatic ineffectiveness in such palpable
6 ways, they are too rare, they are too few,
7 and most of what makes for quality
8 representation in a good indigent defense
9 system which may never be discerned because
10 it's the subtleties of investigation, of
11 preparation, of motion practice, of sentence
12 advocacy, finding alternatives, of working
13 things out in a way which is productive for
14 the individual as well as for the State and
15 for the victims.

16 And, finally, it is in the context in
17 which we have to recognize that there is no
18 viable institutional advocate for indigent
19 defense. These issues get attention only
20 when crises percolate and boil over to the
21 point where there is literally the threat of
22 a disaster.

23 So, it is with that in mind that we
24 have proposed to you eight fundamental

Norman Reimer

1 principles and eight fundamental
2 recognitions that we believe have the
3 potential, at least, to forever alter the
4 landscape in indigent defense in this state
5 and to provide a critical reform to a system
6 which, quite frankly, has failed for years
7 to deliver on the promise of Gideon.

8 Now, I want to say a word about this
9 Commission, which I believe is a rare
10 opportunity. I believe this is a once in a
11 generation -- indeed, I was thinking about
12 when was the last time there was any
13 systemic attempt to deal with this problem.
14 And, frankly, I've now concluded that this
15 is a once in a lifetime opportunity to have
16 an impact on the indigent defense system in
17 this state. Who knows when we will have a
18 chance to do this again?

19 Chief Judge Kaye has repeatedly said
20 that she wants the Commission to imagine the
21 best, to critically examine and be bold,
22 critically examine the entire system and be
23 bold in proposing solutions. And as I
24 understand it, it's her mission that this

Norman Reimer

1 Commission not just work around the edges,
2 but to paint a complete picture,
3 essentially, on a blank canvas.

4 And here is the picture that we
5 recommend that you paint:

6 First of all, comprehensive reform,
7 which is embedded in our principles 1, 4, 5
8 and 6, reform that will provide systemic
9 quality and performance standards that must
10 be enforceable by strong action and by an
11 enforcement mechanism that is inextricably
12 linked with funding.

13 The first of these principles is that
14 the Commission articulate what should be a
15 pretty obvious proposition, but isn't in
16 this state. And that is that quality is
17 essential. And that quality is cost
18 effective. In preparing for the lawsuit, in
19 interviewing countless judges,
20 administrative judges, even D.A.s, we
21 constantly were told that if you have a
22 qualified, prepared lawyer, it moves things
23 along. It is better for the system. It is
24 better, indeed, for the prosecution because

Norman Reimer

1 witnesses don't lose interest and disappear
2 when you have prepared, capable lawyers who
3 are able to move forward. Articulate the
4 principle that quality is essential and that
5 it is cost effective.

6 The second of the key of the structural
7 reform, which is embodied in Principle
8 Number 4 in our testimony, is to adopt
9 quality control standards that apply
10 universally across the board. Whether it's
11 an assigned attorney or an institutional
12 provider, there are mechanisms and proposals
13 that are out there that this committee
14 should be aware of, the Standing Committee
15 on Legal Aid and Defender Services, SCLAD,
16 has proposals from the NBA, the NLD,
17 National Society of Criminal Defense
18 Lawyers.

19 And as you are, I'm sure, well aware,
20 the New York State bar is in the final
21 stages of adopting standards which, although
22 we have some issues that still need to be
23 fleshed out before they were finally
24 adopted, they hold great promise, they are

Norman Reimer

1 comprehensive and this Commission should be
2 looking to adopt those.

3 The third component, which is embodied
4 in our fifth principle, is that there should
5 be some form of statewide indigent defense
6 board, commission, committee, call it
7 whatever you will, but there must be
8 statewide authority that ultimately should
9 exercise that authority through departmental
10 and role boards which, reasons which I will
11 mention in a moment.

12 The fourth and final component of the
13 structural reform, which is embodied in
14 Principle Number 6, is something that,
15 again, so obvious, and yet, so many people
16 in the profession don't understand this
17 deficiency, and that is that you must
18 adequately fund whatever oversight
19 mechanisms you have.

20 As I mentioned to you, I had the good
21 fortune to chair and vice-chair the central
22 screening committee. That committee is a
23 committee of volunteers in the First
24 Department. Second Department and other

Norman Reimer

1 departments have mechanisms.
2 There is no staff assistance,
3 whatsoever. The entire investigation of a
4 new applicant, of a complaint or of a
5 recertification is done entirely by
6 volunteers. The Indigent Defense Oversight
7 Committee was created to establish
8 standards. It did do that. To some extent
9 at some point it was reasonably effective,
10 but it was entirely dependent upon
11 volunteers, was given no staffing. We have
12 a Commission on Judicial Conduct that has a
13 full-time staff. We have a departmental
14 defense committee that has a full-time
15 staff. If you are going to have oversight
16 of indigent defense, you have got to fund
17 the oversight mechanism and you've got to
18 fund it adequately.

19 CO-CHAIRMAN HELLERSTEIN: Can I just
20 ask you --

21 MR. REIMER: Please.

22 CO-CHAIRMAN HELLERSTEIN: -- to flesh
23 out, if you could, that aspect of it? You
24 refer to the Judicial Commission which, of

Norman Reimer

1 course, hears several, not that many cases a
2 year. But from a statewide perspective,
3 would you replicate the IDOOC model in a
4 basis with staff, numerically sufficient so
5 that the state is divided, I don't know, by
6 judicial district or what have you? How
7 would you put me through, sort of, the bones
8 of structure, if you have thought about it?

9 MR. REIMER: I have thought about it.
10 I don't have all the analysis today, but
11 let's explore that for a moment.

12 First of all, IDOOC model for proposing
13 standards is a good model. It was designed
14 primarily -- no, was designed exclusively to
15 deal with institutional providers. The
16 thinking was in the First Department we
17 already had a central screening committee
18 that was established under one part of the
19 court rules and we would establish an
20 oversight committee for the institutional
21 providers primarily at that point to ensure
22 that any new bidders that came in would be
23 meeting certain minimal level of quality.

24 The fact is, however, that IDOOC,

Norman Reimer

1 itself was a compromise. Our original
2 proposal and proposal that we subsequently
3 made to the Committee on the Representation
4 of the Poor, which the First Department had
5 established, I believe, under the
6 Chairmanship of Klaus Eppler at one point,
7 we proposed to them a complete oversight
8 board for the First Department that would
9 deal with all providers, both institutional
10 and assigned counsel.

11 So, the concept that we are advocating,
12 based on what was good about that and what
13 wasn't good, is that there needs to be a
14 statewide indigent defense board that will
15 set the standards, that will then have local
16 boards, whether it is done on a departmental
17 basis, whether it then gets done, where
18 there are departments that have many, many
19 counties on a further localized basis. The
20 idea is that's where your standards come
21 from, that's how they get enforced. And
22 that institution, that statewide board
23 should also be the funding mechanism, that
24 it should essentially be created on a

Norman Reimer

1 statewide basis and with statewide funding.

2 Now, why, why do we need a statewide
3 commission? That's a fair question. And I
4 think to some extent, Mr. Chairman, that is
5 responsive to the question you raised.

6 Partly, it's because of the piecemeal
7 balkanized approach that I -- such a
8 dreadful failure that we now have. Partly
9 because this is a state obligation, it
10 should be funded by the state. It is not an
11 appropriate exercise to pass this along to
12 the counties and expect them to foot the
13 bill unless you provide them with other
14 forms of aid from Albany, which gets into a
15 whole other issue.

16 The other thing we shouldn't overlook
17 is that indigent defense, as I indicated
18 earlier, has no natural constituency. This
19 Board is not only the principal evaluator;
20 ultimately, it's the principal spokesperson.
21 It is a body which is imbued with the power
22 of the State to speak up for these services
23 and make sure that they had are maintained
24 at an adequate level.

Norman Reimer

1 How would you comprise the board? Who
2 would serve on such a board? We're not
3 proposing specifics, but we've raised some
4 concepts.

5 First of all, it must serve the
6 independence of the defense function. This
7 is reflected in every, by every group that
8 has promulgated standards on indigent
9 defense services. And it must be clear that
10 these, that this body is independent from
11 prosecutorial and executive branch law
12 enforcement functions.

13 Secondly, it must reflect geographical
14 weighting of the caseload. I'm well aware
15 of concerns of some in New York City that
16 have a great fear of having Albany get
17 involved in this because, for example, as,
18 apparently, it is the case, at least the
19 courts have held, we don't get our fair
20 share in New York City of educational
21 funding, perhaps we won't get our fair share
22 of indigent defense funding. I think you
23 address that by having a geographical
24 weighting in the composition of the board.

Norman Reimer

1 You preserve local involvement. You do
2 that both by recommendations to the
3 statewide board and you do that by having
4 local boards, departmental boards, so that
5 the local bar is involved and local
6 interests are involved.

7 In addition, there is a need to make
8 sure that this is not dominated by any
9 particular ideology. That is obviously a
10 great concern. And I have heard some people
11 say in New York City, in particular, gee,
12 you know, the last thing we want is to have
13 some of these public officials involved in
14 appointing the indigent defense commission.

15 Well, my answer to that is I share the
16 concerns, but this is a democracy and we are
17 not going to be able to have a credible
18 chance of enacting reform if you exclude
19 public officials from having any role in
20 appointing who serves on this board. But I
21 think that it can be done in a way which
22 creates the right kind of mission and the
23 right kind of protections.

24 Now, there's another issue which I

Norman Reimer

1 anticipate is on the minds of many members
2 of the Commission, and that is this: Should
3 we delve into the area of seeking
4 legislative reform or should we try to do
5 through the court system, itself, what we
6 can do without all the pitfalls of waiting
7 for the Legislature to act?

8 We addressed in our testimony -- and I
9 want to tell you that I have given this a
10 great deal of thought. There is a great
11 virtue if the court system were to
12 articulate some principles. Some of the
13 other principles that I will mention in the
14 testimony in a moment are key to that. And,
15 certainly, articulating the need for quality
16 and even promulgating and enacting standards
17 would be a great step forward.

18 But ultimately, the efficacy of reform
19 will turn on the ability to enforce the
20 standards that you adopt. And having
21 thought about this long and hard, I feel
22 that the courts are ill-suited to be an
23 enforcement mechanism. I can't conceive of
24 the court system saying to a county or a

Norman Reimer

1 city we're not going to accept your indigent
2 defense provider because it's not adequate.
3 There are separations of power issues here.
4 There, quite frankly, are judicial
5 independence issues. The courts get
6 attacked when they issue decisions based on
7 the Constitution. We have seen that. We're
8 in another season in which the Court of
9 Appeals, itself, is under some attack
10 because of decisions that have been
11 rendered, presumably in good faith, in an
12 attempt to execute the law. If the courts
13 get involved in administratively dictating
14 to the other branches who and how the
15 defense function should be performed, I fear
16 that it will greatly compromise judicial
17 independence and subject the judiciary to
18 enormous attack.

19 We also have the history of the court
20 system as an administrative body in dealing
21 with indigent defense. And in our recent
22 experience over the last few years, during
23 the height of the rate crisis, on two
24 occasions the court system as an

Norman Reimer

1 administrative function -- and, again, I pay
2 great respect to its responsibility to get
3 the People's business done -- but when they
4 told Family Court lawyers in Kings County
5 that they would be subjected to serious
6 reprimand, possibly permanent removal from
7 panels or other actions, that was a decision
8 to move cases rather than to stand behind
9 the concept of quality. And when judges
10 throughout the state started to exercise
11 their authority to provide enhanced
12 compensation for lawyers in order to keep an
13 adequate pool of the 18-B lawyers around,
14 the administrative arm of the courts adopted
15 a rule to restrict that.

16 So, the experience that we have teaches
17 us that when push comes to shove, if the
18 court system is faced with a provider that
19 is not doing the job, can we really expect
20 the court system to be the one to be the
21 enforcer that's going to force the other
22 branches of government to spend more money?
23 I don't think so.

24 And it's for that reason that while

Norman Reimer

1 this is a very difficult, troubling issue as
2 to whether or not we should try to seek to
3 get legislative action versus unilateral
4 action by the judicial branch, I have to
5 come down in the long-term saying we're not
6 going to be able to do it simply by reliance
7 on the judicial branch. Although I think
8 there are many steps that can be taken that
9 will improve the situation, I don't think
10 that's the answer.

11 JUDGE BAMBERGER: Can I interrupt?

12 So, if the judiciary and the administrative
13 arm of the judiciary have limited capacity
14 or appropriateness in fulfilling the Sixth
15 Amendment obligation, how do we get the
16 Legislature to respond to the need? There
17 have been many requests of the Legislature
18 by a variety of people for a variety of very
19 important state and government functions,
20 including education, and we can't rouse the
21 group to face the issue and allocate the
22 funds. Should the Commission do something?
23 We're in a Catch 22 because the advocate for
24 defense that you think is so important, and

Norman Reimer

1 which I agree with you is important, won't
2 come into being until the reform takes
3 place, but the reform can't take place until
4 we get something moving, and we can't get
5 something moving because the Legislature is
6 unresponsive. So, what do we do?

7 MR. REIMER: Commissioner Bamberger,
8 thank you for that question because in many
9 respects that leads exactly to the next
10 point that I plan to cover, and that is the
11 role of this Commission in airing, in
12 exposing the true state of the indigent
13 defense system.

14 I think this Commission has to be, as
15 we said in our eighth principle, the
16 galvanizing force. I think what this
17 Commission should be doing, and this is one
18 of our key recommendations, is to conduct a
19 comprehensive statewide assessment of the
20 situation. I understand there is a feeling
21 of futility when we look at the Legislature.
22 We all, everyone is talking about what seems
23 to be a gridlock which we can't seem to
24 break through. But I think the fundamental

Norman Reimer

1 role that you have to play here is not to
2 only promulgate the standards and the
3 principles, but to expose what we really
4 have going and why this is so important.

5 And I don't think your work ends with a
6 report. I think it begins with a report. I
7 think if you're contemplating any kind of a
8 review of the system, it has to be a
9 thorough review, it has to be a professional
10 review, it has to get to the real stories
11 that are out there.

12 I know that you are hearing some horror
13 stories from upstate, I know the situation
14 is deplorable. But don't overlook New York
15 City. New York City has huge problems and
16 they are not all being exposed to this
17 Commission. It is very difficult to rely
18 upon the leaders of any of these
19 organizations to come forward and tell you
20 where they are not doing the job. That is
21 the nature of the problem. They don't have
22 an incentive to tell you.

23 But I will tell you some things that I
24 think you ought to know. Okay?

Norman Reimer

1 I will tell you that, for example, the
2 Legal Aid Society -- as I said, I trained at
3 the sides of some of the finest lawyers you
4 will ever see, some of them might even be
5 here on this Commission. The fact of the
6 matter is that the Legal Aid Society is a
7 shadow of what it once was. It is
8 overburdened, it is understaffed, it is
9 under a contractual mandate which is
10 inconsistent with the highest qualities of
11 standards. Its recent financial crisis
12 coupled with that contract have left a work
13 force which is both inadequately supported,
14 inadequately compensated and, I think,
15 inadequately supervised and trained.

16 I have had private conversations with
17 many supervisors who have told me this, who
18 have confirmed to me that they are not doing
19 the job that they were once doing.

20 I was recently in a courtroom in
21 New York City because, believe it or not,
22 notwithstanding all of these other
23 extra-curricular activities, I do try to
24 practice still, and I was sitting in a

Norman Reimer

1 courtroom next to a lawyer who was with one
2 of the smaller indigent defense provider.
3 And we started chatting, and I asked her
4 what her case load was. She said about 50
5 to 55 cases. And I said how is that working
6 out? She said it's great, I love it.

7 Sitting on my other side was a Legal
8 Aid attorney. I asked what their caseload
9 was. Over 150. I hate it, I can't stand
10 it, I can't wait to get out.

11 That's what we're dealing with. And
12 this is reflected in how people are being
13 represented. I guarantee you it's being
14 reflected in the amount of time that's going
15 into the cases, whether clients are being
16 visited, whether witnesses are being
17 interviewed, whether diversionary programs
18 are being explored. That's what needs to be
19 exposed.

20 I also have been -- we are recipient
21 sometimes of complaints from people who are
22 very frustrated with what's going on with
23 various complaints because we also have a de
24 jure role, we become involved with the

Norman Reimer

1 oversight of indigent defense in New York
2 City. And I also actually have a transcript
3 here in a case in which one institutional
4 provider was appearing on behalf of four
5 defendants, and the Judge, the Judge was
6 attempting to get that one institutional
7 provider to get dispositions from each of
8 the clients and, in fact, ultimately spoke
9 directly to the clients, himself, in order
10 to try to resolve this misdemeanor case.

11 This is not even in arraignment part. This
12 is in AP part.

13 There are problems out there that can
14 be ferrated out if you do the kind of
15 investigation that should be done. I urge
16 you to do that? I urge you to support it.
17 I urge you to fund it. I urge you to staff
18 it. If you need to find private money,
19 let's go out and get the private money. If
20 there is a role that the bar associations
21 can play, we will play it. When IDOOC
22 needed bodies to go out and do interviews,
23 the bar associations came through. When we
24 created a task force on indigent defense,

Norman Reimer

1 ourselves, we relied on a slew of volunteers
2 to go into the courts, to interview people,
3 to interview clients, interview lawyers
4 privately, both on and off the record.

5 You need to do a thorough study in
6 order to expose the true state of indigent
7 defense in New York and then you go the next
8 step and you advocate.

9 And, Judge Bamberger, I sincerely
10 understand the concerns. And if I thought
11 that you could solve the problem
12 unilaterally, NYCLA and I would be more than
13 happy to support that. But I don't think
14 you can do it without at least making the
15 case to the Legislature.

16 In 1997, there was a screening
17 committee meeting at which we came to the
18 conclusion that we no longer had an adequate
19 supply of competent lawyers. It was at that
20 point that in my own mind I decided that
21 unless these rates were changed, we might as
22 well just give up. And when we set about
23 doing that, we were told it will never
24 happen. Well, it happened. It took a lot

Norman Reimer

1 of work, it took a long time. It took a lot
2 of pro bono effort. It took a professional,
3 it took professional expertise to make the
4 case, but the case was made. And I,
5 frankly, I urge you -- in one of the
6 footnotes here I mention that our testimony
7 from that case and all the depositions are
8 fully available. You can have it. You can
9 see it. I think if you do the same thing
10 with respect to the system as it is now,
11 both on the assigned counsel side and on the
12 institutional side, you will ferrate out a
13 picture which even bleaker than anyone can
14 imagine.

15 CO-CHAIRMAN HELLERSTEIN: Mr. Reimer, I
16 hate to reduce your time.

17 MR. REIMER: No.

18 CO-CHAIRMAN HELLERSTEIN: Since we have
19 a long list of the of witnesses, but I want
20 to make sure that my colleagues, if they
21 have any questions, would ask them.
22 Otherwise, you've given us such a full
23 presentation in writing, and even orally, I
24 think we have a lot to digest. So, I

Norman Reimer

1 would --

2 MR. CROTTY: I commend the written
3 report to everyone. I've had a chance to
4 look at it. It's really excellent.

5 CO-CHAIRMAN HELLERSTEIN: And anything
6 else you want to submit?

7 MR. REIMER: I would like to close --

8 CO-CHAIRMAN HELLERSTEIN: Please.

9 MR. REIMER: -- with two points.

10 Point Number 1, and this is Principle
11 Number 2, and this is something that you can
12 do unilaterally that will change the way we
13 think about indigent defense. And that is,
14 you can, once and for all, demolish the myth
15 that it is somehow okay to provide defense
16 providers with lesser compensation than you
17 provide prosecutor providers. The
18 Commission must advocate for parity. This
19 is something which, it's -- as far as I am
20 concerned, this is quaint remnant of a
21 bygone era. Today the average law student
22 comes out of school with a hundred thousand
23 dollars or more of debt. In has to be
24 parity. Somebody should speak up and say

Norman Reimer

1 that. It won't happen overnight, but at
2 least that principle should be out there
3 because these rates -- and you have some
4 data in this report, the differential
5 between what defense lawyers are being paid,
6 particularly on the State side and the
7 Federal side, and the prosecutors on the
8 State side -- is outrageous and shouldn't be
9 tolerated. And even the compensation rate
10 for assigned counsel, which we were also
11 happy to see rise, let's not forget that two
12 courts said that ninety dollars was the
13 minimum rate and seven years ago or six
14 years ago, William Rehnquist told the
15 Congress that the rate should be a hundred
16 thirteen dollars an hour.

17 And my last point is what's really
18 embodied in Principle Number 8, which is for
19 this Commission really to galvanize the
20 profession. Our experience at NYCLA was
21 that once we moved out of the defense realm
22 and started to deal with other people, even
23 in our own board, and explained to them the
24 magnitude of the problem, that's when we

Norman Reimer

1 began to get momentum. It wasn't from the
2 defense lawyers and it even wasn't even from
3 the rest of the people in the criminal
4 justice system. It was when you started to
5 get civil practitioners, big firm, small
6 firm, that people began to sit up and take
7 notice. That's what I think this Commission
8 should be doing, is carrying this message of
9 reform throughout the profession. In the
10 recent SCLAD conference on Gideon, that was
11 one of the principles that they articulated
12 most heavily, is we've got to get the entire
13 profession involved.

14 So, I leave you with this thought, as
15 one who has been involved for more than a
16 dozen years in this fight, I was reminded of
17 the closing, one of the lines near the end
18 of the great movie, "Casablanca," when
19 Victor Laszlo says to Rick, "Welcome to the
20 fight."

21 Welcome to the fight, Commission, and I
22 look forward in every way possible for NYCLA
23 to support your efforts. Whatever
24 reasonable proposals you have for reform,

Norman Reimer

1 we'll be there, championing them.
2 CO-CHAIRMAN HELLERSTEIN: Thank you.
3 PROFESSOR SHANKS: If you can leave
4 those.
5 MR. REIMER: These are for you.
6 CO-CHAIRMAN HELLERSTEIN: Jack Carter?
7 (No response)
8 CO-CHAIRMAN HELLERSTEIN: Jack carter
9 not here?
10 PROFESSOR SHANKS: I didn't see him.
11 CO-CHAIRMAN HELLERSTEIN: No.
12 Byron Cooper? Mr. Cooper.
13 MR. COOPER: Good morning.
14 CO-CHAIRMAN HELLERSTEIN: Let me just
15 take those.
16 MR. COOPER: Sure.
17 MR. CROTTY: Thanks.
18 CO-CHAIRMAN HELLERSTEIN: Good morning.
19 MR. COOPER: Good morning.
20 CO-CHAIRMAN HELLERSTEIN: Welcome.
21 MR. COOPER: It's nice to see everybody
22 today.
23 I'm the Steuben County Public Defender.
24 Our lake is Keuka Lake of the Finger Lakes.

Byron Cooper

1 PROFESSOR SHANKS: And a very nice one

2 it is.

3 MR. COOPER: It is.

4 PROFESSOR SHANKS: It's beautiful.

5 MR. COOPER: I heard the term or the
6 phrase that this system is broken. I had a,
7 one of our County Court judges tell me that
8 about three and a half months ago, Judge
9 Peter Bradstreet. I don't know if any of
10 you know him. The judges had called me to a
11 meeting because I've been on board as the
12 Public Defender since May. Prior to that
13 Steuben County did not have a fulltime
14 county Public Defender. It was a part-time
15 position.

16 I'd like to give you a little snapshot
17 of what our office looks like. I certainly
18 don't come here with a state perspective.
19 Right now I'm trying to keep our head above
20 water.

21 We have three fulltime attorneys,
22 including me. Right now I'm handling C
23 felonies. The other two fulltime attorneys
24 are Family Court. One of them handles a

Byron Cooper

1 small amount of violations of probation and
2 violations of parole.

3 We have three fulltime secretaries, two
4 of which are brand new since I came on
5 board. We have two part-time attorneys, who
6 handle A and B felonies. They have their
7 own practices, as well. Which leaves D and
8 E felonies and the misdemeanors.
9 Misdemeanors, we have four part-time
10 attorneys, who have their own practices, as
11 well.

12 Prior to my coming on board last May,
13 all D and E felonies in Steuben County were
14 assigned. None of the work was done by the
15 Public Defender's Office. That goes back
16 many years. I don't know the reasoning. I
17 think the Legislature didn't pay much
18 attention because of the old assigned
19 counsel rates. Well, when the assigned
20 counsel rates got up, that got their
21 attention, they decided to hire a fulltime
22 Public Defender. After the dust cleared,
23 that was me.

24 To show you part of the attitude I face

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1 in the legislature, the county legislature,
2 when -- and I was not in on this
3 discussion -- when the discussion was going
4 on in the legislature, the county
5 administrator, et cetera, of creating a
6 fulltime Public Defender, one of the
7 legislature's comments was if that happened,
8 we'll have a full-fledged department.

9 I've been working on the attitude since
10 I started meeting with my committee, the
11 Public Safety Committee, on a monthly basis,
12 which, unfortunately, the Public Defender
13 from the past never did. So, at least
14 they're getting to know me. I'm trying to
15 explain to them and educate them over time
16 what we're trying to accomplish.

17 Now, one of the things we have
18 accomplished recently is that because of the
19 rate increase, part of my charge as the new
20 fulltime Public Defender was to propose a
21 plan to do D and E felonies at less cost to
22 the County. I came up with a plan that
23 would save the County approximately -- now,
24 I say "save," would save them one hundred

Byron Cooper

1 fifty thousand dollars if we implemented the
2 plan, as opposed to doing nothing. They
3 accepted the plan and I will be hiring two
4 fulltime attorneys devoted to D and E felony
5 work. One of the new secretaries is also
6 part of that endeavor.

7 The problem I face just, as the way I
8 put it, where the rubber meets the road, is
9 that I'm in a position right now where I
10 have ideas, I have things I want to
11 accomplish to streamline our operation, get
12 the services to the people in an efficient,
13 professional manner, and yet, I'm
14 handicapped because at this point I can make
15 no responsible recommendation to my
16 committee or to the legislature as a whole
17 that will save money. And if my proposal
18 doesn't save money, it will not be adopted.

19 That's where we are in Steuben County
20 right now.

21 CO-CHAIRMAN HELLERSTEIN: Can you
22 detail what things you would like, what you
23 need?

24 MR. COOPER: For example, what tends to

Byron Cooper

1 happen to the attorneys who are part-time in
2 Steuben county, who take on the part-time
3 position and try to handle their own
4 practice -- now, let me give you a little
5 more background in Steuben County. We're
6 rural, we're poor, we have about a hundred
7 thousand residents, in a county larger than
8 the state of Rhode Island. But getting back
9 to your question, specifically, my two guys
10 who handle A and B felonies, they've both
11 told me almost from the beginning that --
12 and, obviously, we know A and B felonies are
13 time consuming, it tends to gobble up their
14 time, it's no longer part-time. I know that
15 both of them have had to cut back on their
16 private practice, for example. But there's
17 no fulltime position into which I can place
18 either of them.

19 Yes?

20 PROFESSOR SHANKS: Yes. Can you tell
21 us approximately how many cases do each of
22 those two lawyers handle, how much do they
23 get paid and --

24 MR. COOPER: Yeah.

Byron Cooper

1 PROFESSOR SHANKS: -- is there a cap on
2 how many or just however many get arrested
3 for A and B felonies?

4 MR. COOPER: That's where we are. The
5 salaries they have right now, both of them
6 are at \$33,000 for part-time work.

7 PROFESSOR SHANKS: And how many cases
8 did they have each year -- last year?

9 MR. COOPER: I don't have that breakout
10 on the specifics.

11 PROFESSOR SHANKS: Can you give me a
12 ballpark?

13 MR. COOPER: Well, I know that I
14 projected approximately 275 D and E felonies
15 for this year because I've been specifically
16 working on that project. They are
17 overloaded. I don't really have that
18 number.

19 PROFESSOR SHANKS: Could you get that
20 information?

21 MR. COOPER: Absolutely, absolutely.

22 And another number, just for the
23 record, is we handled 4046 cases in 2004.

24 That's criminal and Family Court.

Byron Cooper

1 JUDGE FAHEY: You mentioned you have a
2 couple fulltime attorneys.

3 MR. COOPER: Excuse me, sir?

4 JUDGE FAHEY: What do they start at?

5 MR. COOPER: Well, the two fulltime
6 attorneys I have on staff are Family Court
7 and one of them is experienced. In fact, he
8 was senior to me. I had been, I had been an
9 assistant for several years. He was senior
10 to me, but wanted no part of it, the head
11 job. So, he's 56, 57, I believe. My newest
12 attorney, who actually took my place in my
13 old position, is 35.

14 JUDGE FAHEY: Thirty-five?

15 MR. COOPER: Yes.

16 JUDGE SMITH: That's fulltime?

17 MR. COOPER: Fulltime.

18 MS. ZUFLACHT: You said 35 part-time?

19 MR. COOPER: Correct. Some of the
20 structure I just fell into.

21 MS. ZUFLACHT: What's the geographic
22 distribution of the courts? You're saying
23 your county is the size of Rhode Island.

24 MR. COOPER: Bigger.

Byron Cooper

1 MS. ZUFLACHT: Are the courts, I would
2 assume, all over?

3 MR. COOPER: Forty-eight courts.

4 JUDGE SMITH: How many felony
5 prosecutions, do you know, last year?

6 Total.

7 MR. COOPER: Eight hundred forty-five.

8 JUDGE SMITH: Eight hundred forty-five
9 indictments or Superior Court Informations?

10 MR. COOPER: Probably not indictments.
11 But 845 began as felonies.

12 JUDGE SMITH: And out of those, how
13 many did your office represent?

14 MR. COOPER: That's our numbers, that's
15 my numbers.

16 JUDGE SMITH: That's your numbers?

17 MR. COOPER: Right. And three of them
18 are homicides, which is high for Steuben
19 County.

20 PROFESSOR SHANKS: Do you staff 48
21 courts?

22 MR. COOPER: The 48 courts are staffed
23 by our four part-time misdemeanor defenders.

24 CO-CHAIRMAN HELLERSTEIN: How can they

Byron Cooper

1 cover that many? What about arraignments
2 and people arrested? How quickly do they
3 see a lawyer in Steuben County?

4 MR. COOPER: Usually not that night and
5 typically the next appearance.

6 JUDGE BAMBERBGER: Which is how long?

7 MR. COOPER: Usually a matter of days.

8 JUDGE BAMBERBGER: So, a person might
9 be in the county jail or the local jail for
10 two days, three days, four days --

11 MR. COOPER: Sure.

12 JUDGE BAMBERBGER: -- before they see a
13 lawyer?

14 MR. COOPER: Hm, mm.

15 CO-CHAIRMAN HELLERSTEIN: Will any of
16 those cases be disposed of between the
17 prosecutor and the judge or the defendant
18 without a lawyer being involved?

19 MR. COOPER: That has happened. I
20 don't have a number, but that has happened.

21 CO-CHAIRMAN HELLERSTEIN: Frequent,
22 infrequent?

23 MR. COOPER: I would say it's not
24 unusual.

Byron Cooper

1 PROFESSOR SHANKS: How is your office
2 notified? Say somebody gets picked up --
3 and I'm assuming that some of these courts
4 don't have, just meet once a week or once
5 every other week. How are you notified and
6 how do you get a person out of custody
7 before the next D.A. night, or do you?

8 MR. COOPER: It is, as one of my
9 assistant Public Defenders has told me, we
10 put out fires. That's the position we're
11 in. And, so, we get them there as best we
12 can, as fast as we can. We're notified by
13 phone, we're notified by fax, depending on
14 the court.

15 PROFESSOR SHANKS: So, let's say
16 somebody get arrested tonight in one of the
17 town courts and tomorrow you're notified by
18 phone. What would then happen in your
19 office?

20 MR. COOPER: Well, I would notify the
21 attorney whose court that is.

22 PROFESSOR SHANKS: Okay.

23 MR. COOPER: If he can't get there, if
24 there's some -- I'll go. I mean, we take

Byron Cooper

1 care of it, but it's fairly haphazard.

2 PROFESSOR SHANKS: But how soon? Do
3 you have a rule? Do you get there that day,
4 the next day? How do they get back to court
5 before the next D.A. night?

6 MR. COOPER: Sometimes they don't.
7 That's the honest answer.

8 PROFESSOR SHANKS: So, it could be a
9 week or two?

10 MR. COOPER: Sure, sure.

11 PROFESSOR SHANKS: And do you have a
12 rule in your office about how soon the
13 lawyer has to get to see them in the jail?

14 MR. COOPER: There's no rule. I came
15 into a situation where, frankly, jail
16 visitations were, in my book, a shambles. I
17 have put out memo saying you will visit your
18 clients. There will be no excuses.

19 PROFESSOR SHANKS: And there -- I'm
20 sorry.

21 MR. COOPER: You will visit your
22 clients.

23 MS. ZUFLACHT: Are the defendants held
24 in the county jail, in the county seat, one

Byron Cooper

1 particular location, or are they held in the

2 local --

3 MR. COOPER: It's a central location,

4 right. In Bath.

5 CO-CHAIRMAN HELLERSTEIN: Where is the

6 central location?

7 MR. COOPER: Bath, New York.

8 MS. ZUFLACHT: And where is the

9 criminal court, the county court?

10 MR. COOPER: In Bath. That's the

11 county seat.

12 JUDGE SMITH: I Have a couple

13 questions.

14 MR. COOPER: Sure.

15 JUDGE SMITH: I don't know if you

16 mentioned it, do you have any fulltime

17 investigators?

18 MR. COOPER: I smile. No, sir.

19 JUDGE SMITH: All right. And last

20 question, for clarification, did you say

21 that -- does the prosecutor, the District

22 Attorney's Office, does he have or she have

23 representatives, Assistant D.A.s in the

24 local courts and your assistants aren't

Byron Cooper

1 there and cases are being disposed where the
2 defendant is representing himself? Did I
3 hear that correctly?

4 MR. COOPER: Well, there have -- I know
5 of instances where, as you say, someone is
6 arrested, they're brought in that night, out
7 in the middle of nowhere, for example, well,
8 there's not going to be a D.A. that night,
9 there's not going to be a Public Defender
10 that night and if the court is tardy in
11 contacting us, sure, there can be a
12 resolution without us. There could be a
13 resolution without us having gotten the word
14 yet.

15 MS. ZUFLACHT: Without a prosecutor
16 also?

17 MR. COOPER: They do occur.

18 JUDGE SMITH: That's what I'm asking.

19 MR. COOPER: But most often not.

20 JUDGE SMITH: You've heard of instances
21 where a prosecutor dealt directly with a
22 defendant to dispose of a case?

23 MR. COOPER: Yes, sir.

24 MR. CHAN: I have a quick question on

Byron Cooper

1 the judges, town judges. Could you give us
2 an approximation of how many of them are
3 lawyers and how many of them are
4 non-lawyers?

5 MR. COOPER: I could count them on one
6 hand, I believe. Let me review in my mind.

7 MR. CHAN: That are lawyers?

8 MR. COOPER: That are lawyers. And I
9 think -- let me see, one, two -- I'm trying
10 to think of a third.

11 MR. CHAN: I'm more interested in the
12 number of non-lawyers.

13 MR. COOPER: There is a third. So, out
14 of the 48 -- again, that's 32 towns and
15 villages make up the rest of the courts --
16 two of them are attorneys that are part of
17 the Steuben County bar. One of them is a
18 former JAG officer. Other than that --
19 right. There are no trained attorneys in
20 the local courts.

21 JUDGE RUSSELL: There was a question
22 posed as far as fulltime investigators. Do
23 you have any investigation staff?

24 MR. COOPER: No staff, no staff. If we

Byron Cooper

1 need an investigator, we have to farm it

2 out.

3 JUDGE SMITH: Have you requested of the
4 Legislature that they provide you with that?

5 MR. COOPER: I have not yet. I have a
6 list of dozens of requests and I am --

7 JUDGE SMITH: Out of your 845 cases
8 last year of felonies, how many went to
9 trial in County Court?

10 MR. COOPER: How many went to trial?
11 Sir, I don't have that number. I can get it
12 for you. I don't have that number in front
13 of me.

14 JUDGE SMITH: Okay.

15 JUDGE FAHEY: Mr. Cooper?

16 MR. COOPER: Okay.

17 JUDGE FAHEY: If you know the answer
18 this, how is the comparable staffing of the
19 District Attorney's Office in Steuben?

20 MR. COOPER: They certainly have an
21 investigator. And they have two part-time
22 attorneys, again, that have their own
23 practices, and the staff, the rest of the
24 attorneys, I'm going to count them in my

Byron Cooper

1 head, one, two, three, four -- five

2 full-time staff attorneys.

3 JUDGE FAHEY: Five full-time staff?

4 MR. COOPER: Including the boss.

5 JUDGE FAHEY: Including the boss, all

6 right.

7 MR. COOPER: Right.

8 JUDGE MARKS: Can I ask a question?

9 I'm Judge Patricia Marks.

10 MR. COOPER: Yes, your Honor.

11 JUDGE MARKS: To what extent do you

12 bail review by going to county court and

13 asking that bail be reviewed?

14 MR. COOPER: To what extent?

15 JUDGE MARKS: Is there a regular

16 calendar day employed by the county judges?

17 MR. COOPER: No, ma'am.

18 JUDGE MARKS: Do you make that as a

19 regular request through your office?

20 MR. COOPER: If -- let me put it this

21 way: I don't have the information for you.

22 I know that those requests are made. I

23 don't know how often. And, frankly, because

24 of the non-centralized nature of our office,

Byron Cooper

1 I'm not in a position to keep track of those
2 day-to-day activities of my misdemeanor
3 attorneys at this time. It's just not --
4 again, I have a --

5 JUDGE MARKS: What's your relationship
6 with the Sheriff and the jail superintendent
7 in terms of informing you as to someone who
8 has been brought into custody who would be
9 an indigent client?

10 MR. COOPER: Here is what happens:
11 When they go to their first court
12 appearance, the judge would give them the
13 financial affidavit and they fill it out at
14 the jail, and then the jail faxes it to us.

15 JUDGE MARKS: So, that should happen
16 very quickly?

17 MR. COOPER: Very quickly, that's
18 right.

19 CO-CHAIRMAN HELLERSTEIN: Have you had
20 occasion to encounter individuals who had
21 resolved their cases without an attorney and
22 then came seeking your advice or your
23 attorneys' advise with respect to
24 consequences about what they had resolved

Byron Cooper

1 that they hadn't foreseen, if they took a
2 plea and now they realize they took
3 something they should not have?

4 MR. COOPER: I have had, I have had
5 feedback like that on a second go-round, if
6 you will, for example, a second or third
7 time a person is a defendant and they said
8 I'm glad we asked for an attorney this time
9 or got an attorney this time. But not that
10 frequently, no, sir.

11 PROFESSOR SHANKS: I'm sorry. You said
12 you met with the Public Safety Committee?

13 MR. COOPER: That's my committee.

14 PROFESSOR SHANKS: I don't know what
15 that means, that's your committee.

16 MR. COOPER: Well, it's four
17 individuals of the Legislature. I think the
18 legislature comprises 17 individuals who are
19 elected. And there are committees. And the
20 Public Safety Committee, which includes the
21 Sheriff's Department, Probation, District
22 Attorney, has historically included the
23 Public Defender's Office.

24 PROFESSOR SHANKS: And that's basically

Byron Cooper

1 where you try to convince them to give you
2 something on the theory that it will save
3 them money?

4 MR. COOPER: That's the first place I
5 have to make an impact.

6 CO-CHAIRMAN HELLERSTEIN: And what will
7 it save they them money from? In other
8 words, you say you are saving us money.
9 From what?

10 MR. COOPER: Well, the specific example
11 I gave was there was a projected cost based
12 on an analysis I did of the last two years
13 of assigned counsel vouchers that indicated
14 to me that the cost had we done nothing in a
15 given year would be close to seven hundred
16 thousand dollars for assigned counsel
17 vouchers, only D and E felonies. And I said
18 I can hire these two people and a secretary
19 for approximately one hundred fifty thousand
20 dollars a year less. And they liked that.

21 PROFESSOR SHANKS: Again, though,
22 you're agreeing to do however many there are
23 with no investigators, with whatever support
24 staff you have. So, in other words, you've

Byron Cooper

1 promised them that you're going to handle
2 this, no matter what?

3 MR. COOPER: Well, I'm not agreeing to
4 it. I'm recognizing the financial
5 constraints I'm under, and we will do the
6 best we can until I can convince them at a
7 later date that we need more. But, again,
8 the position I'm in and the political end of
9 it, which I had, frankly, not anticipated to
10 be so severe, is that the position I'm in is
11 I can make no reasonable proposal, such as a
12 fulltime investigator, unless it saves the
13 County money.

14 PROFESSOR SHANKS: So, in other words,
15 you know, correct me if I'm wrong,
16 basically, you're in a position where you're
17 not going to advocate for standards or for
18 caseloads or for support staff or even,
19 really, an argument that how to serve your
20 clients the best way. You're going to try
21 to get money by letting them know that they
22 can do it cheaper with you than if they used
23 another system.

24 MR. COOPER: No, I am advocating, but

Byron Cooper

1 you have to realize -- well, I don't know if
2 you have to, but the position we're in is --
3 and by "we," I mean my office and, frankly,
4 all other departments in the county, I mean,
5 we all need money -- and one of the
6 realities for my county, and I'm assuming
7 most of the counties in the state, is vast
8 quantities of the budget are eaten up by
9 Medicaid. Good, bad or indifferent, that's
10 just a fact of life. So, I'm presented with
11 here is your piece of the pie, and everybody
12 else wants a piece of my pie and I want a
13 piece of their pie.

14 And, so, when I came into the position,
15 there was no credibility in the minds of my
16 committee and, probably, the Legislature at
17 large for the Public Defender's office. We
18 are second-class citizens. I hesitate to go
19 this far, but many of them don't care.

20 JUDGE BAMBERBGER: Is it that they
21 don't -- I think we're talking, we've gotten
22 into two issues here. The first issue is
23 the viewing or the perspective of the county
24 legislature of all of these agencies, the

Byron Cooper

1 D.A., the Public Defender, the Probation
2 Department, which I know is starved of
3 funds.

4 MR. COOPER: Absolutely.

5 JUDGE BAMBERGER: And various other
6 county agencies. And then whether or not
7 the P.D.'s Office has a special role among
8 deprived agencies.

9 So, you seem to imply that both
10 situations exist, that all of these agencies
11 are starved and that you have a less-favored
12 role or a more starvation level than the
13 other agencies do. Is that right?

14 MR. COOPER: That is correct, that is
15 correct. And part of what I've been trying
16 to accomplish over these months since last
17 May is to develop a rapport with my
18 committee. And I think over time I've
19 gained their trust. I'm there every month,
20 I make a report every month. Why that
21 wasn't done before, I don't know.

22 JUDGE BAMBERGER: So, now you're
23 equally disfavored, not more disfavored?

24 MR. COOPER: No, I think I'm more

Byron Cooper

1 favored now than when I began.

2 JUDGE BAMBERGER: But more equally
3 disfavored?

4 MR. COOPER: Probably not at that
5 point.

6 JUDGE BAMBERGER: But you're getting
7 there?

8 MR. COOPER: But better than we were.

9 JUDGE BAMBERGER: Okay.

10 CO-CHAIRMAN HELLERSTEIN: If you had
11 done nothing, you said the tab was seven
12 hundred thousand dollars?

13 MR. COOPER: Approximately. For just
14 the D and E felonies.

15 CO-CHAIRMAN HELLERSTEIN: So, if you
16 had done nothing. So, you came in front of
17 them with a hundred thousand dollars less,
18 you showed them you could save them. What
19 if you had come in with a 675,000 dollar
20 proposed budget and save them twenty-five
21 thousand, what would have happened?

22 MR. COOPER: I don't know. I didn't.
23 And I don't know. They would -- look, in my
24 own committee, in my own committee of four

Byron Cooper

1 -- excuse me, five people, including the
2 Chairman, demonstrating -- and the
3 arithmetic was easy, it wasn't even
4 mathematics, it was arithmetic. I still got
5 a no vote, demonstrating in the next
6 calendar year when we got the people on
7 board, the calendar year, we would save
8 approximately a hundred fifty-five thousand
9 dollars, I still got a no vote.

10 JUDGE SMITH: If I may --

11 MR. COOPER: So --

12 JUDGE SMITH: I'm sorry.

13 MR. COOPER: If -- so if it had been
14 twenty-five thousand, I may have gotten five
15 no's.

16 MS. ZUFLACHT: How would you rate the
17 quality of these indigent defenders given
18 the limitation of your budget?

19 MR. COOPER: My staff works their butts
20 off, and I think in general it is well above
21 competent and sometimes inspired.

22 MR. CHAN: Quick question. You haven't
23 mention he appeals. I'm sorry.

24 JUDGE SMITH: Just one question. I'd

Byron Cooper

1 like to jump backwards. Defendants arrested
2 and charged with felonies, arraigned in
3 local courts, generally are remanded without
4 bail to the county jail. Yes?

5 MR. COOPER: Generally.

6 JUDGE SMITH: Okay. Does your office
7 handle bail appeals on those cases to County
8 Court?

9 MR. COOPER: Sure.

10 JUDGE SMITH: Okay.

11 MR. COOPER: The individuals, the
12 individuals --

13 JUDGE SMITH: How quickly?

14 MR. COOPER: Here is the way I would
15 say it: At this point, and I think my
16 management style, if I may be bold to say I
17 have one yet, is pretty hands off. I let my
18 attorneys do their work. We, in fact, even
19 at this time do not have regularly scheduled
20 meetings. I trust them to do those things
21 as they see fit.

22 JUDGE SMITH: How quickly? Do you have
23 any feel for how quick -- how long is the
24 defendant sitting in the county jail?

Byron Cooper

1 MR. COOPER: I think they're very
2 quick. Very quick. Yeah, I don't think
3 there's any great delay.

4 CO-CHAIRMAN HELLERSTEIN: Mr. Chan?

5 MR. CHAN: You haven't mentioned
6 appeals.

7 MR. COOPER: Yes.

8 MR. CHAN: In your county does your
9 office handle the appeals or does it
10 influence any way the way cases are disposed
11 of?

12 And what I'm trying to get at is when
13 you have a disposition, are there automatic
14 waivers of appeal or is that kind of
15 emphasized in your court system in your
16 county?

17 MR. COOPER: I don't think it's
18 emphasized and we don't, my office doesn't
19 handle anything other than filing the notice
20 of appeal and then getting the proper
21 indigent paperwork to the Appellate
22 Division, and then those cases are assigned.

23 Now, one of the projects -- again, I
24 have I've got a list of dozens of projects

Byron Cooper

1 I'm trying to work on over the next four
2 years, I was appointed for four years -- one
3 of them is do we want to do them? I
4 think -- and, again, it's one of those
5 things I can perhaps demonstrate that we can
6 do them more cheaply, but unless I can
7 demonstrate that kind of cost efficiency, I
8 believe at this time most proposals are
9 going to fall on deaf ears -- well, actually
10 not deaf, but very negative ears.

11 CO-CHAIRMAN HELLERSTEIN: Mr. Cooper --

12 JUDGE BAMBERGER: I just have one
13 question. If there was something that could
14 be done in terms of the geography, things
15 were located in a different place or the
16 timing of the court session was different,
17 what would you recommend?

18 MR. COOPER: I would recommend -- this
19 is not popular with the magistrates
20 organization -- but I would recommend that
21 at least on a county-by-county basis, the
22 counties have the opportunity to do away
23 with the justice courts and institute what I
24 would call district courts. For example, in

Byron Cooper

1 my county we could have a district court in
2 Hornell, a district court in Bath and a
3 district court in Corning. And rather than
4 one of my assistants spending five nights a
5 week in court and then going to this court
6 on the next Monday, being scattered, even
7 though they have their region of the county,
8 it's a vast area, if you look at counties,
9 they could go to Bath and stay in court all
10 day and get their work done.

11 CO-CHAIRMAN HELLERSTEIN: Thank you,
12 Mr. Cooper. Is there anything else you
13 wanted to tell us? If you have any
14 information you'd like to send us, we'd
15 appreciate it.

16 MR. COOPER: Certainly. In terms of
17 case load. I had no panel to approve my
18 presentation here. I sort of approved it,
19 myself.

20 I did want to mention, though, there
21 is, the Steuben County Southern Tier Legal
22 Services does exist in Steuben County. They
23 do no criminal work that I know of. They do
24 some custody cases and I think they mainly

Byron Cooper

1 concentrate on landlord - tenant and some
2 labor and perhaps Social Security type
3 issues. But there is no -- we're it.

4 CO-CHAIRMAN HELLERSTEIN: Thank you,
5 very much.

6 JUDGE RUSSELL: Before you leave, who
7 does the appellate work?

8 MR. COOPER: The appellate work is all
9 assigned. Now, one, that is, again, one of
10 the dozen or so projects that I have in
11 line, to, perhaps, look and see the
12 viability of us having an appellate group
13 within the office.

14 CO-CHAIRMAN HELLENSTEIN: Thank you.

15 MS. ZUFLACHT: What percentage of the
16 defendants are represented by your office
17 versus private defense attorneys?

18 MR. COOPER: Oh, my gosh. That's a
19 good question. We have a very poor county.
20 I don't have an exact figure for you. I'll
21 bet it's well over 50 percent and probably
22 higher than I'm thinking.

23 CO-CHAIRMAN HELLERSTEIN: Thank you,
24 Mr. Cooper.

Byron Cooper

1 MR. COOPER: Thank you, very much.
2 JUDGE BAMBERGER: Thank you, very much.
3 CO-CHAIRMAN HELLERSTEIN: Mr. Rich?
4 Good morning, Mr. Rich.
5 MR. RICH: Good morning, ladies and
6 gentlemen.
7 CO-CHAIRMAN HELLERSTEIN: Welcome.
8 MR. RICH: Thank you.
9 CO-CHAIRMAN HELLERSTEIN: Thank you for
10 coming.
11 MR. RICH: I appreciate being here.
12 Thank you.
13 Again, my name is Richard Rich. I'm a
14 Chemung Public Advocate. That's a new
15 position that our county created.
16 In essence, what I am, I run the
17 Conflict Defender Office in Chemung County,
18 and then our office is also the primary
19 defender now in Family Court situations.
20 Prior to taking that position, I was
21 the County's Public Defender for a four-year
22 period, took two years off in private
23 practice, but luckily got back into really
24 doing the job I love.

Richard Rich

1 Our county, Chemung County, is right
2 next to Steuben County, where you just heard
3 from, however, I think quite a bit different
4 both in terms of the way we deliver our
5 services and also our geography is quite a
6 bit different. Our county geographically is
7 very small. I think we're lucky in that
8 it's a much easier county to administrate.

9 CO-CHAIRMAN HELLERSTEIN: The county
10 seat is?

11 MR. RICH: The county seat is Elmira.
12 We're approximately 25 miles southwest of
13 here.

14 Let me give you a little history about
15 our county and what we are doing right now
16 because we're in the process of revamping
17 our entire indigent defense system.

18 I started, myself, in the Public
19 Defender's Office back in 1995, fresh out of
20 law school. Within two and a half years
21 literally every attorney in the office,
22 except for the chief defender, left. And
23 our chief defender was a nightmare. He
24 since has been disbarred. He spent less

Richard Rich

1 than an hour a month in the office and it
2 was at that time a part-time position. And
3 to say that the state of things was a
4 disaster really is an understatement.

5 There developed a lot of complaints
6 from the judiciary about the quality of the
7 Public Defender's Office. And, finally, the
8 County Legislature and County Executive got
9 rid of my predecessor and with two and a
10 half years I was the most experienced guy
11 and became chief defender.

12 I immediately got very connected with
13 the Defender's Office. I went to training
14 at Vera (phonetic) and tried to do anything
15 I could to develop a professional office.
16 Within about six months the County did make
17 my position fulltime, which helped
18 tremendously, and also converted two of the
19 previous part-time positions we had to
20 fulltime. And over the course of the four
21 years that I was Public Defender, I think we
22 developed a pretty good professional
23 fulltime Public Defender's Office. And many
24 of the problems that you just heard from

Richard Rich

1 Steuben county, I think we addressed and no
2 longer, although previously did have, in
3 Chemung County.

4 What we are doing now, largely, is a
5 reaction to the rate increases. The Court
6 has essentially hired me back to develop a
7 conflict defender office for criminal stuff
8 and to start having fulltime employees or in
9 an office similar to the Public Defender's
10 Office get involved in Family Court.
11 Historically, the Public Defender's Office
12 in our county did nothing in Family Court.
13 That was all handled by the assigned counsel
14 panel.

15 They've also asked me -- and this is
16 literally a work in progress -- to develop a
17 formal assigned program. Historically, if
18 you didn't receive the Public Defender, if
19 in Family Court we didn't do it, the judges
20 just assigned whoever they wanted to
21 represent the individual client. We are
22 presently in, we're looking to go to the
23 County Legislature on April 4th, attempting
24 to create a fulltime assigned counsel

Richard Rich

1 administrator position to handle those
2 duties and I think our hopes of getting that
3 passed are very, very good.

4 Our county, I think, is somewhat of a
5 microcosm of the state. And I think we see
6 a lot of the same problems in Chemung County
7 that you're probably seeing everywhere else.

8 The big problems that I see right now in
9 public defense, obviously, is a lack of
10 oversight. There is tremendous disparity
11 from county to county in terms of the
12 quality and type of services delivered by
13 Public Defender's offices, and routinely are
14 fielding questions and getting calls from
15 people in neighboring counties. There is
16 just no standardization.

17 And in just looking at the disaster
18 that I inherited, if there is any kind of an
19 oversight board at all, that never would
20 have happened. I mean, nobody would allow
21 any government services to deteriorate to
22 the point that they did before I became
23 Public Defender.

24 We, our county, again, being a small

Richard Rich

1 one, geographically, are frequently
2 representing people who have charges in
3 other counties, Steuben County, Tioga
4 County, sometimes up here in Tompkins or
5 Broome. And we run into problems frequently
6 in eligibility criteria, differences between
7 the various counties.

8 We think our county is fairly generous.
9 I almost never turn down anybody seeking
10 assigned counsel services. That is not
11 always the same in our neighboring counties.

12 We run into situations at least five or six
13 times a year where we get, with a
14 neighboring county, a problem where we
15 decide to defend a client who are eligible
16 in our county and they're ineligible and
17 can't afford counsel in, say, Schuyler or
18 Steuben. Sometimes that requires us to send
19 our attorneys to handle that situation.

20 Again, something that needs to be addressed.
21 But the only way that's going to happen is
22 with universal standards for eligibility.

23 MS. ZUFLACHT: When you go into another
24 county, does that county reimburse you?

Richard Rich

1 MR. RICH: No, that would be pro bono.

2 But again, there are some cases that will
3 call for that. We'll try to, I've had
4 conversations with s neighboring District
5 Attorneys when I have a matter or we're
6 representing someone who we feel is eligible
7 for services in Chemung County, but isn't in
8 another county --

9 PROFESSOR SHANKS: Do you have parity
10 with pay, your attorneys and the local DA?

11 MR. RICH: Again, this is something
12 new. The answer is sort of. Our starting
13 salaries are the same and they progresses
14 the same. However, the District Attorney
15 has a second level of management that we
16 don't have, so there's room for advancement
17 in the D.A.'s Office that we don't have. A
18 chief salary obviously isn't close to what
19 the statutory salary for the District
20 Attorney is.

21 JUDGE SMITH: What's the population of
22 your county?

23 MR. RICH: 96,000.

24 JUDGE SMITH: And do you know how many

Richard Rich

1 felony prosecutions occurred in the County

2 Court last year?

3 MR. RICH: We had 437 indictments in
4 Chemung County last year.

5 CO-CHAIRMAN HELLERSTEIN: How many
6 SCI's?

7 MR. RICH: Very few. I believe, we've
8 been told by our administrative judge that
9 we're the lowest in the state, probably ten
10 to eleven. Our county relies very heavily
11 on the grand jury system.

12 CO-CHAIRMAN HELLERSTEIN: Now, the
13 Public Defender, the office you left --

14 MR. RICH: Yes.

15 CO-CHAIRMAN HELLERSTEIN: -- has a new
16 chief?

17 MR. RICH: A new chief. It's been two
18 years.

19 CO-CHAIRMAN HELLERSTEIN: How big a
20 staff, do you know?

21 MR. RICH: Four fulltime, two
22 part-time. And they're growing. It looks
23 like, part of our expansion plan is that the
24 Public Defender is going to be doing Family

Richard Rich

1 Court, as our office is, so they will be
2 adding staff, probably in the next month or
3 two, to handle Family Court. I know they're
4 hiring a new second, probably two new
5 lawyers. And our office also is likely to
6 grow in April.

7 PROFESSOR SHANKS: Do you have any
8 investigators?

9 MR. RICH: We have a part-time
10 investigator. The Public Defender has a
11 fulltime investigator.

12 JUDGE FAHEY: You mentioned there was a
13 disparity between the salary between the
14 Chief Public Defender and the District
15 Attorney. Do you know what that is?

16 MR. RICH: The Public Defender makes
17 \$73,000 and the D.A.'s salary is set by
18 statute. I believe one and a quarter or
19 119, something like that.

20 MR. CHAN: Do you have any translators
21 or need for translators?

22 MR. RICH: We do. A lot of our felony
23 caseload is prison crimes. We have two
24 maximum security prisons in Chemung County,

Richard Rich

1 Southport and Elmira Correctional Facility,
2 which brings in a lot of Spanish-speaking
3 clients. We frequently need translators.
4 But those are provided by the court. That
5 has never come out of my budgets before, so
6 that isn't a concern for our office.

7 MR. CHAN: How about for
8 investigations, when you need a
9 Spanish-speaking person to translate for
10 you?

11 MR. RICH: That becomes difficult.
12 We -- when that has come up in the past, and
13 when I was Public Defender, it hasn't come
14 up in my new job, but when I was Public
15 Defender we had two situations where we did
16 have to do an investigation in the Southport
17 Correctional facility and we did have to
18 hire a translator to go with our
19 investigator. Luckily, we had somebody
20 legally that wasn't licensed, but that
21 worked for a reasonable rate. But we do
22 have some Spanish-speaking population that
23 we can avail ourselves of if that comes up.
24 That wasn't a problem in the past. And I

Richard Rich

1 hope it's not a problem.

2 PROFESSOR SHANKS: What if you're going
3 to jail to see your client?

4 MR. RICH: When I've had a
5 Spanish-speaking client, and that used to
6 happen a lot, I would bring a translator
7 with me. We have, we have a local bail
8 project, which probably addresses some of
9 the problems you had in Steuben earlier,
10 that had two Spanish-speaking people on
11 staff, and I've always made an arrangement
12 where they'd submit a voucher and the County
13 never failed to pay it.

14 PROFESSOR SHANKS: So, that wasn't out
15 of your budget?

16 MR. RICH: No, it wasn't a problem.
17 Aid to court project. Knock on wood.

18 MR. CROTTY: Chemung County seems to be
19 more generous in supporting a Public
20 Defender's Office than, for example,
21 Mr. Cooper's county. Have you done a
22 comparison that, say, contrasts Schuyler,
23 Steuben, Tompkins, Tioga, surrounding
24 counties?

Richard Rich

1 MR. RICH: We haven't done a
2 comparison, although I think that is
3 something we are looking at because, again,
4 we're right now in the process of
5 reevaluating everything. Our office is
6 brand new and what we are doing is
7 expanding, the Public Defender is also
8 expanding, to areas that historically have
9 been handled by assigned counsel. So, we're
10 looking at -- I don't know if they'll ever
11 do a formal study comparing us to the other
12 counties other than just looking at the
13 numbers that are reported, D.C.J.S.

14 MR. CROTTY: Listening to Mr. Cooper
15 and listening to you, Mr. Cooper seems to
16 have twice the caseload than you.

17 MR. RICH: I don't know that's true.

18 MR. CROTTY: And yet, you have a staff
19 that's at least his size?

20 MR. RICH: I don't know those numbers
21 are that accurate. I know our indictment,
22 we do look at that and that is reported
23 data. When I would go to the Legislature,
24 particularly as Public Defender, and this

Richard Rich

1 position is new, so I haven't had to do
2 that, I would often use Steuben specifically
3 and benchmark, this number of indictments
4 and their staff and we're pretty close. Our
5 populations are similar. We probably
6 actually have more felonies than Steuben
7 does. I think in terms of total
8 prosecutions, we've always been very close.

9 MR. CROTTY: I thought he said he had
10 eight hundred.

11 MR. RICH: He said he had eight hundred
12 felonies. He wasn't sure of the number of
13 indictments. The 437 that I gave you were
14 the number of felony indictments.

15 MR. CROTTY: Okay.

16 MR. RICH: The number of cases that
17 started at the felony level is over nine
18 hundred in our county, but often times those
19 things get reduced prior to.

20 MR. CROTTY: Thank you.

21 MS. ZUFLACHT: When you're dealing with
22 crimes that occur in the state prison --

23 MR. RICH: Yes.

24 MS. ZUFLACHT: -- is there any part of

Richard Rich

1 that that is state funded?

2 MR. RICH: That's a good question.

3 Under 606 of the State Law, we submit a
4 voucher and we've never not gotten a
5 reimbursement. So, that's not drain on the
6 County.

7 JUDGE SMITH: What's the percentage of,
8 if you know it, what's the percentage then
9 of the clients you represent, state
10 prisoners, inmates in Elmira and Southport,
11 as opposed to those who are not?

12 MR. RICH: When I -- again, our office,
13 right now I have two state prison inmate
14 cases. And the reason we get them is
15 because it's typically an assault situation
16 and the Public Defender has a conflict with
17 the second defender.

18 JUDGE SMITH: Right.

19 MR. RICH: But in general, the only
20 prison crimes we get are felonies and I
21 would estimate probably 20 percent of the
22 felony caseload, when I was Public Defender,
23 and I need to caution on this, when I was
24 Public Defender about 20 do 25 percent of

Richard Rich

1 the felony caseload was either promoting
2 contraband case or prison assault charge or
3 aggravated harassment. That has gone down.
4 The number of prison crimes being
5 prosecuted, for whatever reason, seems to
6 have clearly gone down.

7 PROFESSOR SHANKS: When you say you
8 would submit a voucher, what was that based
9 on, percentage of your salary or an hourly
10 rate?

11 MR. RICH: It would be an hourly -- 606
12 sets out a couple of different criteria that
13 you can submit it based upon. I think
14 initially we were submitting them at the
15 assigned counsel rate, at the 40, 25, and I
16 think after that, once my salary moved up
17 when they made me fulltime, I think I could
18 charge what my hourly rate was based upon my
19 salary, dividing that by 40 hours a week and
20 they aid you.

21 CO-CHAIRMAN HELLERSTEIN: You say the
22 County has been responsible for expansion of
23 your office, both of your office and the
24 Public Defender's office?

Richard Rich

1 MR. RICH: Right.

2 CO-CHAIRMAN HELLERSTEIN: Is it going,
3 is it at the degree or going to the degree
4 where everything that needs to be done will
5 get done or would you still have a wish
6 list?

7 MR. RICH: Oh, we absolutely still have
8 a wish list.

9 CO-CHAIRMAN HELLERSTEIN: What would
10 that wish list contain?

11 MR. RICH: First, again, to echo the
12 gentleman from the New York County Lawyers
13 Association, I think the State needs to be
14 looking at this. Right now our office is
15 running wonderfully, and that's to a large
16 degree because it's brand new, we haven't
17 gotten our numbers up to where they're
18 ultimately going. What the County is, in
19 essence, doing through our office and
20 through the expansion of the Public
21 Defender's office is taking cases away from
22 the assigned counsel panel. At some point
23 we're going to be much busier than we are.
24 And I want to make sure that we're able to

Richard Rich

1 provide the some quality of representation.
2 Luckily, we have a good relationship with
3 our County Executive department. But, you
4 know, anything can change.

5 In terms of a wish list, though, I wish
6 that the State would create some form of
7 caseload standards, what a maximum is and
8 what isn't. The attorneys in the Public
9 Defender's office are more overworked right
10 now than ours. They're certainly having
11 higher caseloads. That will even out, I'm
12 sure, over time, but again, because we're
13 relatively new we haven't hit that level
14 now, but I know it's coming.

15 I wish there was eligibility criteria
16 that was uniform for the State or at least
17 for our region so that we wouldn't get into
18 turf wars and situations like that with
19 other counties.

20 Our county, I think, luckily, we have
21 parity with the District Attorney's Office,
22 but our District Attorney's Office,
23 unfortunately, is underpaid, too. Our
24 salaries are not great. You know, probably

Richard Rich

1 less than, over time I think they're less
2 than what Mr. Cooper was saying.

3 We don't right now keep our lawyers in
4 public defense long enough. We have a real
5 longevity problem. People get training and
6 leave.

7 CO-CHAIRMAN HELLERSTEIN: What is your
8 turnover rate, what was it when you were PD?

9 MR. RICH: I would say on average
10 people stay about three years. Again, my
11 office is a year old, so we haven't had any
12 turnover yet. Again, knock on wood. But
13 again, I'm not foolish enough to know that's
14 not coming. With the salaries we're paying
15 there's not a lot of incentive to make a
16 career there.

17 PROFESSOR SHANKS: Do you do training?

18 MR. RICH: We -- yes and no. I mean,
19 again, I'm a very hands-on manager. I
20 typically spend a lot of time with the brand
21 new people. Each time I brought somebody in
22 new, if they've been able to stay through a
23 full year, I've sent somebody to the
24 defender institute. I, myself, went through

Richard Rich

1 there. We do a lot of CLE. The county is
2 very generous, I believe. We don't have a
3 budget for CLE, I just put in for it, but I
4 rarely, if ever, have been turned down to
5 send somebody to training within the state.
6 Again, we're not sending people very often
7 to South Carolina or some of those programs.
8 But they're good about making sure that we
9 go to CLE. And I have a requirement for my
10 attorneys that they double the OCA
11 guidelines.

12 CO-CHAIRMAN HELLERSTEIN: Thank you.

13 MS. ZUFLACHT: How many justice courts
14 do you have to cover?

15 MR. RICH: We handle, we have twelve
16 towns in the county. Most of them have two
17 judges. So, you know, roughly 24. But,
18 again, our county is small enough that
19 that's not a huge problem. The coverage
20 usually is not a huge problem. It seems to
21 have a lot of import on Wednesday night,
22 seems like everybody in our office is out
23 Wednesday night and typically hits more than
24 one court. But that hasn't been a

Richard Rich

1 tremendous problem yet.

2 CO-CHAIRMAN HELLERSTEIN: Thank you,
3 very much.

4 MS. ZUFLACHT: If there were a
5 statewide caseload standard, how would you
6 suggest a county like Orleans County or --
7 not Orleans.

8 CO-CHAIRMAN HELLERSTEIN: Chemung.

9 MS. ZUFLACHT: No, Steuben.

10 MR. RICH: Steuben.

11 MS. ZUFLACHT: Steuben, that has the
12 geographic, 48 justice courts, the size,
13 geographic size of Rhode Island --

14 MR. RICH: I don't know the caseload
15 standards are going to address that because
16 I think while you're covering a huge amount
17 of courts in Steuben County, a vast amount
18 of territory, the amount of cases that
19 you're handling in each one probably is not
20 very big. Again, we handle a lot of justice
21 court work, too, but it's not terribly
22 problematic and, again, we're central enough
23 that we see our client the very next day.

24 If we weren't there when they were

Richard Rich

1 arraigned, we typically have somebody in
2 each justice court two nights a month and
3 they meet four nights a month. So, it
4 generally isn't a major problem.

5 CO-CHAIRMAN HELLERSTEIN: Thank you,
6 very much, Mr. Rich.

7 MR. RICH: Thank you.

8 CO-CHAIRMAN HELLERSTEIN: Mr.
9 Schlanger.

10 Good morning, Mr. Schlanger.

11 MR. SCHLANGER: Thank you.

12 CO-CHAIRMAN HELLERSTEIN: Thank you for
13 appearing.

14 MR. SCHLANGER: My name is Craig
15 Schlanger. I'm a lawyer in Syracuse, New
16 York. And I'm here representing the
17 Onondaga County Bar Association's Assigned
18 Counsel Program. I've also tried to bring
19 to this session my own perspective as an
20 attorney, having practiced criminal law for
21 the past 27 years, all of that time in
22 Onondaga County and the surrounding counties
23 and in Federal Court, as well, not for as
24 long, but for a number of years.

Craig Schlanger

1 Just to give a little snapshot of our
2 program, of the Assigned Counsel Program,
3 this is a not for profit corporation that
4 was organized by the Onondaga County Bar
5 Association and we are currently the primary
6 provider of indigent defense in Onondaga
7 County through a list of approximately 165
8 panel attorneys, who are assigned by the
9 court, usually at arraignment by the court,
10 by the arraigning judge.

11 We average approximately 1075
12 assignments per month. At least that was
13 the statistic for 2004.

14 There was recently a reorganization in
15 our county. For many years, I don't know
16 the exact number of years, but before I
17 started, the Hiscock Legal Aid Society had a
18 City Court program and handled all the
19 non-traffic misdemeanor assignments in
20 Syracuse City Court, and except for conflict
21 situations. And the panel handled conflicts
22 and the panel also handled Family Court
23 cases. That was changed. Now Hiscock Legal
24 Aid Society is the primary provider of

Craig Schlanger

1 Family Court representation, not Law
2 Guardian, but assigned counsel
3 representation in Family Court and the panel
4 attorneys are handling the Syracuse City
5 Court assignments.

6 CO-CHAIRMAN HELLERSTEIN: Hiscock does
7 no criminal defense?

8 MR. SCHLANGER: At this time Hiscock
9 still has an appeals program and has had for
10 a long time. Some appeals are also assigned
11 directly by the Fourth Department to private
12 attorneys. Susan Horne is here and she can
13 probably give you more information on
14 exactly what Hiscock is doing these days.

15 CO-CHAIRMAN HELLERSTEIN: So, in terms
16 of the criminal caseload, it's your program,
17 pretty much?

18 MR. SCHLANGER: That's about it.

19 CO-CHAIRMAN HELLERSTEIN: And retained
20 counsel.

21 MR. SCHLANGER: That's correct, that's
22 correct.

23 One of the big issues that our county
24 had to confront, and every county has

Craig Schlanger

1 confronted, continues to confront, is what
2 kind of system do you have? Do you have an
3 assigned counsel system, do you have a
4 Public Defender system, do you have a little
5 bit of both, do you have private defenders?
6 And, obviously, New York's scheme allows the
7 county -- actually, requires the county, the
8 individual county, to make that choice.

9 And flexibility is a good thing. This
10 is a very diverse state. A lot of the
11 people who practice downstate, you're
12 hearing things about practice in upstate
13 New York that sometimes would make your hand
14 stand up on end.

15 CO-CHAIRMAN HELLERSTEIN: Some of us
16 don't have that problem.

17 MR. SCHLANGER: But some of the things
18 that we hear about practice in New York City
19 makes our hair stand up on end, if we have
20 hair to stand up on end.

21 But the flexibility is a good thing.
22 One size fits all doesn't work in this
23 state.

24 There are --

Craig Schlanger

1 CO-CHAIRMAN HELLERSTEIN: Why do you
2 say that?

3 MR. SCHLANGER: Well, to give you an
4 example, in a lot of counties you have a
5 presence of a very, very strong private
6 criminal bar. In other words, if you have
7 an assigned counsel program, you have large
8 number of qualified, experienced lawyers who
9 are available and willing to take criminal
10 cases, such as we have in Onondaga County.

11 And we have, as I say, 165 panel attorneys.
12 And I think 81 of those are considered
13 qualified to take felony cases. And we do
14 have a system for determining qualifications
15 to move up the ladder from misdemeanor to
16 felony and then to homicide.

17 CO-CHAIRMAN HELLERSTEIN: Can I just
18 ask you?

19 MR. SCHLANGER: Yes.

20 CO-CHAIRMAN HELLERSTEIN: You have 1075
21 assignments a month with 165 attorneys. How
22 many assignments a month?

23 MR. SCHLANGER: It was about 1075
24 assignments a month.

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1 CO-CHAIRMAN HELLERSTEIN: Divided by
2 165 attorneys, when you analyze that, that's
3 a hell of a caseload.

4 MR. SCHLANGER: Right. It doesn't come
5 out to exact numbers. And the reason is
6 because there's some, there's a certain
7 amount of skewing towards misdemeanor cases,
8 other non-felony cases. Lots of traffic
9 assignments. Loads of traffic assignments.
10 For example, last year we had -- let me see
11 if I have the right statistic here.

12 JUDGE SMITH: When you say "traffic,"
13 you're not talking about moving violations?

14 MR. SCHLANGER: Well, not moving
15 violation. Aggravated unlicensed operation.

16 JUDGE SMITH: Misdemeanor level?

17 MR. SCHLANGER: Misdemeanor.

18 JUDGE SMITH: Procedurally, who makes
19 the assignment?

20 MR. SCHLANGER: Judges do.

21 JUDGE SMITH: Local?

22 MR. SCHLANGER: Yes, they do in the
23 City Court and they do in the justice Court.

24 JUDGE SMITH: Do you have any sense how

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1 long defendants, for example, on felony
2 charges arraigned in local court, remanded
3 without bail, how long they go without
4 seeing an attorney?

5 MR. SCHLANGER: Well, there's really
6 two different systems going on at the same
7 time. In City Court, Syracuse City Court
8 there are arraignments every single morning,
9 one seven days a week. And very often
10 during the week there are arraignments in
11 the afternoon, as well.

12 The Judges in Syracuse City Court will
13 always set a preliminary hearing date within
14 six days, as required. Usually less.

15 JUDGE SMITH: They're a fulltime court.
16 What about the town courts, say, or village
17 court?

18 MR. SCHLANGER: That's where we have a
19 problem. That's where we have a problem.

20 JUDGE SMITH: What's the scope of the
21 problem?

22 MR. SCHLANGER: Well, it depends on the
23 court. If somebody is brought in for
24 arraignment on a felony, let's say, at

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1 night -- and it could be in the middle of
2 the night or it could be at a regular court
3 session -- the judge will set bail or high
4 bail or hold the defendant without bail, as
5 the case may be, and assign an attorney.
6 Depending on the staff of that court, that
7 attorney may or may not be notified within a
8 day or the following morning of that
9 assignment.

10 There are, some of our courts in the
11 suburban towns are well staffed. They are
12 full-time staffed. And they will notify the
13 assigned lawyer if it's at night, first
14 thing in the morning, will fax the paperwork
15 directly to them. And then it's up to that
16 attorney to spring into action, as it were,
17 visit the client and --

18 JUDGE SMITH: The question I would have
19 then would go to this: If you have local
20 court judges making the assignments -- and
21 you have 165 lawyers, you said, on the
22 panel?

23 MR. SCHLANGER: Yes.

24 JUDGE SMITH: How do the local court

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1 judges know, either doing it on a rotational
2 basis or do you have local court judges
3 assigning criminal cases to, essentially,
4 the same smaller group of attorneys?

5 MR. SCHLANGER: There are some smaller
6 groups of attorneys because on the list some
7 of the lawyers actually express a preference
8 for the courts that they wish to get
9 assignments from and a lot of times it has
10 to do with where they live. Our county is
11 not as big as Steuben County, but it's not
12 that small, either. And sometimes that's an
13 advantage because it means that there are
14 certain lawyers who handle a number of cases
15 in certain justice courts, so that can work
16 out fairly well because those lawyers are
17 going to be there and have access to the
18 judges.

19 The problem may arise in some of the
20 more remote courts, where, you know, it
21 sometimes may be hard to find a lawyer to
22 take the case.

23 There are -- in our county the judges
24 get to know the lawyers and vice versa. And

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1 I don't think -- I think we've come away
2 from the situation where there is a lot of
3 preferential treatment. That certainly was
4 the case when I started out, and I can't say
5 that we've completely dealt with that
6 situation.

7 But in many cases the judges will
8 appoint the lawyers they know, but they will
9 tell you that they appoint the lawyers that
10 they know are going to appear in that court
11 and are going to take care of those cases
12 and not neglect them.

13 MR. GOLDMAN: Mr. Schlanger, have you
14 ever had any attorneys who claim that they
15 are not being appointed because of vigorous
16 advocacy?

17 MR. SCHLANGER: I have not heard that
18 complaint in Onondaga County. I would not
19 rule that out in other counties. I think
20 that there is a culture in our county, maybe
21 I'm looking at this with rose-colored
22 glasses, but I think there is a culture in
23 our county where the judiciary appreciates
24 good lawyers and, as you heard this morning,

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1 they know that good lawyers help the system
2 in many ways, not just in representing their
3 clients effectively, but in helping the
4 entire system. And I think that seems to be
5 a general belief in our county. But as I
6 said, I could certainly see that happening
7 the other way in other counties. And that
8 is a problem.

9 MS. ZUFLACHT: Is there a Public
10 Defender in your county?

11 MR. SCHLANGER: No, there isn't.

12 PROFESSOR SHANKS: What's the process
13 for moving up, say, to do homicides and what
14 oversight is there to ensure that the person
15 who is then on that list does a competent
16 job?

17 MR. SCHLANGER: Well, I can tell you
18 what the general requirements are. That --
19 there is a threshold requirement to be
20 placed on the list, having, of course,
21 required to be admitted to practice in
22 New York State and have good standing, have
23 an office in Onondaga County, and the lawyer
24 who wishes to get on the panel has to

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1 undergo a certain amount of training.

2 In order to --

3 PROFESSOR SHANKS: By whom?

4 MR. SCHLANGER: There are certain CLE
5 requirements and has to maintain at least 50
6 percent of state-mandated CLE credits in the
7 areas of practice in which the attorney
8 seeks to get assignments. So that would
9 include family as well as criminal.

10 PROFESSOR SHANKS: So, if I moved to
11 Syracuse and set up an office and said I
12 want to get homicides, I want to be assigned
13 to homicides, to build up my practice,
14 that's all I would need to do?

15 MR. SCHLANGER: No. This is what --
16 first you'd have to meet the threshold
17 criteria for felony assignments, which is
18 either to be a member of the misdemeanor
19 panel for a year and during that time have
20 second-chaired an experienced attorney in a
21 felony case to verdict or having been
22 admitted to practice in New York for two
23 years and having tried at least one felony
24 case to verdict or five misdemeanor cases to

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1 verdict in New York State Courts as chief
2 trial counsel within the preceding ten
3 years. And there is some provision for
4 waiver. Some of the people come out of the
5 District Attorney's Office and have
6 equivalent experience or come from other
7 states or other counties and have equivalent
8 experience.

9 To be on the homicide panel list --

10 PROFESSOR SHANKS: Could you provide
11 those standards? I don't mean that you have
12 to read them now. I just was curious that
13 you had a set of standards. Could you
14 provide those for the committee?

15 MR. SCHLANGER: I have a copy of the
16 rules, policies, rules and procedures for
17 the program. I have the copy here that I
18 can just leave.

19 PROFESSOR SHANKS: That would be great.

20 JUDGE BAMBERGER: Great. Thank you.

21 JUDGE SMITH: May I, real quick?

22 MR. SCHLANGER: Yes.

23 JUDGE SMITH: On felony prosecutions in
24 felony court, cases that are, look like

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1 they're headed for trial, at least, is there
2 any problem with your panel, your 18-B panel
3 of attorneys of obtaining investigative
4 services knowing, of course, that there's a
5 statutory limit? Is there any problem with
6 the judiciary in Onondaga County where
7 attorneys are experiencing problems with
8 their investigator that's going to go over
9 the statutory amount, getting him, that
10 person paid?

11 MR. SCHLANGER: That will vary from
12 judge to judge. I think investigative
13 services are not as much a problem because
14 they don't cost as much. The problem
15 arises --

16 JUDGE SMITH: Don't cost as much as
17 what?

18 MR. SCHLANGER: As experts, let's say.

19 JUDGE SMITH: Okay.

20 MR. SCHLANGER: That's where we can run
21 into problems because, unfortunately, there
22 are situations where lawyers have to go
23 begging for experts to take cases, as they
24 say, on 18-B rates and there's no reason for

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1 that to happen. Those experts have not
2 signed onto our program and are entitled to
3 be paid what they're being paid and
4 sometimes lawyers have a problem getting
5 authorization to hire experts to be paid at
6 their full rate. And that's definitely a
7 problem that should be addressed.

8 MR. GOLDMAN: Mr. Schlanger, let me ask
9 you about qualifications. You went through
10 certain kinds of regulatory qualifications,
11 years of practice, et cetera. What about,
12 is there any peer review, is there any
13 review in terms of asking people who try
14 cases with these attorneys, judges, how
15 qualified they are? Because we all know
16 there are a lot of lawyers who try piles of
17 cases, do all the CLEs and are yet walking
18 disasters.

19 MR. SCHLANGER: You mean peer review in
20 order to be admitted to the panel?

21 MR. GOLDMAN: Either to be qualified or
22 initially to be qualified.

23 MR. SCHLANGER: No, we don't. We don't
24 have that.

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1 PROFESSOR SHANKS: So, once you're on
2 the panel, you're on the panel, no matter
3 what?

4 MR. SCHLANGER: Unless, unless that
5 attorney is not complying with the rules or
6 unless there are actual complaints that
7 could result in removal from the panel.

8 PROFESSOR SHANKS: And what if there
9 would be a complaint from a client, say?

10 MR. SCHLANGER: Well, complaints from
11 one client, those things can happen, but
12 they would be brought to the attention of
13 the board of directors and there's a
14 committee that would deal with that.
15 There's an attorney competence committee.
16 And it doesn't happen often, but it has
17 happened where attorneys have been removed
18 from the panel.

19 CO-CHAIRMAN HELLERSTEIN: Are there
20 cases that happen often where the
21 prosecution has called one or more expert
22 witnesses and the defense has not been able
23 to call an expert witness?

24 MR. SCHLANGER: I can't, I couldn't

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1 really answer that question with any
2 specifics, but I can certainly try to find
3 out. I don't have that information in front
4 of me. It is conceivable that that would
5 happen or at least that that attorney may
6 have had an expert who was not, who was
7 basically cutting corners or maybe is not
8 the most qualified expert for that
9 particular case.

10 But be that as it may, when we look at
11 our felony panel, there is an average of 18
12 years experience among the felony panel.
13 And I think that's significant.

14 Another thing that's significant, when
15 you have this kind of depth, and you will
16 have that in these urban counties, Onondaga,
17 Monroe, Erie and Broome, as well, and other
18 counties, that you have this number of
19 lawyers, and I agree that a number of years
20 of experience, number of cases tried is not
21 the ultimate answer, but it's a pretty good
22 barometer in most cases.

23 We also have the ability to cover a
24 large number of courts. You've heard

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1 testimony about the problems that Public
2 Defenders have in rural counties, especially
3 of staffing or providing lawyers in the
4 justice courts. And that will vary
5 depending on how large and how widespread
6 the county is.

7 In Onondaga County there are 28 town
8 and village courts, with a total of 46
9 judges. And they run, pretty much, four
10 days a week. Sometimes afternoons,
11 sometimes evenings. And there is not
12 usually a District Attorney there at
13 arraignment. But at regular court sessions
14 there are almost always lawyers present in
15 the courtroom. And the lawyers who are
16 assigned to those cases are, as I said
17 before, generally lawyers who appear on a
18 regular basis in those courts and will be
19 there when they need to be, to represent
20 those clients.

21 PROFESSOR SHANKS: Can I ask you two
22 related questions? One, what percentage of
23 the lawyers in your county who do criminal
24 defense privately are also on the assigned

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1 counsel list?

2 And secondly, what percentage would you
3 say of their cases are assigned, as opposed
4 to private? If you has a sense.

5 MR. SCHLANGER: I would say that among
6 the active assigned counsel lawyers, almost
7 all of them handle cases, private, criminal
8 cases privately. There are really very few
9 who handle only assigned counsel cases.
10 Most of them, of course, will also handle
11 non-criminal cases, as well, privately.

12 PROFESSOR SHANKS: But of the lawyers
13 of -- I mean, if you were to name, you know,
14 the ten most prominent criminal defense
15 lawyers in your county, private criminal
16 defense lawyers, of those ten or twenty,
17 whoever are most prominent, do they take
18 assigned counsel cases?

19 MR. SCHLANGER: I would think when you
20 start thinking of the ones who are the most
21 prominent, that they do not. But that does
22 not mean that you don't have some of the
23 best lawyers who do. So, I would say maybe
24 about 50 percent.

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1 PROFESSOR SHANKS: Okay.

2 MR. SCHLANGER: Give or take.

3 JUDGE SMITH: Two quick questions, if I
4 may. How many total felony prosecutions in
5 Onondaga County, if you know, last year?

6 MR. SCHLANGER: I have the number of
7 assignments.

8 JUDGE SMITH: All right. We'll go with
9 the assignments.

10 MR. SCHLANGER: About 2900.

11 JUDGE SMITH: 2900 assignments on
12 felony cases, right?

13 MR. SCHLANGER: Right.

14 JUDGE SMITH: And what was the total
15 amount of the 18-B budget, all the vouchers?

16 MR. SCHLANGER: For all the vouchers to
17 attorneys, approximately 3.8 million dollars
18 and about \$71,000 to experts and
19 investigators.

20 MR. CHAN: What are the problems that
21 you perceive in your county and what would
22 be your proposed solution?

23 MR. SCHLANGER: All right. I think the
24 problems that I see are existent in all

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1 counties, as well. Going to the issue --
2 and I want to address the other counties.
3 You've heard some things about it, that in
4 some counties you have terrible lack of
5 lawyers, especially in the rural counties.

6 The downside of this system is that it,
7 as I said, it's probably a good idea to try
8 to determine what works best in certain
9 counties and certain regions.

10 But the current scheme really delegates
11 too much authority to the individual
12 counties and doesn't provide any guidelines
13 or criteria for making that determination
14 and it doesn't provide sufficient funding.
15 Actually, provides almost no funding. And
16 as a result, when the county makes its
17 determination, it makes its determination on
18 the basis of finances almost entirely and a
19 certain amount of politics, unfortunately,
20 that enter into it, as well.

21 And the needs of the defendants,
22 especially the needs of the indigent
23 defendants, are lost in the shuffle. And
24 that's a problem. And if we were able to

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1 get adequate funding in our county for our
2 assigned counsel program, then we were just
3 either lucky or we may have been fortunate
4 to have a county legislature that recognizes
5 the need for adequate funding for criminal
6 defense. And as you have heard, that
7 doesn't exist in every county or we may have
8 a county legislature that doesn't, just
9 simply doesn't want a lawsuit on their
10 hands. But that shouldn't be the motivating
11 factor.

12 Some of the proposals I would be
13 primarily -- you've heard this many times
14 before, but I'll just repeat it, that the
15 State, Albany has to take responsibility for
16 its constitutional mandate under Gideon
17 versus Wainwright, to provide indigent
18 defendants with effective assistance of
19 counsel. The State has to take a leadership
20 role. It should not be up to the individual
21 counties to make this determination. There
22 has to be adequate funding. And, again,
23 that has to come from the top. And by
24 "adequate funding," I mean if there is going

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1 to be an assigned counsel, that the rates
2 must be in accordance with the cost of
3 living and the cost of doing business and
4 they have to, there has to be periodic
5 review to make sure they stay that way.

6 JUDGE RUSSELL: Mr. Schlanger, is there
7 an individual designated to administrate the
8 program?

9 MR. SCHLANGER: Yes, there is a
10 fulltime administrator and there's a staff
11 of about four.

12 JUDGE RUSSELL: Okay. Does the
13 administrator engage in any assignment,
14 review process, if there are complaints?
15 What's the task of, the job of the
16 administrator?

17 MR. SCHLANGER: Well, the
18 administrator prepares the budget, oversees
19 the budget, makes sure that the vouchers,
20 makes sure that the -- the office reviews
21 assignments for eligibility and the office
22 reviews vouchers, and there's a board of
23 directors that would deal with any major
24 issues. There's a voucher review committee

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1 made up of a number of, taken from the board
2 of directors that reviews vouchers that are
3 questioned either for accuracy or problems
4 with perceived overbilling, that type of --

5 JUDGE RUSSELL: Does the administrator
6 designate any assignment of lawyers to
7 particular cases or merely to process the
8 voucher, determine eligibility with regards
9 to indigency and that's essentially their
10 role?

11 MR. SCHLANGER: The administrator
12 doesn't take any part in making assignments.
13 In our county the assignments are made by
14 the judges.

15 JUDGE RUSSELL: And what if a question
16 is raised with regards to representation
17 that's been made by one of the lawyers
18 that's been assigned?

19 MR. SCHLANGER: Well, that complaint
20 could come from a client or it could from a
21 judge, it could come from any number of
22 sources, and that will be referred to the
23 board of directors and ultimately go to the
24 attorney competence committee for review,

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1 which may result in sanction, it may result
2 in suspension or removal from the panel.

3 JUDGE RUSSELL: Is there an internal
4 competency review panel or are you talking
5 about --

6 MR. SCHLANGER: It's a subcommittee of
7 the board of directors. We have a board of
8 directors that really is the governing body
9 of the Assigned Counsel Program. And, so,
10 there is a committee made up of members from
11 that board of directors.

12 CO-CHAIRMAN HELLERSTEIN: Mr.
13 Schlanger, we're running a little bit behind
14 schedule, so if there's something you
15 haven't covered that you think we ought to
16 hear from you, I'll ask you to do it more
17 briefly.

18 MR. SCHLANGER: Okay. I will try to do
19 that because I think most of the things that
20 I had planned to say have been covered in
21 many ways by people who have already
22 testified.

23 I would also, I just want to say
24 briefly that in reviewing the entire picture

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1 of indigent defense in New York State, it
2 should not be seen in a vacuum. I think
3 that the Commission should also be looking
4 at the criminal justice system in general.
5 And there are other issues that impact very
6 strongly, and they impact very strongly on
7 indigent defendants because, let's face it,
8 they make up the overwhelming majority of
9 people charged with crimes in this state,
10 particularly serious crimes. There has been
11 no talk of oversight of prosecutors and
12 we've had numerous complaints of problems
13 with prosecutors, of ethics violations,
14 holding back discovery material, Brady
15 material and so on and other forms of
16 prosecutorial misconduct. There has to be
17 discovery problems because what we have in
18 this state is trial by ambush.

19 You've heard a lot about the justice
20 court system and I think that's a quaint
21 throwback to the 18th century that doesn't
22 necessarily work anymore. We have too many
23 judges who are not lawyers. And even those
24 who receive training don't necessarily

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1 receive adequate training. The system is
2 much more complicated than it used to be.
3 We don't have lawyers in the courtroom. We
4 have. In many counties we have people who
5 are being held without bail who are not
6 being assigned attorneys in a timely manner
7 and who are not having their bail or their
8 remand challenged by counsel.

9 And one thing that I haven't touched
10 on, but I really mean to touch on are the
11 issues with the jails. And that impacts
12 very strongly on the type of representation
13 and the type of justice that indigent
14 defendants get. There are statewide rules
15 governing access to counsel, and I think
16 that they are, that they really need to be
17 enforced and modified in certain cases.
18 There are too many jails where it's
19 difficult to, for lawyers to see -- we have
20 two jails in Onondaga County. The main jail
21 is the Justice Center, is not really too
22 much of a problem because lawyers can walk
23 in pretty much any time and stay as long as
24 they like. That's not the case in the other

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1 facility, where you have make an
2 appointment, you only have certain time
3 slots and you have meet with the client in a
4 tiny, little room at the same time other
5 contacts are being done and have to deal
6 with the overwhelming din and short time
7 limits.

8 You have some counties, and I remember
9 another case going to visit a client,
10 driving down to Binghamton to visit a client
11 who was being held in the Broome County Jail
12 and I was told I could not see that client
13 because they were understaffed, so they
14 couldn't provide an attorney visit. And
15 they were understaffed because it was a
16 holiday, it was a Martin Luther King
17 holiday. I thought that was pretty ironic.
18 So, I had to turn around and go home and
19 come back the following day. That should
20 never happen.

21 We have serious problems with the
22 telephones. I know this is not only a local
23 problem or statewide problem, but it's a
24 nationwide problem. Now, this is a source

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1 of tremendous profit for jails and
2 correctional facilities and it adds very
3 much to the detriment of the defendants and
4 their lawyers they simply can't make calls.
5 They're required to make collect calls,
6 which are very often not accepted by certain
7 telephone providers. And it effectively
8 cuts off the line of communication not only
9 between the defendants and their families
10 but between the defendants and their
11 lawyers. And there's really wholesale
12 profiteering going on and that's something
13 that I would ask the Commission to look into
14 also.

15 CO-CHAIRMAN HELLERSTEIN: Thank you,
16 sir.

17 MR. SCHLANGER: Thank you. I have
18 this.

19 PROFESSOR SHANKS: Thank you.

20 (Documents handed to the Commission)

21 CO-CHAIRMAN HELLERSTEIN: I think we'll
22 take a 15 minute break now, if that's okay.

23 (Whereupon, a short recess was then
24 taken.)

Craig Schlanger

1 (After Recess)

2 CO-CHAIRMAN HELLERSTEIN: Mr. Wilber?

3 MR. WILBER: Good morning.

4 CO-CHAIRMAN HELLERSTEIN: Good morning,
5 Mr. Wilber. Welcome.

6 MR. WILBER: Thank you.

7 CO-CHAIRMAN HELLERSTEIN: We are
8 running a little bit late, so we may be a
9 little bit more abrupt with you.

10 MR. WILBER: That's fine.

11 CO-CHAIRMAN HELLERSTEIN: But we don't
12 want to be.

13 MR. WILBER: I understand.

14 CO-CHAIRMAN HELLERSTEIN: But welcome.

15 MR. WILBER: Thank you.

16 The biggest problem I have in Broome
17 County would be the justice courts, echoing
18 the comments of my colleagues.

19 CO-CHAIRMAN HELLERSTEIN: Let me just
20 ask, you're the Broome County Public
21 Defender?

22 MR. WILBER: Yes, I am.

23 I would echo the comments of my
24 colleagues that I'm in favor of a district

Jay Wilber

1 court. One of the big problems that I have
2 are the advent of the specialty or boutique
3 courts that I'm mandated to represent.
4 Presently in Broome County, in the
5 Binghamton City Court we have domestic
6 violence court, we have drug court that's
7 been operating for about three years, and
8 soon to be, I was told, we're having an
9 integrated domestic court.

10 CO-CHAIRMAN HELLERSTEIN: Is your mike
11 working? I'm not sure they can hear you in
12 the back.

13 MR. WILBER: It's on.

14 JUDGE SMITH: Hit the mike.

15 JUDGE BAMBERGER: Maybe pull it a
16 little closer.

17 PROFESSOR SHANKS: How many people are
18 in your office?

19 MR. WILBER: Including myself, eleven.
20 The D.A.'s Office has 17, presently 16 due
21 to a vacancy. Their budget is 2.4, mine is
22 1.6 million. We have to cover approximately
23 20 justice courts. One of the problems we
24 have that I'm trying to work on with the

Jay Wilber

1 magistrates is we're working on a 35 year
2 old system developed by the District
3 Attorney, Pat Monserrate, and the local
4 magistrates do not want to change that. The
5 reason that's a problem is because there is
6 39 separate justices that I have to cover.

7 Now, the plus is we only have to do
8 those during the day, between nine and five.
9 There's no night court in Broome County.

10 Last year we opened up the greatest
11 number of cases we've ever had, 6900. Of
12 those we represented about 4100. Of those
13 approximately 1200 were felonies.

14 Now, when I say "felonies," I'm also
15 including fugitive and parole. We have an
16 extensive parole visitation in our jail.

17 We do have a good relationship with our
18 correctional facility. When somebody comes
19 to the Public Safety Facility, being
20 remanded on a misdemeanor or felony, we've
21 worked out where they will fax us that list
22 and we will see them the next day.

23 We also have two fulltime
24 investigators. District Attorney has four.

Jay Wilber

1 But I have an additional three staff that
2 are intake specialists. They'll meet with
3 the individual, get their qualifications,
4 get the facts of the case. That will go to
5 me and I will assign it that day. So,
6 everybody is seen, theoretically, the next
7 day. If somebody is remanded, if they've
8 been remanded and they don't tell us about
9 another charge, we might not open that file.

10 But that's usually an isolated incident.

11 Try to get some of the comments from
12 the other people that have spoke. We do
13 go -- Judge Smith is our County Court judge.
14 If there is a need for an appeal for bail,
15 we go to him or Judge Mathews on a
16 case-by-case basis, as needed.

17 One of the things that we're working on
18 with the local bar association, that we have
19 a problem, that I'm a proponent of district
20 courts, is if you're in one of the justice
21 courts and you want a trial and you are the
22 13th person that wants a trial, you will get
23 that trial in the 13th month, over a year.

24 There is one jury trial per month in that

Jay Wilber

1 particular court, and I dare to say almost
2 in every single justice court they have one
3 jury trial a month, which creates additional
4 problems because they have on their
5 schedule, particularly pre-trial days,
6 that's not the day of the trial. So, if
7 Monday is one of your pre-trial days, that
8 trial may be on a Thursday. The problem is
9 that attorney has to be in another justice
10 court. So, you're always in conflict with
11 the justice courts, trying to get more time
12 for your attorneys due to vertical
13 representation.

14 Now, the other end of the spectrum, if
15 you're not going to get a trial for 13
16 months, it is my belief that some particular
17 justice courts want to wear down your
18 client. You'll be there saying that you
19 want a trial, you'll come back four more
20 times to say yeah, I really, really wanted a
21 trial and you may be the fifth backup for
22 the same day for a trial because they want
23 to move their trials. So, in my office, in
24 Johnson City Court, May 10th, I am the first

Jay Wilber

1 backup, the fourth back up and the fifth
2 backup. We have to have all our witnesses
3 there, we have to have all our experts, if
4 they're needed, to be there, prepared to go
5 to trial. Creates a burden on the staff,
6 creates a burden on the client, as well.

7 Another problem I see is in our
8 particular county there are no or very few
9 times where because we are the exclusive
10 criminal defense, we don't participate,
11 we're not told of the arraignments at most
12 justice courts. Now, in County Court, Judge
13 Smith will pick up the phone and call us.
14 If we know there's going to be an
15 arraignment, we'll get an attorney over
16 there. But for the most part, it happened
17 just a few weeks ago, where a person asked
18 for a preliminary hearing in City Court,
19 they bring the person back, assigned counsel
20 could not be given that particular person,
21 it was a co-defendant case, we represented
22 the other person, and lo an behold, instead
23 of an attorney being assigned, an offer was
24 made and that person took a disposition

Jay Wilber

1 unrepresented. That does happen in Broome
2 County. And infrequently, but it does
3 happen.

4 CO-CHAIRMAN HELLERSTEIN: There's
5 conflict counsel?

6 MR. WILBER: There is an assigned court
7 administrator for assigned counsel. That is
8 presently done by the comptroller. That was
9 within the Public Defender's Office until
10 about 1995. Then the County took that over.
11 Presently the conflicts are done by either
12 County Court, City Court or there's one
13 justice who wants to do his own assignments.

14 PROFESSOR SHANKS: What is the -- do
15 you have parity in terms of salary with the
16 D.A.'s?

17 MR. WILBER: Yes, we do. We have
18 parity from the chief on down. Obviously, I
19 don't make what the statutory is of the
20 District Attorney, but other than that there
21 is parity.

22 One thing that we do have in Broome
23 County is most of the staff tends to be
24 senior. We have a lot of people there eight

Jay Wilber

1 years and over. There's been an influx now
2 from the private sector.

3 PROFESSOR SHANKS: You said 80 years?

4 MR. WILBER: Eight years. There's been
5 a few attorneys from the private sector that
6 have joined our staff in the last year.

7 PROFESSOR SHANKS: Everyone is
8 fulltime?

9 MR. WILBER: Yes, everyone is fulltime.

10 JUDGE BAMBERGER: Do you have the same
11 delays with felony trials as you do with
12 justice trials?

13 MR. WILBER: Absolutely not.

14 JUDGE BAMBERGER: So, it's just the
15 misdemeanor trials?

16 MR. WILBER: Correct.

17 JUDGE BAMBERGER: And, generally, those
18 people are not in prison, I would assume --

19 MR. WILBER: Correct.

20 JUDGE BAMBERGER: -- more than a year?

21 MR. WILBER: They would get a
22 preference due to the statutory
23 configuration, but those people would have
24 to travel back.

Jay Wilber

1 JUDGE BAMBERGER: Back and forth?

2 MR. WILBER: Correct.

3 JUDGE BAMBERGER: For their cases? And
4 is there any reason given as to why there's
5 only one trial done a month?

6 MR. WILBER: Court congestion.

7 JUDGE BAMBERGER: With what are they
8 congested?

9 MR. WILBER: In my belief --

10 JUDGE BAMBERGER: Yes.

11 MR. WILBER: -- their private practice.

12 JUDGE BAMBERGER: Oh, I see. In other
13 words, the town justice is --

14 MR. WILBER: Part-time.

15 JUDGE BAMBERGER: And he has other
16 things to deal with?

17 MR. WILBER: Yes.

18 JUDGE BAMBERGER: Got it.

19 CO-CHAIRMAN HELLERSTEIN: What about
20 your investigators?

21 MR. WILBER: We have two fulltime
22 investigators. They are provided with one
23 vehicle. The D.A. investigators have four
24 vehicles. I have budget line with eight

Jay Wilber

1 thousand dollars. We're starting to get
2 more computer cases, which tend to be
3 expensive, but I do have the ability with my
4 contractual line, if that line is needed, I
5 can take the money out of another line and
6 use that for experts, if I need it.

7 JUDGE BAMBERGER: How is the D.A. with
8 discovery and Rosario materials, whatever?

9 MR. WILBER: They used to be fairly
10 decent. There's what they call an open file
11 policy. They've had new individuals come
12 into the District Attorney's Office, and the
13 chief complaint that I get now from my
14 assistants are a lot of the reports are
15 redacted to find out if we have conflicts of
16 interest. I have to remind them about
17 certain cases that they have an exact
18 responsibility, as we do, to notify the
19 County Court if there is a conflict.
20 Sometimes they do, sometimes they don't.
21 Sometimes we may not find out about that
22 conflict until we're far along in the case
23 and we have to go to the County Court and
24 advise them of the conflict.

Jay Wilber

1 PROFESSOR SHANKS: What would you see
2 would be or what, any problems that you
3 have, what would you like to see if you had
4 a wish list?

5 MR. WILBER: Well, I would like to see
6 the counties taken out of the picture. I
7 would like the independent defense
8 commission enacted. I think that would give
9 state standards, state resources, caseload.
10 Now, my caseload is running about 420 per
11 attorney per year.

12 PROFESSOR SHANKS: Felonies?

13 MR. WILBER: No, that's everything.

14 PROFESSOR SHANKS: That's everything.

15 MR. WILBER: For the felony attorneys
16 it's about 220 that they have to do. More
17 than the 200, that's a little bit manageable
18 at this time.

19 The reason I got the other attorney, to
20 be quite honest with you, I had to threaten
21 a shut-down of accepting cases, felony cases
22 for two months due to the fact that we have
23 had approximately 70 SORA reclassification
24 hearings. And if not for that, I would not

Jay Wilber

1 have gotten the additional personnel that I
2 needed.

3 MR. CROTTY: Is there some body that
4 you have to deal with in the legislature?
5 We heard testimony from Steuben County. How
6 do you work that relationship? Is it with
7 your county legislature?

8 MR. WILBER: Yes, it is. It's really
9 through the finance committee at the
10 legislature and the County Executive.
11 Presently there is a change in the County
12 Executive, in the administration. Our
13 budgets are due January -- excuse me,
14 July 8th, I believe. And then they have
15 hearings on those and those have to be
16 enacted by, I believe, late November.

17 MR. CROTTY: How is that process?

18 MR. WILBER: Last year not too bad.
19 This year we'll see what happens.

20 CO-CHAIRMAN HELLERSTEIN: Continue with
21 your wish list.

22 MR. WILBER: I also would like, because
23 of the training, the basic training my
24 attorneys have are through the New York

Jay Wilber

1 State Defenders Association, basic trial
2 skills, and we've been lucky enough because
3 we do have a budget, that I'm able to
4 send -- I, myself have attended the National
5 Criminal Defense College in Macon, Georgia.

6 And I believe that should be statewide.

7 PROFESSOR SHANKS: And do you send
8 other attorneys in your office there?

9 MR. WILBER: Yes. Maybe not every
10 year, but everyone that's been a senior, I
11 believe, has attended that particular
12 program. We have another application
13 pending to see if that individual would go
14 this year, as well.

15 Thank you, very much.

16 CO-CHAIRMAN HELLERSTEIN: Thank you.

17 PROFESSOR SHANKS: Thank you.

18 CO-CHAIRMAN HELLERSTEIN: Ms. Brink?

19 MS. BRINK: I have copies of my
20 testimony for both you and your absent
21 colleagues.

22 CO-CHAIRMAN HELLERSTEIN: Good morning
23 and welcome.

24 MS. BRINK: Thank you.

Malia Brink

1 My name is Malia Brink. I'm an
2 indigent defense counsel for the National
3 Association of Criminal Defense Lawyers.

4 NACL is a specialized bar association
5 representing both private and public
6 criminal defenders, 35 affiliates or so,
7 representing a grand total of about 45,000
8 lawyers across the country.

9 I want to sort of move briefly through
10 the recommendations that I made in my
11 testimony for two reasons. One, I think
12 many of them would overlap with the
13 testimony you've heard first this morning,
14 from NYCLA. But I also want to be clear
15 that coming from a national association, I
16 think that the best role I can provide is to
17 put New York in a national context rather
18 than comment specifically on the individual
19 problems. I don't pretend to know enough
20 about what's going on in justice court
21 upstate or any other part of New York to
22 make those sorts of recommendations.

23 So, let me move relatively quickly
24 through what I think we agree with some of

Malia Brink

1 the recommendations you've heard. And I'll
2 try and stop where I think you haven't heard
3 it before, at least not today.

4 First, the general context. I think
5 you are familiar with the A.B.A. recent
6 report on Gideon. And from those things
7 that -- national observations tend to look
8 at strict numbers -- New York is now in a
9 similar position to Mississippi and
10 Louisiana and Texas. It's not something to
11 be proud of. It's probably as shocking as
12 it sounds.

13 What are those things? State funding.
14 Right? When you look at state funding in
15 New York, the strict numeric is about
16 17.9 percent funding for indigent defense
17 comes from the State. In reality, if you
18 reduce that down to the indigent defense
19 funding that actually goes to criminal
20 defense, that number drops to 10 percent,
21 possibly below.

22 In our experience nationwide, county
23 funding for indigent defense does not work.
24 It doesn't work. Counties are too

Malia Brink

1 different, they have very different economic
2 bases. Their economies are too fragile and
3 too easily hurt. And the dependence on
4 things like property tax for sort of funding
5 of indigent defense is just, is
6 traditionally unworkable.

7 Similarly, county and state competition
8 for shared funding of indigent defense is
9 inherently problematic because when you go
10 to the county and you say we need more money
11 for indigent defense, they say, well, we'll
12 put in some money, but go get the state
13 money first. And you go to the state, and
14 the state says where are the counties? And
15 the running of that political who is doing
16 what, when is almost impossible. And for
17 that reason, we generally believe in a
18 hundred percent state funding.

19 State oversight. All of the
20 well-working systems have something like a
21 state indigent defense commission, and like
22 NYCLA, we would strenuously support the
23 formation of that commission here in
24 New York. There are certain standard rules

Malia Brink

1 to insulate it from political influence, you
2 know, making sure that the appointments come
3 from a variety of sectors, making sure that
4 the private players like bar associations
5 and minority bar associations and law
6 schools have some input.

7 I've reviewed the nominating committee
8 proposal that's actually currently before
9 the New York State Legislature and I think
10 that satisfies that desire to insulate that
11 body politically, including rules about
12 prosecutors and so forth. I think there a
13 number of good models for recently-formed
14 commissions that you can look to. North
15 Carolina has had its commission put in place
16 for five years and I think it's a very good
17 model.

18 The method of delivering services is an
19 area that I want to spend, actually, a
20 little bit of time on because the
21 recommendation that Public Defenders,
22 fulltime Public Defenders be used wherever
23 possible is one that I think comes from
24 national standards and often gets somehow

Malia Brink

1 downplayed. And I think it's correct, I
2 think having fulltime defenders allows for a
3 level of specialization and lack of
4 competition among sort of caseloads and
5 different ways in which they're pulled.
6 That's important. I think it's particularly
7 a good model for a place like New York that
8 I think is coming off of considerable injury
9 from part-time Public Defenders and contract
10 situations.

11 That said, there is a really important
12 role to be played by maintaining leadership
13 and involvement of the private bar. And
14 generally, that's done through conflict
15 cases, but I would suggest to you that it
16 allows also a perfect method with dealing
17 with overflow. Once you put in hard numbers
18 on caseloads, you inherently have
19 fluctuation within the system where
20 sometimes you have spikes and it creates
21 overflow systems. Wisconsin very
22 effectively uses a private bar as its
23 overflow mechanism. And I think that way of
24 interacting between the public and private

Malia Brink

1 defenders have worked very well there.

2 JUDGE BAMBERGER: You don't think that
3 it should be to a greater degree than you
4 just stated, a mixed system?

5 MS. BRINK: Well, I think that -- you
6 know, don't underestimate how much overflow
7 will keep them involved. If you look at a
8 system like Wisconsin, I will bet that
9 almost a quarter to third of its cases are
10 done by the private bar because of the
11 nature of conflict cases at this point now.

12 You talk about, and I think upstate
13 counties experience this, they grossly
14 underestimated how many conflicts cases
15 there would be and how much the private bar
16 would have to be involved when they tried to
17 switch out of the appointing counsel
18 system after the rates were raised. That
19 shows you conflict cases, alone, create a
20 huge involvement for the private bar. When
21 you then add in overthrow, I think you're
22 talking about a fairly well-balanced mix
23 system.

24 PROFESSOR SHANKS: So, you would oppose

Malia Brink

1 then a conflict office with fulltime people
2 there?

3 MS. BRINK: I think you have to be
4 careful with it. I mean, I listened to the
5 testimony of the man who runs the conflicts
6 office. That sounded like a very well run
7 office. And it may be a very viable -- you
8 know, you have to look. One of the reasons
9 the state commissions are important is
10 because they can look at the specifics of
11 the area you're dealing with. And in a
12 county like he's talking about, where it's
13 rural, there might not be enough private
14 defenders to have an effective assigned
15 counsel system and a conflicts counsel
16 office may be your best alternative.

17 Like I said, you know, you can't make
18 those decisions from a national standpoint.
19 I can just tell you what I think our
20 experience is. And our experience is that a
21 balanced mixed system maintains, you know,
22 involvement of the private bar wherever
23 possible. And I think it does fluctuate as
24 to how much that, where that balance lies,

Malia Brink

1 based on, sort of, your area, how much the
2 private bar wants to be involved, how, quite
3 frankly, how accessible they are. In an
4 area like New York -- New York City, sorry,
5 where you have this expansive criminal
6 defense bar that may well want to be
7 involved, you have a sort of extensive
8 history of that involvement, the balance may
9 be very different than an upstate county,
10 where the bar is very small.

11 We had a situation in Pennsylvania,
12 where I did some work, where, quite frankly,
13 having an assigned counsel program as the
14 backup counsel or conflict counsel wouldn't
15 work. There just aren't enough lawyers.
16 And I think it's likely that that would be
17 the case in some places in upstate.

18 JUDGE MARKS: Can I ask a question?

19 MS. BRINK: Absolutely.

20 JUDGE MARKS: I'm Judge Patricia Marks,
21 for the record.

22 Do you have any thoughts about getting
23 a state-based, on your national experience,
24 to pick up the tab for a statewide system?

Malia Brink

1 Obviously, you know what our state's
2 reaction was to 18-B. Are there thoughts or
3 ideas you have about identifying a funding
4 stream to do that, examples you can give us
5 of other states that have successfully done
6 it in the context of having to face those
7 difficulties?

8 MS. BRINK: Sure. I was actually going
9 to spend my whole last half on sort of what
10 I can tell you about our experiences from
11 working on reform.

12 And the first thing I would say is to
13 give you some hope. I mean, if you ever
14 thought that we would have managed to get
15 statewide funding in some of the places
16 where we now have it, you know, whether it's
17 North Carolina or Georgia or, you know, some
18 of the states that have undergone relatively
19 recent reform, they were very much in a
20 position where everyone was saying it will
21 never, ever, ever happen, about five years
22 before it did. And I think New York is
23 farther along than that five years.

24 In terms of where the funding comes

Malia Brink

1 from, it really is about each state. We
2 have a major problem going in in Louisiana.
3 We've been investigating Louisiana a lot.
4 One of the things that we learned is that
5 discretionary funding in the counties is
6 housed in some very strange places and you
7 find money where you least expect it. We
8 started investigating, quite frankly, D.A.s
9 and Sheriffs, where their backup money was
10 going, the money they didn't have, we think
11 about 330 million dollars in Louisiana.

12 MS. ZUFLACHT: Where was it going?

13 MS. BRINK: It was sitting in bank
14 accounts because it didn't have to be
15 returned and the Sheriff wasn't utilizing it
16 for various things, and it's just sitting
17 there.

18 I think each state is different, in
19 identifying, sort of, those fundings are
20 different. Some things very unpopular with
21 this room have been done, including raising
22 bar fees, and some other things, to help
23 support it in other states. But I think
24 there are a lot of options.

Malia Brink

1 I think the bigger question is how do
2 you get the State on board for reform. And
3 that's quite a long process, but I think
4 it's a role this Commission can play a very
5 important part in bringing it about.

6 Harkening back to the NYCLA testimony,
7 he talked about you all talking about the
8 problems that you've heard here. And he
9 specifically talked about you talking to
10 civil lawfirms. I think if you were to go
11 talk to civil lawfirms you'll find that a
12 lot of them are way past where you would
13 expect them to be. Some of them do pro bono
14 counsel and massive reform cases. Cravath,
15 Swaine & Moore is the one who is, you know,
16 almost -- well, largely responsible for the
17 change that we hope is about to occur in
18 Montana. They're about to get a statewide
19 system in a state where you never thought it
20 was possible. And they've done such a good
21 job of turning the hearts and minds of the
22 people in Montana around that the primary
23 proponents of the bill that would give them
24 that statewide system is the A.G. And if

Malia Brink

1 you ever think that we thought that would
2 happen five years ago, you'd be wrong.

3 JUDGE BAMBERGER: What is it that
4 turned it around?

5 MS. BRINK: Cravath, Swaine & Moore.

6 JUDGE BAMBERGER: Through litigation or
7 through what?

8 MS. BRINK: I think they did it through
9 a number of means. I think, quite frankly,
10 in Montana there wasn't a lot effort to
11 raise consciousness outside litigation, or
12 at least before it started, but the
13 litigation was a vehicle of massively
14 raising consciousness.

15 People believe in the right to counsel.
16 88 percent of Americans say they believe
17 firmly in the right to counsel. 94 percent
18 say that criminal justice shouldn't be based
19 on how much you earn and whether or not
20 you're poor. And, you know, politicians
21 have to respond to that kind of a
22 percentage.

23 So, the question is how do you sort of
24 bring it about? And I think one of the

Malia Brink

1 things that you all can do, in addition to
2 talking to civil lawfirms and trying to
3 bring the bar about, is to just generally
4 try and raise consciousness about it because
5 sometimes the most effective advocates are
6 not lawyers, they're not even people who
7 have been involved in the system. In
8 Louisiana, one of our vocal opponents who on
9 Gideon Day stood up and said we need to pay
10 attention to, someone who I think the
11 Legislature is going to listen to way more
12 than they do me is the former LSU basketball
13 coach. And it's advocates like that, people
14 coming forward and saying this is a
15 fundamental justice, that they need to pay
16 attention to it, that, I think, are very
17 helpful in turning that tide.

18 JUDGE BAMBERGER: So, we need to hire a
19 PR firm?

20 MS. BRINK: No, we've never really used
21 a PR firm. It's really just talking about
22 the people that you know and talking to -- I
23 think it is a public education campaign.
24 Whether you want to do that with

Malia Brink

1 professionals or whether or not you think
2 you can handle it, yourselves is a different
3 issue. But I think you a play a leadership
4 role in it or I think you should.

5 I have, I mean I have -- oh, I was in
6 Albany for Gideon Day less than a week ago,
7 and I talked to legislators. And,
8 admittedly, there's hostility, I think, now
9 between the judiciary and the legislators
10 that you heard reference to earlier and I
11 heard some of that. But I also think that
12 when we sat down and told them about the
13 horror stories, they were shocked. And I
14 think that they can be won over.

15 Some of our most unlikely allies, you
16 know, for reform in Virginia, for example,
17 the best bills that we've seen are coming
18 from the very far right. They're coming
19 from a guy who I never thought I would be in
20 a room with, quite frankly, and who comes at
21 it from a position that I never heard
22 before. He was in JAG. Right? And the
23 bottom line is in JAG what the prosecutor
24 gets, the defense gets. That's his version

Malia Brink

1 of fairness. And that's what he's pushing.
2 And it it's just a question of ferreting
3 out. You know, we had hadn't identified
4 him, we don't know he was an ally. He came
5 out of the woodwork and sort of agreed with
6 us. I don't even know which press member
7 called him and got the comment, but he has
8 become the forefront of the fight for reform
9 in Virginia.

10 And I think those things are sort of
11 important.

12 Having done that part of my testimony,
13 now I'm going to jump back to methodology
14 and say there are a couple of things
15 New York absolutely has to get rid of. Flat
16 fee and low bid contracts among --

17 CO-CHAIRMAN HELLERSTEIN: Ma'am, what
18 did you just say?

19 MS. BRINK: Flat fee and low bid
20 contracts. And I'll define both terms, if
21 you want. The bottom line is flat fee means
22 you're not doing it anywhere based on the
23 number of cases you have to do. Low bid is
24 exactly what it sounds like, where quality

Malia Brink

1 isn't factoring and the people charge part
2 TPD, who is the one who said they'd do it
3 for the least amount of money. I think
4 you've seen a dramatic rise upstate in low
5 bid, flat fee contracts. And that
6 combination is deadly. I think either of
7 them should be forbidden.

8 The other thing that you have in some
9 parts of New York, I think, the political
10 appointments. You know, a
11 politically-appointed defender is just a
12 nightmare. Sometimes it's great because the
13 counties feel some tremendous
14 responsibility, but a county legislature
15 choosing the defender can be an absolutely
16 horrible situation, and because of that
17 possibility is something that we would like
18 to see just put to a halt.

19 When I listened to the testimony of
20 some of the defenders who were here today
21 and I read some testimony that was given in
22 New York City and in Rochester, the gross
23 lack of sort of services and abilities that
24 comes to the forefront, and I just wanted to

Malia Brink

1 put that into a national perspective and
2 just go over some of the standards.

3 In P.D. offices, supervision ratio that
4 is sort of at the highest possibles, that
5 there should be one supervising attorney for
6 every ten junior attorneys and that that
7 supervisor should be capable of giving them
8 regular standardized reviews and have a cut
9 caseload in order to allow for the
10 supervision time that they have to spend.

11 And I'm just going to start with the P.D.s
12 first and then I'll go back to assigned
13 counsel.

14 Appropriate support staff ratios,
15 depending on who you sort of speak to, one
16 to four or one to three, were for each of
17 the following: Secretaries, investigators
18 and paralegals, which means that even the
19 best staffed office that you heard about
20 today doesn't hit that mark or, I suspect,
21 anywhere close, although we didn't talk
22 about paralegals and secretaries in some of
23 the testimony.

24 Obviously, there are the workload limit

Malia Brink

1 issues and I know everyone tends to be
2 familiar with those upper limits.

3 For assigned counsel programs, you
4 heard a little bit about a variety of
5 methods of, sort of, administering them.
6 Administrators should have a role in
7 figuring out who the people are that are
8 assigned. There should be a review process.

9 I remember the man from NYCLA talking a lot
10 about the deficiencies in the First
11 Department, sort of, qualification. That
12 body that he talked about as its
13 deficiencies is universally, at least in my
14 circles, considered the best at reviewing
15 lawyers in New York. So, I think its
16 deficiencies should be taken in very
17 seriously because I don't think other
18 departments in, even in the city have
19 extensive review. It's important that
20 assigned counsel be prescreened and
21 certified.

22 But I also want to mention something
23 that doesn't get a lot of look at and that
24 is monitoring assigned counsel workloads,

Malia Brink

1 not just their assigned cases, but a central
2 integral review of their profession. And
3 recertification that occurs on an annual
4 basis has got to get assigned counsel to
5 limit their private workloads to allow them
6 to take on those private cases. That's a
7 difficult process and it requires, sort of,
8 the intensive review and it requires some
9 real time. And it's -- I think people like
10 assigned counsel systems because they don't
11 think it requires the administration. I
12 think that's because that part of it often
13 gets overlooked.

14 The last comment that I wanted to make
15 was on the issue of parity, but I know that
16 you've heard a lot about it today. Parity,
17 for me, the devil is in the details. People
18 tend to talk about salary parity and where
19 people are starting out. Parity is also
20 about similar access to forgiveness
21 programs. It's about having an equal seat
22 at the table when there's a conference to
23 discuss whether or not a specialty court
24 should be formed or if there is a conference

Malia Brink

1 to discuss the different scheduling of the
2 court and the county. There's a D.A. there,
3 there should be a Public Defender there.
4 Parity is about access to the same type of
5 retirement programs. And I know in New York
6 sometimes that's very disparate more than
7 salaries are similar. So, I sort of, that
8 was my only, really, brief comment on the
9 issue of parity because I think you heard a
10 lot about it today, but I think often it
11 gets minimized down to salary, where it's
12 not overly productive.

13 And then I'll take any questions you
14 have. But otherwise, I'm happy to let it
15 rest with my written testimony.

16 CO-CHAIRMAN HELLERSTEIN: That's been
17 very helpful. Thank you.

18 PROFESSOR SHANKS: Thank you.

19 JUDGE BAMBERGER: Thank you.

20 CO-CHAIRMAN HELLERSTEIN: Ms. Gewanter,
21 good morning. Ms. Gewanter, welcome.

22 MS. GEWANTER: Good morning and thank
23 you for allowing me to present testimony.

24 My name Barrie Gewanter and I'm

Barrie Gewanter

1 executive director of the Central New York
2 Chapter of the New York Civil Liberties
3 Union.

4 As you know, the New York Civil
5 Liberties Union is the New York State
6 affiliate of the ACLU. And I think most of
7 you, as lawyers, are already familiar with
8 our mission.

9 My chapter covers the vertical swath of
10 Central New York, going from Watertown in
11 the north down to Binghamton in the south
12 and from Utica in the east to Auburn in the
13 west.

14 As you've heard from testimony from
15 some of the other employees of our
16 organization, the NYCLU is very deeply
17 concerned about the provision of adequate
18 legal representation for criminal defendants
19 that cannot afford an attorney.

20 The system of indigent defense services
21 in New York State, in our opinion, is
22 broken, as others have said today, and in
23 need of careful repair. There are serious
24 and systemic deficiencies, there is little

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1 consistency, very little accountability, if
2 at all, and no real guarantee of fundamental
3 fairness.

4 For the past year in looking at this,
5 the NYCLU has been conducting investigations
6 of public defense systems in selected
7 counties. As director of the Syracuse
8 office, I've been directly involved in our
9 investigations in Onondaga County. And
10 today I will speak mainly of concerns
11 identified in that county through interviews
12 with local lawyers, judges, civil liberties
13 advocates and a few referred defendants.

14 Our investigations in Onondaga County
15 are not complete, but we have already seen
16 troubling indications of inadequate and
17 ineffective representation.

18 Here's a example of some of what we've
19 seen. Lack of assigned attorney contact
20 with clients before and after key steps in
21 the legal process. This includes failure to
22 visit clients in jail, repeated failure to
23 accept or return client phone calls, failure
24 to respond to client letters or to engage in

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1 meaningful communication with clients prior
2 to scheduled court proceedings.

3 We've also seen -- yes.

4 PROFESSOR SHANKS: I'm sorry. Is this
5 limited to the assigned counsel plan in
6 Onondaga County that we heard about before?

7 MS. GEWANTER: I'm basically talking
8 about the current state of indigent defense
9 services for criminal defendants in Onondaga
10 County, which is currently in the province
11 of the assigned counsel program.

12 PROFESSOR SHANKS: I just wanted to
13 know if those were sort of coterminous?

14 MS. GEWANTER: I will say quite up
15 front that these kind of complaints in the
16 past have really not been lodged against
17 Hiscock Legal Aid Society, which was
18 involved in criminal defense services prior
19 to, I think, April of 2004.

20 PROFESSOR SHANKS: So, it's primarily
21 the assigned counsel program that we heard
22 about from Mr. Schlanger?

23 MS. GEWANTER: I'm commenting today
24 about the current provider in Onondaga

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1 County.

2 A second thing that we've seen is lack
3 of timely action by assigned attorneys on
4 behalf of their clients, including repeated
5 postponements while clients wait in jail,
6 failure of attorneys to actually appear in
7 court. And our concern is that this has
8 resulted in additional and unnecessary weeks
9 and in some cases months of pre-trial
10 detention.

11 We have seen a failure of attorneys to
12 investigate the circumstances of alleged
13 crimes, including potentially exculpatory
14 information. We've seen attorneys who have
15 failed to pursue any legal options beyond
16 the unquestioned acceptance of a plea deal
17 offered by the prosecution.

18 We've also seen attorneys failing to
19 present mitigating evidence that might
20 encourage a reduced sentence or to pursue
21 the potential of sentencing alternatives.

22 Later on today you'll hear from Marsha
23 Weissman from the Center of Community
24 Alternatives. CCA actually provides free

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1 services to identify and describe sentencing
2 alternatives. But a significant number of
3 the attorneys that are currently
4 representing indigent clients in Onondaga
5 County do not seek those services even
6 though they are free.

7 We've also seen attorneys taking action
8 on behalf of their clients without
9 consultation with those clients beforehand
10 and in some cases without their consent,
11 including the waiving of preliminary
12 hearings and engaging in plea negotiations
13 that run against their client's wishes.

14 Now, these problems are really not new
15 in Onondaga County. There was a
16 fact-finding hearing conducted by the
17 New York State Defenders Association in 1998
18 that revealed a similar pattern of
19 complaints. Some of the people that
20 testified at those hearings will be
21 testifying today. I, myself, testified at
22 that hearing.

23 These kind of complaints have also been
24 acknowledged and addressed in a newsletter

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1 circulated --

2 MR. CROTTY: Ms. Gewanter, may I
3 interrupt you? In 1998, when this was
4 studied, who was the provider then?

5 MS. GEWANTER: It was a combination of
6 Hiscock Legal Services providing
7 representation for the misdemeanor office
8 and the assigned counsel panel providing
9 representation in the conflict cases and in
10 felonies.

11 MR. CROTTY: So, the difference between
12 '98 and now is Hiscock Legal Aid Society is
13 out of this picture now and it's almost
14 exclusively the assigned counsel plan?

15 MS. GEWANTER: That is a difference
16 now. However, at the time the complaints
17 that were --

18 MR. CROTTY: The complaints were the
19 same, I gather?

20 MR. GEWANTER: The complaints were the
21 same, but the complaints were not being
22 lodged against attorneys under the
23 supervision of Hiscock Legal Aid.

24 MR. CROTTY: I see, thank you.

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1 MR. GOLDMAN: Can I ask you a question?

2 MS. GEWANTER: Certainly.

3 MR. GOLDMAN: All these complaints,
4 which, undoubtedly, at least to some extent
5 are legit, I've heard lodged against private
6 counsel. We've heard testimony, but these
7 are the same attorneys who comprise good
8 defense bar, whether private or not. Is
9 there any evidence that they treat their
10 private clients differently from
11 court-assigned clients?

12 MS. GEWANTER: Understand that the
13 information that I've been privy to is
14 anecdotal largely. It's been based on
15 interviews, in some cases confidential
16 interviews. I have had reports, however, of
17 attorneys promising to be more zealous in
18 their representation or to only take a case
19 to trial if a client agreed to become a
20 retained client rather than an assigned
21 client. This is something that is reported
22 to happen.

23 So, I would say, in short, yes, that
24 does occur. The extent, I can't comment on.

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1 JUDGE BAMBERGER: I have questions
2 about a couple of the categories and I'll
3 try to do it quickly.

4 MS. GEWANTER: Sure.

5 JUDGE BAMBERGER: You say a failure to
6 investigate. Do you know if the --
7 investigation and proper experts and
8 investigators has been an issue throughout
9 these hearings.

10 MS. GEWANTER: Yes.

11 JUDGE BAMBERGER: Do you attribute the
12 lack of investigating to the inability of
13 the 18-B counsel to get an order signed by
14 the judge to get the expert or the
15 investigator to conduct the investigation or
16 is it simply the inadequacy of the lawyer?

17 MS. GEWANTER: I really don't have any
18 information about the extent to which the
19 panel has requested investigators and has
20 not received them. So, I really can't
21 comment on that dynamic. As I said a lot of
22 the information is anecdotal and I can tell
23 you that I have received complaints or had
24 complaints referred to me in which

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1 individuals said but I didn't do it and can
2 you look into this and this and this and
3 this and they said to me that their attorney
4 did not, was not interested in doing that
5 and only talked about a plea deal. I can't
6 give you statistics.

7 JUDGE BAMBERGER: There have been
8 complaints about judges refusing to sign
9 vouchers and orders for investigators and
10 experts. And that's come up several times.

11 MS. GEWANTER: It has and I can't give
12 you any precise information about the extent
13 to which that occurs.

14 JUDGE BAMBERGER: And what about the
15 exploration of legal options? There was one
16 other.

17 MS. GEWANTER: Sure. I can read it
18 back, if you want.

19 JUDGE BAMBERGER: No, no. There were
20 discussions, plea negotiations against the
21 interests of the client. Now, I assume
22 that -- my understanding of the law is that
23 if a prosecutor wants to discuss a plea
24 disposition, it's the lawyer's, defense

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1 lawyer's obligation to listen to what the
2 prosecutor has to say and report it to the
3 client.

4 MS. GEWANTER: Right.

5 JUDGE BAMBERGER: Now, is that what
6 they're talking about or is there more
7 substantial, are they alleging more
8 substantial pressure to compel them to take
9 a plea that they don't want to take? I'm a
10 little confused.

11 MS. GEWANTER: I'm talking about
12 pressure to take a plea that they don't want
13 to take.

14 JUDGE BAMBERGER: Okay.

15 MS. GEWANTER: And I'm talking about
16 situations in which clients actually say I
17 don't want to take a plea, I'm innocent or
18 that deal is not something that is
19 reasonable for my situation. And yet, the
20 lawyer still pursues the negotiation on the
21 basis that the client would go ahead and
22 take it.

23 JUDGE BAMBERGER: Okay, thank you.

24 PROFESSOR SHANKS: Can I ask you if you

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1 keep any statistics in terms of diversity?
2 You know, what are the ethnicity or the race
3 of the lawyers as opposed to the client,
4 percentages? And then, if you know that in
5 terms of the people who are lodging
6 complaints with you, if you see a pattern
7 there.

8 MS. GEWANTER: First of all, I don't
9 have any information about race of client
10 versus race of attorney. I will tell you
11 anecdotally that there are very few, if any,
12 African-American attorneys that I know of in
13 the Syracuse area. I've been in the
14 Syracuse area for twelve years, I've been
15 with the ACLU since 1996 and I frequently
16 will interact with and refer to lawyers, but
17 I'm not aware of -- I'm aware of one
18 African-American attorney in Syracuse that I
19 might refer to, but not for criminal defense
20 matters.

21 PROFESSOR SHANKS: What about the
22 clients?

23 MS. GEWANTER: The clients. I should
24 clarify that our office does not receive the

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1 bulk of the complaints. We have had
2 conversations with other agencies that do
3 receive the complaints and those are the
4 local chapter of the NAACP, Human Rights
5 Commission of Syracuse and Onondaga and the
6 jail ministry. And I've had conversations
7 with representatives of all three
8 organizations about the range of complaints.

9 What I can tell you as far as
10 demographics is that we believe there is a
11 disproportionate effect of these problems on
12 African Americans, who represent 50 to 60
13 percent of the population awaiting trial in
14 the county jail. Specifically, I just got a
15 phone call earlier, 57 percent of the jail
16 is minority, 53 percent of the jail is
17 black. And as I said, it ranges from 50 to
18 60. But this is coming directly from the
19 jail representative, itself, to somebody
20 from the Commission on Human Rights, who
21 reported back to me.

22 CO-CHAIRMAN HELLERSTEIN: And do you
23 know what the percentage of the population
24 is?

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1 MS. GEWANTER: Yes, actually I do.
2 African-Americans represent 6.6 percent of
3 the Syracuse metropolitan statistical area
4 or SMSA, 25 percent of the population within
5 the boundaries of the City of Syracuse and
6 9.4 percent of the population of the county
7 as a whole. I can also give you figures on
8 non-white generally. I put that in quotes.

9 PROFESSOR SHANKS: And then do you know
10 if the percentage -- I mean, is it because
11 it's those agencies who get the majority of
12 the complaints, do you think then that the
13 majority of the people complaining are black
14 and are going to them because of that or
15 that's the majority of complaints even you
16 get?

17 MS. GEWANTER: What I'm suggesting is
18 this the majority of the people that end up
19 spending jail time awaiting trial are
20 African-American. If you look at 53 percent
21 of the jail population on any given day
22 being African-American. And there's another
23 statistic that I think is very important to
24 bring to your attention, another agency that

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1 we have also spoke to that provides services
2 to incarcerated youth indicates that more
3 than 85 percent of the 16 to 18 year olds in
4 the jail are youth of color. So, not only
5 am I suggesting this has a disproportionate
6 effect on African-Americans, people in color
7 generally, but an even more significant
8 disproportionate effect of youth of color.
9 And that very much needs to be addressed.

10 I have some other concerns that I'd
11 like to bring to your attention.

12 My testimony will give you two examples
13 of two very egregious complaints that were
14 brought to my attention by an agency that
15 referred them. But I want to say that I
16 know of several dedicated attorneys that
17 represent assigned clients with the same
18 zeal that they would for a retained client.
19 I also know there's attorneys in Onondaga
20 County that are not serving the interests of
21 their assigned clients. And to some extent
22 it's almost as if it's a game of chance. If
23 you get one of the good attorneys, you may
24 get something resembling a measure of

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1 fairness, but if you end up being assigned
2 one of the attorneys that is known to
3 postpone court appearances or not show up in
4 court or do nothing more than pushing a
5 prosecution plea deal, that defendant is not
6 going to get an experience of equal justice.

7 MR. GOLDMAN: Have you or any of these
8 other agencies gotten complaints or the
9 victims, as such, themselves made a
10 complaint to the Onondaga County Bar
11 Association?

12 MS. GEWANTER: There are complaints
13 that are made directly to the assigned
14 counsel program office.

15 MR. GOLDMAN: And what has been their
16 response?

17 MS. GEWANTER: Until recently I believe
18 they didn't even log the complaints. The
19 response, as far as I know, based on a
20 conversation that we had with the
21 administrator and ACP board members, is that
22 the administrator will take the complaint
23 and call the lawyer, but there's no
24 follow-up beyond that.

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1 JUDGE FAHEY: I requested that in the
2 county and I think Paul has a letter, copies
3 of a letter from the balance of the
4 committee with respect to the Assigned
5 Counsel Program in response to that.

6 I'm sorry. Go ahead.

7 MS. GEWANTER: That's all right. I
8 will say there are complaints that have been
9 communicated to the Assigned Counsel Program
10 by the Human Rights Commission by the NAACP
11 and also by jail ministry, and there was in
12 the 1990s a complaint review committee and
13 that complaint review committee did
14 recommend removal from the panel of some
15 attorneys. But for some reason sometime at
16 the end of the 1990s that complaint review
17 committee ceased to exist and there is now
18 no complaint review committee.

19 In fact, one of our concerns is that
20 the only reason that attorneys seem to be,
21 to get in trouble within the ACP process is
22 for financial questions, questions about
23 overbilling. There is a very, very active
24 voucher review committee that has, in fact,

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1 reduced the amount of compensation that
2 attorneys have gotten. But there is no
3 review of performance. There are also no
4 standards established within the Assigned
5 Counsel Program now for qualifications. I
6 think Craig spoke to that. But actually for
7 performance, for expectations of what an
8 attorney is supposed to do for their
9 clients.

10 And this problem of lack of oversight
11 in Onondaga County and lack of effective
12 oversight is something that needs to be
13 addressed statewide. There need to be
14 mechanisms for oversight of attorney
15 performance.

16 And there's a reason why the Assigned
17 Counsel Program does not necessarily engage
18 in this effective intervention. The system
19 in Onondaga County, in which assigned
20 counsel gets the criminal defense work, is
21 one in which assigned counsel basically
22 steadfastly sticks to the idea that they
23 have no supervisory responsibility. They
24 are simply an administrative organization

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1 for independent contractors. Well, who
2 loses out in that? The people that address
3 the complaints. They fall on deaf ears.
4 There was some response in the 1990s, as a
5 result of the fact-finding hearing. And I
6 happen to know that in 1999 there was in a
7 newsletter circulated to the criminal
8 defense attorneys in the program some
9 dimension of standards and expectations.
10 But for some reason those don't exist
11 anymore.

12 There needs to be an expectation of
13 oversight. And it needs to either come from
14 the county, but I think that's really
15 ineffective, and I think it really needs to
16 come from the State. There needs to be
17 standards not only for qualifications, but
18 for performance. Then there needs to be an
19 expectation from the State that there will
20 be monitoring of that performance and that
21 there will be intervention. Right now it's
22 left up to the Assigned Counsel Board and to
23 the judges to recommend to remove an
24 attorney from the panel. But it rarely, if

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1 ever, happens and it only seems to happen

2 for gross financial misconduct.

3 Craig also mentioned something about

4 the jail calls. I want to say something

5 briefly about that. There are many

6 obstacles placed in the way of inmates and

7 connecting with their attorneys. The phone

8 system in the jail allows inmates to only

9 make collect calls to the outside world.

10 And this may seem a little bit weird, but

11 the County actually receives 45 percent of

12 the revenues from the phone service company

13 for each of these collect calls. The amount

14 that the County receives each year from this

15 arrangement is as much as four hundred fifty

16 thousand dollars a year.

17 The jail does allow through this system

18 free phone calls to the assigned counsel

19 office, to the jail ministry office and to

20 the Human Rights Commission, but the jail

21 does not allow free calls to the attorneys

22 who are actually assigned the cases. There

23 are inmates who have found collect calls

24 blocked, who have found when they try to

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1 make a collect call to the offices of their
2 attorney, that this call is refused, either
3 by the attorney or by the staff, and some
4 indigent defendants as a result sit in jail
5 for weeks or months without any way to
6 contact their attorney besides letters,
7 which may be ignored or filed away without
8 response.

9 Another concern to bring to your
10 attention has to do with the eligibility
11 assessments. We have a concern that
12 eligibility assessment protocols designed to
13 cut off may effectively result in the denial
14 of representation to defendants who cannot
15 reasonably afford an attorney. And I'll
16 point out that what's written in the state
17 statute is cannot afford an attorney.

18 However, narrow guidelines are reported
19 to exclude anyone who owns a home or any
20 other significant asset, but the guidelines
21 also ignore any consideration of debt, such
22 as an existing mortgage. There was one
23 gentleman who I was referred to, who was
24 referred to me by the NAACP, that said I

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1 have to pay my mortgage, my children need a
2 place to live. If I pay the attorney, I
3 can't pay my mortgage. And the standard is
4 cannot afford an attorney. There needs to
5 be in this state more consistency in the
6 determinations of what that means and
7 mechanisms to avoid the utilization of
8 eligibility protocols that are unnecessarily
9 narrow or strict. There should be clearer
10 statewide guidelines for eligibility
11 assessments for these indigent defendants.

12 Another factor that comes into this is
13 also that there is really not adequate
14 oversight to prevent the abuses of these
15 eligibility assessments. Instead, attorneys
16 in the program are strongly directed to
17 automatically seek removal from cases
18 whenever eligibility is at all in question.
19 At the same time they are strongly
20 discouraged from seeking a motion to
21 continue in the hope that eligibility
22 questions might be resolved in a more
23 careful and compassionate manner.
24 Ultimately, the determination for who is

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1 eligible should be up to the judge. And in
2 some cases it's referred to the judge. And
3 when those few clients who are actually
4 allowed to speak in court do address their
5 financial concerns to the judge, sometimes
6 the judges do file a motion to continue.
7 But there is such pressure in Onondaga
8 County to meet the goals and the
9 standards -- and all of you know what I mean
10 by goals and standards in the context of the
11 Office of Court Administration -- that a
12 judge's focus is on moving cases through the
13 system and who has presented an
14 ineligibility assessment and is presented
15 with a pros -- sorry, with a defense
16 attorney who is making a motion to be
17 removed, I doubt most of the judges are
18 going to take the time to ask the defendant
19 questions about their financial dilemmas.

20 CO-CHAIRMAN HELLERSTEIN: You're saying
21 that defense attorneys are quite often
22 making these motions and aren't --

23 MS. GEWANTER: I don't have statistics
24 on that. What I can tell you --

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1 CO-CHAIRMAN HELLERSTEIN: But they
2 reflect conversations between the client and
3 the attorney in terms of what was said to
4 the attorney, like the attorney learns from
5 the attorney-client privilege, about what a
6 person's assets are?

7 MS. GEWANTER: What happens is the
8 attorney does an eligibility assessment and
9 says they're eligible, ineligible.

10 CO-CHAIRMAN HELLERSTEIN: He does that
11 up front, he's the screening agent before he
12 gets into the case?

13 MS. GEWANTER: That is the way it was.
14 They are contemplating a change in that.
15 They're contemplating doing a centralized
16 eligibility assessment at the Assigned
17 Counsel Program, which would require the
18 clients to actually go down to that
19 centralized office. They haven't actually
20 instituted that yet.

21 CO-CHAIRMAN HELLERSTEIN: So, let me
22 see if I understand this. The judge assigns
23 an attorney?

24 MS. GEWANTER: Yes.

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1 CO-CHAIRMAN HELLERSTEIN: Attorney X.

2 And that Attorney X is not really yet
3 assigned until he has a conversation with
4 the defendant about his financial status?

5 MS. GEWANTER: They're assigned and
6 then the attorney does an assessment of the
7 eligibility and indicates both to the client
8 and to the Assigned Counsel Program or
9 directly to the Assigned Counsel Program,
10 who refers back to the, back to the client.

11 I'm not precisely sure about that. You'd
12 need to actually ask somebody in the
13 Assigned Counsel Program what it is. And
14 then somebody is told they're eligible or
15 they're ineligible. But the guidelines for
16 the Assigned Counsel Program, and I've
17 looked at the handbook, explicitly say that
18 if a client appears to be ineligible, you
19 must make a motion to remove.

20 PROFESSOR SHANKS: You indicated
21 earlier that at least anecdotally clients
22 have reported to you that if they want to go
23 to trial they've had their assigned
24 attorneys say then you have to hire me.

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1 MS. GEWANTER: Some attorneys. Please
2 don't make a generalization about all.

3 PROFESSOR SHANKS: Have you heard from
4 clients about any attorneys who have said,
5 you know, I've done this assessment and
6 you're not eligible, but you can hire me?

7 MS. GEWANTER: I believe that happens.
8 Can I tell you that I've had somebody say
9 those precise words to me? No. There
10 was --

11 PROFESSOR SHANKS: Do you know of any
12 standard that says that you can't do that,
13 if you determine that the person is
14 ineligible, you are prohibited from having
15 that person as a client?

16 MS. GEWANTER: No. But I do know that
17 the Assigned Counsel Program discourages,
18 strongly discourages attorneys from making
19 motions to continue. And, so, there is a
20 disincentive to continue.

21 PROFESSOR SHANKS: To continue as
22 assigned?

23 MS. GEWANTER: Right. They make a
24 motion -- and I'm not an attorney, so excuse

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1 me if I don't get the exact specifics
2 correct -- but they make a motion to the
3 judge to continue as assigned counsel, even
4 though there's a question of eligibility,
5 and the judge makes a decision whether to
6 grant that. That's my non-lawyer
7 understanding.

8 MS. ZUFLACHT: The judge is making the
9 assignment in the first instance.

10 MS. GEWANTER: Yes.

11 MS. ZUFLACHT: So, he's not asking the
12 client any questions, so he's not asking,
13 like, well, you --

14 JUDGE FAHEY: No. Typically, what will
15 happen when that client or defendant will
16 appear in court indicating he can't afford
17 an attorney, I'll assign an attorney. The
18 attorney will take a questionnaire sometimes
19 to the assigned counsel --

20 MS. ZUFLACHT: You don't ask him
21 questions?

22 JUDGE FAHEY: I don't, no. They make
23 that determination. And if he comes back
24 ineligible, it's up to the judge whether

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1 they're going to order the attorney to
2 continue.

3 MS. ZUFLACHT: When he makes the
4 assignment does he do the arraignment before
5 the questionnaire is filled out?

6 JUDGE FAHEY: Yes.

7 MS. GEWANTER: And some clients have
8 told me they're terrified of saying anything
9 in court because some of the judges really
10 discourage defendants from speaking up. So,
11 as I said, if a judge is faced with an
12 illegible assessment and an attorney says
13 please remove and a defendant is terrified
14 that they're going to get treated more
15 adversarially by the judge if they speak up
16 and object, you've got a client that's in an
17 impossible situation. There was one
18 gentleman that was referred to me by the
19 NAACP, and I tried to explain to him that it
20 was the judge that made the decision, and if
21 he wanted to, if it was his choice to do so,
22 he could try to address it directly to the
23 judge in court. And he did and the judge
24 assigned him an attorney. And that attorney

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1 then declared him ineligible and the guy was
2 back in court again, trying to get the judge
3 to allow him to continue having an assigned
4 attorney. But it was the defendant having
5 to advocate for that rather than the
6 attorney.

7 CO-CHAIRMAN HELLERSTEIN: So, we're
8 running a little bit late.

9 MS. GEWANTER: Understood.

10 New York State really has a broken
11 system, as I've said. And I think that this
12 Commission has an opportunity to play a
13 truly historic role in ensuring the real
14 legacy of Gideon, in order to do indigent
15 defense systems funded in a way that
16 provides adequate resources for effective
17 representation, but this must be accompanied
18 by the establishment of basic standards
19 governing the provisions of these services
20 and mechanisms to monitor and ensure
21 compliance. And I honestly do not think the
22 way to do this is to continue the reliance
23 on a system in which each county is expected
24 to bear the financial and administrative

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1 responsibility for providing a defense,
2 indigent defense services. I've seen the
3 political and financial mess that this has
4 caused in Onondaga County. And counties
5 should not be faced with difficult choices
6 as to whether to honor the constitutional
7 rights of indigent defendants or manage to
8 meet their Medicaid costs or manage to meet
9 the other costs that a county has to meet.
10 It is not a workable way to have insuring
11 adequate defense services.

12 CO-CHAIRMAN HELLERSTEIN: Thank you.

13 MS. GEWANTER: Thank you. I will
14 forward by e-mail a copy of my testimony. I
15 do have one copy that is in late draft form.

16 (Document handed to the Board)

17 CO-CHAIRMAN HELLERSTEIN: Thank you so
18 much.

19 MS. GEWANTER: Thank you for your
20 patience.

21

22

23

24

1 CO-CHAIRMAN HELLERSTEIN: This is Cuddy
2 and Andino. Can we get another chair?

3 Good morning and welcome.

4 MR. ANDINO: If it would please the
5 commission, I have a brief statement to read
6 followed by Mr. Cuddy and then we can take your
7 questions.

8 Good afternoon, I am Kurt Andino. For the
9 record, I am the Director of Jail Ministry
10 located in Onondaga County. I am joined by Bill
11 Cuddy, the Director of the Jail Ministry Bail
12 Expediter Program.

13 Jail Ministry is a 30-year old experiment
14 and inquiry into the role of community within
15 the criminal justice paradigm. Our group
16 welcomes all and excludes none. Our staff and
17 volunteers represent many ethnicities, economic
18 strata, belief systems and socio-political
19 positions. Our work is premised upon the
20 recognition of the essential equality of the
21 human person as well as the preservation and
22 respect for the dignity found therein. Our
23 singular communitarian mandate is to serve the
24 outcast prisoner. With this in mind we commend

1 Chief Judge Judith Kaye for her creation of the
2 New York State Commission on the Future of
3 Indigent Defense Services. We thank the
4 Honorable Burton B. Roberts and Professor
5 William E. Hellerstein for chairing this long
6 overdue review. Our goal at Jail Ministry is to
7 be responsive and reactive to the needs of the
8 imprisoned. In the course of this work we help
9 inmates get home, get housing, get sober, get
10 clothed and get fed. Last year we spent over
11 4,500 hours visiting people in the jail. We
12 sent in over 3,000 books, 2,200 pair of socks
13 and hundreds and hundreds of reading glasses,
14 bibles, envelopes and hygiene products all
15 requested individually by persons incarcerated.

16 This past year our office received over
17 32,000 inmate initiated phone calls through our
18 three phone lines. I report these numbers to
19 demonstrate that our services both broad in
20 potential while staying narrow in focus. I also
21 report these numbers because it is important to
22 realize that we are not speaking on behalf of
23 the 67 volunteers and staff of Jail Ministry,
24 but as perhaps the only persons to directly

1 represent those 650 incarcerated members of our
2 community, not inmates, not clients, just people
3 who happen to be in jail.

4 With all that we offer, it should be
5 surprising that 63 percent of our phone calls
6 and 45 percent of in person requests in the
7 months of January and February of 2005 are
8 requests to contact counsel. Sadly, it comes as
9 no surprise to those of us who work closely with
10 the incarcerated population. Last year in a
11 randomly selected sample of unique inmate phone
12 calls made to Jail Ministry in the month of
13 March, '56 percent of inmates complain that
14 their lawyer has never visited them; 58 percent
15 could not contact their lawyer; 46 percent state
16 that their lawyer's phone has a block on it; and
17 9 percent claim that their case has been
18 postponed without their knowledge.

19 It is our studied position that persons
20 incarcerated in the Onondaga County Justice
21 Center, a non sentenced facility suffer an
22 entirely avoidable state and county sponsored
23 curtailment of their freedoms and rights due
24 largely to the county's choice of funding an

1 unsupervised and unaccountable program in lieu
2 of an existing structured, adversarial and
3 responsive legal aid society.

4 It is not my intention to condemn the
5 entire assigned counsel program or the good work
6 many attorneys provide their indigent clientele.
7 However, when ten of 15 attorneys consistently
8 fail their charges and are responsible for
9 hundreds of individual cases per year, justice
10 is absent. Indigent defendants in the Justice
11 Center are separated from reasonable contact
12 with their counsel due to collect call blocks on
13 land-line phones, the exclusive use of cell
14 phones which cannot accept collect calls by many
15 attorneys, and the reluctance of attorneys to
16 accept collect calls from clients without
17 guaranteed remuneration from the county.
18 Indigent incarcerated defendants are spatially
19 separated from counsel as well and do not
20 possess the agency or freedom of movement to
21 initiate appropriate contact with counsel.
22 Separated from contact with their appointed
23 defenders, incarcerated indigent inmates have
24 their reasonable access to the courts denied so

1 that bail reduction hearings do not occur,
2 pretrial release is not considered, and
3 alternatives to the criminal process are not
4 available options. Ultimately and ironically
5 indigent inmates are separated from the law
6 itself by those who have been appointed to
7 defend them.

8 This frequent and persuasive dehumanizing
9 treatment of indigent inmates by their appointed
10 counsel in Onondaga County is not only a legal
11 issues, it's a social issue. Leaving an inmate
12 unattended by assigned counsel has implications
13 that reach beyond inappropriate confinement,
14 jail overcrowding, ineffective assistance, and
15 the predominance of a prosecutorial weighted
16 system of plea bargains. It is also destructive
17 to the most vulnerable and systematically
18 abused persons in our society, the
19 disenfranchised, often uneducated and
20 impoverished. These forgotten people rely more
21 than any other social economic class of persons,
22 upon the competent work of an interested legal
23 advocate to restore their ability to fully
24 function in the society from which they left.

1 The fact is that the indigent inmate is often
2 ignored by assigned counsel, postponements are
3 too frequently overlooked by the bench, and
4 subsequently the time served ACD'd, ror'd,
5 charges dismissed or the no billed defendant is
6 returned to society without any understanding of
7 the proceedings which has incarcerated him or
8 her. We too frequently encounter inmates who
9 were released without being informed by their
10 counsel in a reasonable manner that they could
11 understand that they had further business before
12 the court. This blatant disregard for the poor
13 and vulnerable is the shame of the legal system
14 and holds the stench of injustice.

15 In closing, I would like to suggest that
16 the absence of an advocate for the indigent
17 incarcerated person on this distinguished
18 commission does a disservice to the cause of
19 justice and excludes further the already
20 disenfranchised voice of the poor. Looking at
21 the membership of this commission, I fail to
22 note any inclusion of persons not in possession
23 of a Juris Doctorate or commensurate legal
24 degree. I would strongly encourage the

1 commission to broaden its scope beyond the
2 juridical field and to seek enhanced
3 contributions from those whose lives will truly
4 be determined by the extent of your combined
5 efforts. Thank you.

6 CO-CHAIRMAN HELLERSTEIN: Thank you. I
7 don't know if Mr. Cuddy wants to make a
8 statement.

9 PROFESSOR SHANKS: I wanted to know if you
10 have identified the ten or 15 attorneys who you
11 have indicated consistently don't speak with
12 their clients or don't come visit their clients,
13 or, you know, pressure them into pleas, that
14 sort of thing? Have you taken the names of
15 those ten people and talked to the Assigned
16 Counsel Commission, and, if you have, what has
17 been the result?

18 MR. ANDINO: We had a few meetings with
19 Assigned Counsel. Names have been brought up.
20 We have been told that they are looking at ways
21 to change things. This was prior to our last
22 meeting in March, and then, thereafter, we met
23 two more times.

24 PROFESSOR SHANKS: Last March, a year ago?

1 MR. ANDINO: Yes. We have been told a lot
2 of things by Assigned Counsel.

3 PROFESSOR SHANKS: Has anything happened
4 to any of the ten lawyers or 15 lawyers that you
5 have identified as being sort of the ones who
6 are least responsive to their clients?

7 MR. ANDINO: With the regency of Hiscock
8 Legal Aid Society, the assigned program has
9 become much more brazen and we are for those ten
10 or 15 attorneys of which I speak, they see no
11 value in communicating with us directly or
12 through Assigned Counsel.

13 PROFESSOR SHANKS: So you try to, if a
14 client comes to you or someone from the jail
15 calls you and says, I haven't been able to speak
16 to Mr. Or Ms. X, do you then attempt to call Mr.
17 Or Mrs. X.

18 MR. ANDINO: Step one is, we ask the
19 inmate, the indigent inmate to call Assigned
20 Counsel. We give them the number, 476-4921.
21 Please call and ask that your attorney be put in
22 contact with you. We ask that if they don't
23 hear within two days that they call us back. We
24 will also, after they make that phone call, the

1 initial phone call, we will follow up with a
2 phone call of our own. After two days
3 invariably they have not heard from their
4 counsel and at which point in agreement with the
5 Assigned Counsel program, we fax the chief
6 supervising judge for the Fifth Judicial
7 District Barry Donty from Oneida a fax that
8 says -- and we cc to the attorney and Assigned
9 Counsel program, that says, inmate X requests
10 the pleasure of your presence or communication
11 at some time in the foreseeable future. If you
12 would be so kind to visit him. Those are not
13 the exact words. But it's a very forthright
14 statement, and that is the only thing that gets
15 a response. Judge Donty's clerk initially
16 called us and asked us exactly what we thought
17 we were doing. We explained the situation and
18 his Honor told us to keep it up. It seems to be
19 one of the few or perhaps the only successful
20 measure that we have found over the four years
21 that I have be director.

22 PROFESSOR SHANKS: People will continue to
23 get assignments as far as you know?

24 MR. ANDINO: Absolutely.

1 MS. ZUFLACHT: Do you have positive
2 feedback?

3 MR. ANDINO: Yes. From inmates?

4 MS. ZUFLACHT: Yes.

5 MR. ANDINO: Yes. There are probably two
6 or three Assigned Counsel attorneys that we have
7 great reviews about. What is interesting is,
8 because we are often seen as having an inmate
9 interested agenda that people would put us in
10 the same boat with Hiscock Legal Aid Society.
11 You must talk constantly to the Hiscock Legal
12 Aid Society. The fact of the matter is that
13 when they had the City Court cases, we never
14 talked to Hiscock Legal Aid. We didn't have to.
15 They are there. They were adversarial. They
16 were audacious. They were always a presence.
17 We would occasionally call them once about
18 somebody. We would never have to call them
19 twice.

20 MS. ZULFACHT: They only handle
21 misdemeanor cases.

22 MR. ANDINO: I would suggest the majority
23 of the persons who are indigent inmates at the
24 Justice Center in Onondaga County are

1 misdemeanors.

2 JUDGE BAMBERGER: Are they there beyond
3 the length of time that they would get as a
4 sentence as far as you have been able to
5 determine? The maximum sentence is a year.

6 MR. ANDINO: There was a case that was
7 concluded in -- not concluded, it was brought to
8 our attention in November 2003 where an inmate's
9 case has been postponed seven times while
10 incarcerated. It was for an unauthorized use of
11 a motor vehicle which I believe is an A
12 Misdemeanor. When he finally -- we are only
13 initiated by the inmates. So, we did not know
14 this person was in until they called us. We
15 went in. We met with the individual. We called
16 the lawyer numerous times. We were told that
17 she was busy in trial. We then called the
18 presiding judge. He called the defendant into
19 his courtroom and ROR'd him on the spot. It is
20 not uncommon to have somebody in there long
21 beyond what we know would be a reasonable time
22 served simply waiting for the first appearance
23 of the Assigned Counsel attorney.

24 JUDGE BAMBERGER: What happened to his

1 sentence?

2 MR. ANDINO: It was a budgetary issue as
3 far as services being delivered under -- it was
4 promoted as a budgetary issue, but I believe
5 that there's somebody here who can speak to that
6 in much better length than myself.

7 MR. CUDDY: Good morning.

8 CO-CHAIRMAN HELLERSTEIN: Good morning,
9 Mr. Cuddy.

10 MR. CUDDY: I have just had a cataract
11 operation done. I have a pair of those glasses
12 that we send to the jail. I brought them for
13 the purpose of looking at my notes. I want to
14 look at my notes as I talk with you. I am going
15 to backup a bit and indicate what occurred. As
16 was mentioned, I am Director of the Jail
17 Ministry Bail Expediter Program in Onondaga
18 County. This program originated out of the
19 Federal Class Action suit, Class Action suit
20 against Onondaga County, Albro versus Dillon,
21 consent decree causing that suit in 1995, and
22 our program was mandated.

23 CO-CHAIRMAN HELLERSTEIN: Who brought that
24 lawsuit?

1 MR. CUDDY: University of Law Clinic. So
2 there was, it was -- the suit was based on
3 protracted, prolonged overcrowding in the Public
4 Safety Building Jail that existed at that time.
5 There would be a new facility put up, the
6 Justice Center. This program would help a
7 little bit to address some of that possible
8 overcrowding. First by a major Low Cash Bail
9 Fund, \$70,000 bail fund which we would work with
10 families and friends and put together bail
11 packages in order to post bails for low level
12 criminal charges, misdemeanors and class C
13 felonies. That's a fund that is supported by
14 the county.

15 Secondly, we are designed as a kind of
16 advocate for inmates, kind of a program that
17 would address all aspects of their release
18 issues, however we could do that. Our office is
19 separated by upstairs and downstairs from the
20 regular jail ministry office. We receive about
21 12,000 phone calls a year. We screen and
22 interview on an average of 100 inmates per week
23 for their bail situations or for advocacy on
24 pertinent release issues. It's in this context

1 that we hear this overwhelming number of
2 complaints. There's a critical mess of these
3 complaints. There's a tremendous amount of
4 negative hostile feelings by inmates in the jail
5 the way they get treated by the system and
6 Curtis picked up on that in his address. But,
7 it's that list that you have heard over and
8 over; no contact; no communication. Lawyers are
9 not physically in the jail. Inmates are
10 complaining about, they are not able to get
11 through on the collect phone system in the jail.
12 There are calls to assigned counsel which do not
13 result in expected visits. Postponements of
14 preliminary hearings and scheduled court dates
15 take place and the defendant and incarcerated
16 inmates, the person in jail, doesn't hear about
17 this, doesn't even get communicated about it
18 sometimes for several weeks later.

19 PROFESSOR SHANKS: I want to address the
20 same question I asked earlier, do you feel
21 there's disparity with respect to race or
22 ethnicity or more just class or economic issues?

23 MR. CUDDY: I wouldn't know, economically.
24 I don't keep track of the disparity in terms of

1 ethnic backgrounds. So, I don't think so.

2 CO-CHAIRMAN HELLERSTEIN: Does your
3 particular role expose you to some things that
4 Mr. Andino didn't cover?

5 MR. CUDDY: Yes.

6 CO-CHAIRMAN HELLERSTEIN: What would those
7 be?

8 MR. CUDDY: The particular role --

9 CO-CHAIRMAN HELLERSTEIN: Your particular
10 function --

11 JUDGE MARKS: We can't hear you down here.

12 CO-CHAIRMAN HELLERSTEIN: You can't hear
13 me?

14 JUDGE MARKS: You have to use the mike.

15 CO-CHAIRMAN HELLERSTEIN: I'm sorry.

16 Does your particular function at the ministry
17 expose you to aspects of what goes on that
18 perhaps Mr. Andino did not cover in his
19 statement?

20 MR. CUDDY: We deal directly more with
21 bails and release issues. His is more services
22 to inmates in jail and when they get out of
23 jail, some services.

24 CO-CHAIRMAN HELLERSTEIN: Can you tell us

1 about the relationship or lack of relationship
2 between the attorney and the inmate on the bail
3 issue?

4 MR. CUDDY: Well, what I said is, it's a
5 basic lack of communication in engagement of the
6 incarcerated defendant and the process. So a
7 lot of things get passed by that might have
8 gotten addressed; bail reductions.

9 CO-CHAIRMAN HELLERSTEIN: When you talk
10 about bail reductions, do inmates tell you they
11 want the attorneys make reductions but they
12 can't communicate with them?

13 MR. CUDDY: That happens.

14 CO-CHAIRMAN HELLERSTEIN: Frequently?

15 MR. CUDDY: No, but it does come up. It
16 has a prolonged stay in there. Jail, you hear
17 all kinds of possibilities. They have, as time
18 goes on, there's a lot of jail lawyering. So we
19 get calls and requests along those lines.

20 JUDGE BAMBERGER: Do you contact the
21 lawyer when you believe that there's been a
22 failure to, proper failure to consider the bail
23 issue or do you bring, have the defendant
24 brought to court so that you can represent the

1 person in the bail application? Mechanically,
2 how does the bail project work?

3 MR. CUDDY: Well, you know, a number of
4 bail is set by the Courts. It's not our scope
5 to be able to do. So, that's the pro forma part
6 of achieving the bails. But, the posting of
7 bails, on occasions there's work which would
8 include calling the lawyer and exploring that
9 possibility with the lawyer.

10 JUDGE BAMBERGER: Is the function of your
11 project to take the bail package that the judge
12 has set to try and help the person make the bail
13 so that the person can be released?

14 MR. CUDDY: Right. We have a \$70,000 bail
15 fund. We share bails with family and friends.

16 JUDGE BAMBERGER: When bail is set,
17 somebody from the person's family would come to
18 you and say, the bail is this, what do we do
19 now? You would say, well, do you have bail
20 money? I don't know. Do you have any money?
21 You give us what you can and we will makeup the
22 differences? Is that it?

23 MR. CUDDY: The limit on bail is \$500. We
24 will put up two thirds of that bail. In the

1 case of \$100 bail, we will go the whole bail if
2 the family or friends have no resources. So we
3 do have a formula for that.

4 JUDGE BAMBERGER: How do they know -- how
5 do their families call you?

6 MR. CUDDY: Principally, through the
7 people in the jail. And the jail population
8 knows that we exist, so -- and administration,
9 the personnel. So, there's all kinds of ways in
10 which they know and make phone calls to our
11 office. We go through that screening process.

12 CO-CHAIRMAN HELLERSTEIN: Let me ask you,
13 you have -- you called it an experiment,
14 30 years.

15 MR. ANDINO: Yes, sir.

16 CO-CHAIRMAN HELLERSTEIN: Ministry has
17 been around for 30 years? It strikes me you
18 provide a very valuable resource. Yet I sense
19 that despite 30 years in existence the
20 relationship with the attorneys who are assigned
21 to represent your universe is not exactly a
22 marriage made in heaven? Is that accurate?

23 MR. ANDINO: That would be our
24 characterization.

1 CO-CHAIRMAN HELLERSTEIN: Has it ever
2 changed? It's strange to have at your disposal
3 members of the bar, resources such as yours and
4 then you should have what can be characterized
5 as somewhat of an estranged relationship. Did
6 it ever change over time in terms of ups and
7 downs?

8 MR. ANDINO: I would actually broaden it
9 and say that our relationship with the criminal
10 justice system aspects of it have changed
11 dramatically over time. We came in
12 adversarially with the old public safety
13 building, the old jail which was closed because
14 of overcrowding. We contested the overcrowding.
15 So we have had a negative relationship with the
16 Sheriff's department which is now an extremely
17 positive relationship. We are the voluntary
18 agency that spends more time in the jail than
19 any other group. We are considered by the
20 Justice Center to be the community
21 representative for those incarcerated because we
22 -- we have no checklist, no criteria to serve
23 somebody. Our relationship with the Syracuse
24 Police Department has probably been strained

1 over the years but now seems to be very, a
2 fairly close relationship. The relationship
3 that has never structurally changed in my
4 experience and in my knowledge of the history of
5 jail ministry is a relationship with attorneys.
6 And when I say attorneys, I would be speaking
7 almost exclusively of assigned counsel program
8 attorneys.

9 CO-CHAIRMAN HELLERSTEIN: Do you have an
10 opinion as to why that relationship has remained
11 that way?

12 MR. ANDINO: They would rather that we not
13 as a communitarian organization impose ourselves
14 in the juridical field. They believe that we do
15 not legally inhabit the space which we are in.
16 And, therefore, they are constantly challenging
17 our position discontented space which we have
18 within the paradigm. We are a burden. We are a
19 burden under the saddles of somebody who is not
20 being responsive to indigent inmates.

21 MS. ZUFLACHT: Do you get complaints from
22 inmates who have retained counsel?

23 MR. ANDINO: It is few and far between.
24 It is generally counsel that they have retained

1 in the sketchiest of manners in which I would
2 think back to the eligibility requirements and
3 the frequent stories that I am told firsthand
4 of, well, this attorney works better with cash.
5 But, isn't he your assigned counsel? Yes. But,
6 he works better with cash. At some points where
7 they will no longer even be assigned counsel,
8 they will have left that and they will simply be
9 a privately hired attorney. And they would be
10 representing somebody on a C felony for \$1,000,
11 and, yes, they have -- they have quite a few
12 complaints. That's because they are getting
13 what they paid for.

14 PROFESSOR SHANKS: Do you have attorneys
15 in the community who use you as a resource?

16 MR. ANDINO: Absolutely.

17 PROFESSOR SHANKS: So, if an attorney
18 calls you and said, can you talk to my client
19 about X, or can you help, you know, my client's
20 mother and, you know, put together something,
21 you would be willing to do that?

22 MR. ANDINO: Absolutely. I would suggest,
23 and Bill can speak more to this, thank you, as
24 far as the bails go, a lot of referrals come from

1 attorneys. We have a positive relationship and
2 many longstanding relationships with attorneys
3 on the assigned counsel panel who do very, very
4 good industrious often behalf of their clients.

5 MS. ZUFLACHT: In Syracuse County, all of
6 the indigents are represented by assigned
7 counsel. So those assigned counsel must have
8 defendants who have retained them as well as or
9 clients who have retained them as well as
10 clients who they are assigned to?

11 MR. ANDINO: I think a number of the panel
12 attorneys make their entire income off of court
13 assignments, and I think I would -- the
14 attorneys that I complain about would be ones
15 who would probably take more than half of thier
16 pay check from the assigned counsel program.
17 But, that is speculation.

18 CO-CHAIRMAN HELLERSTEIN: Thank you.

19 MR. CUDDY: Can I add a word? It seems to
20 be a new issue, eligibility. Eligibility rules
21 that I come across more in my work, but, in one
22 case, a 19 year old Spanish speaking inmate,
23 arraigned on a bench warrant for a petit larceny
24 charge, spent three months in jail without ever

1 being transported to court, three months in
2 jail. The inmate's mother with logistic
3 problems, she was Spanish speaking mostly,
4 failed to keep appointments with assigned
5 counsel at her office or in the court for the
6 purpose of signing the eligibility statement.
7 Therefore, the detainee, she postponed court
8 dates because she wasn't going to represent the
9 client in jail. So that ineffectively this
10 person was in jail for two months without legal
11 representation. The mother finally did make it
12 in to sign the eligibility statement, and then
13 the case went forward and the inmate received an
14 ACD and \$100 payment that night in court for the
15 restitution. It raises questions.

16 In another case, an inmate was arrested
17 for an AUO II for failure to report to the Court
18 regarding the completion of his community
19 service. A bench warrant was issued. He was
20 picked up. There was a failure to transport him
21 to his first scheduled court appearance after
22 being arraigned and incarcerated. Then he spent
23 the next 16 days in jail.

24 MR. CROTTY: 16 days?

1 MR. CUDDY: 16 days, yes.

2 The assigned counsel who originally was
3 assigned this case what no longer assigned. It
4 was in limbo. Only when the Diversion and
5 Community Service Program faxed a second letter
6 to the Court, the first one was sent last
7 summer, saying that the defendant had indeed
8 completed his community service was the case
9 closed, after spending 16 days in jail without
10 legal representation. It raises questions how
11 this eligibility set of rules is now getting
12 implemented.

13 Then, finally, there's a question of how
14 people start off with assigned counsel and then
15 switches to, you know, retained counsel, and we
16 know that, through, sometimes their share of the
17 bail is turned over to the lawyer when the case
18 is concluded.

19 We have questions about that.

20 CO-CHAIRMAN HELLERSTEIN: Thank you,
21 gentlemen.

22 MS. ZUFLACHT: The attorney who is
23 assigned becomes retained?

24 MR. CUDDY: Yes. Right. Right.

1 CO-CHAIRMAN HELLERSTEIN: Is Ms. Horn
2 here?

3 Would you mind if we listened to Judge
4 Ciardullo first?

5 Mr. Klinger here?

6 Ms. Rhodes here?

7 Judge Ciardullo.

8 JUDGE CIARDULLO: Thank you, Mr. Chairman,
9 for being considerate of my time.

10 Members of the Commission, my name is
11 Frances Ciardullo. I have been an attorney in
12 Syracuse for 25 years. I have also been town
13 justice in Oswego County for, this is my 17th
14 year. In that capacity I have served for the
15 past 15 years as senior faculty member for the
16 Office of Court Administration, Administrator
17 for the town and village justice certification
18 programs. I sit on the curriculum committee and
19 have formulated the curriculum for the basic
20 advanced certification programs for the town and
21 village justices. I am an ongoing member of
22 the commission of judicial conduct and anything
23 I say should not be attributed to the
24 commission, it's my own views.

1 My perspective on this issue is formed by
2 my experience as town justice. I don't know if
3 anyone here has firsthand experience in town or
4 village courts.

5 Does anybody litigate in the courts?

6 Okay, great.

7 Basically, you know how we operate. We
8 are very different. I would like to explain to
9 some of the other members how we operate and put
10 some of the comments that I have heard today in
11 context.

12 There are approximately 1900 town and
13 village justices in the state and we are elected
14 for four-year terms. There's approximately 20
15 to 25 percent turnover each year. So every four
16 or five years you have a new crowd of justices.
17 Less than half of the justices are attorneys.
18 They are lay people from various backgrounds.
19 My co-justice is a building contractor. Many of
20 them have no prior experience with the legal
21 system. Those that have prior experience tend
22 to come from law enforcement background, retired
23 state troopers, that type of thing. Those that
24 have no experience with the legal background are

1 faced with issues of statutory interpretation
2 and case law and legal concepts such as stare
3 decisis. These are foreign concepts to them.
4 They go to a basic certification program which
5 is either five or six days, depending upon the
6 geographic location where they take the program.
7 In that five or six days they are supposed to
8 learn the law, which, of course, is impossible.
9 It's an impossible task. But, I have to applaud
10 these individuals because they are working with
11 very few resources. The town and village courts
12 are funded by their municipalities. They are
13 not state funded. Many have no clerks. Some of
14 the issues you are talking about in terms of
15 notifying assigned counsel, there's no clerk
16 there. They have no libraries. They have no
17 security in the court. They have no
18 stenographers. They are not courts of record.
19 We are working in the middle of the night when
20 no other offices are open. What I do is, in my
21 court, we have an assigned counsel program in
22 Oswego County. If I have in the middle of the
23 night an arraignment, I fill out an assigned
24 counsel form. If there's any question on the

1 indigency of defendant, I will ask, unlike Judge
2 Fahey, I will ask questions. Are you working?
3 Are you working full-time? Do you have family?
4 Approximately, how much do you make? Do you own
5 any property? I make sort of a triage. It's in
6 my mind, there is any question, I ask it, and
7 then I assign counsel. We fax the papers over
8 and they are remanded until the next court date.
9 The next court date could be a week in my court,
10 because I only hold court once a week. Some
11 courts only hold court once every few weeks.

12 JUDGE SMITH: If the defendant is
13 remanded for a week, how do you handle a felony
14 hearing?

15 JUDGE CIARDULLO: We fax the papers to an
16 assigned counsel right away. We have a list.

17 JUDGE SMITH: If you are only sitting once
18 a week, how do you handle a felony hearing?

19 JUDGE CIARDULLO: I will schedule a
20 hearing if need be. My regular court session is
21 once a week. If I need to have a preliminary
22 hearing, I get -- if it's a felony, I get on the
23 phone to next day to the attorney I am
24 assigning. I need to know, let's schedule

1 something. I have to say, though, in my county
2 I never had preliminary hearings because the
3 DAS's office won't do them.

4 JUDGE SMITH: If he doesn't do them --

5 JUDGE CIARDULLO: Then they are ROR'd.

6 From their perspective, they don't want to
7 put their proof out. That's their choice, not
8 mine. The town and village courts process a
9 huge volume of the cases that implicate the
10 right to counsel. The division of criminal
11 justice services told me yesterday that in 2004
12 the courts outside of New York City which is
13 where the town and village courts are, 134,000
14 fingerprintable offenses were processed in the
15 town and village courts. To give you a proper
16 perspective, superior courts process 148,000.
17 It's roughly the same volume as a package in
18 terms of these courts.

19 Upon arraignment it is the obligation of
20 the justice court to advise the defendant of the
21 right to counsel. And, according to the
22 statute, and this is the language that we judges
23 find to be problematic, to take such steps as
24 necessary to effecuate that right. This year,

1 as a part of 2005 advance certification program,
2 I am presenting a module to all of the town and
3 villages throughout the state, throughout the
4 state as part of a mandated curriculum on right
5 to counsel. I am doing it in the context of
6 Bower decision that came down from the Court of
7 Appeals last year. What I am about to tell
8 you, I gave this program in New York City for
9 about 400 judges. What I am about to tell you
10 is anecdotal information that came back to me as
11 to what they see are barriers in effecuating the
12 right to counsel.

13 First of all, the judges are not aware of
14 what 722-A of the county law says in terms of
15 when the right attaches. I wasn't aware of it
16 until I studied it. I have to say that.

17 722-A of the county law defines a crime
18 for purposes of implicating the paid counsel
19 rights as a felony, misdemeanor or breach of any
20 other state law or local ordinance for which a
21 sentence of imprisonment is authorized other
22 than traffic infractions. This language throws
23 into the pot many types of offenses that the
24 counties are unprepared to deal with. Local law

1 violations would be, for example, if my
2 municipality passes a law, you can't have a junk
3 vehicle in your yard. They are prosecuted as
4 criminal offenses punishable by a 15-day jail
5 sentence. They are not prosecuted by the
6 district attorney's office. They are prosecuted
7 by the town attorney. Yet, the right to counsel
8 under the county law would attach. The counties
9 are unprepared to implement that.

10 Second of all, a type of offense. The
11 Environmental Conservation Law says that if you
12 take a bass out of season and it's your third
13 offense, that can be punishable by imprisonment.
14 The counties, again, this is a non penal law
15 offense. They are not prepared for that type of
16 offense. In fact, I believe there's an attorney
17 general that was promulgated on that very point
18 saying a right to counsel attaches. Assigned
19 counsel or public defender would have to be
20 appointed in that kind of case.

21 The judges feel that the counties are
22 unprepared and unwilling to commit the resources
23 to those types of cases even though they are
24 statutorily obligated to assign counsel. But

1 they have told me point blank that counties have
2 refused to either assign a defender, public
3 defender or pay for assigned counsel in cases
4 involving violations. Violations being, under
5 the penal law, they are not defined as a crime.
6 These would be things like harassment, trespass,
7 disorderly conduct. They are punishable by
8 15 days in jail. They are not defined as a
9 crime. Again, under the county law, they would
10 be. The counties are telling the judges we
11 won't pay for it. Do not assign counsel.

12 The reason why, it's important to
13 understand the concept is because you have lay
14 judges who are trying to do a good job but do
15 not have the self-confidence, I believe, in
16 their understanding of the law to be able to
17 have the tools to contradict what the counties
18 are saying to them.

19 PROFESSOR SHANKS: What do you think
20 should be done?

21 JUDGE CIARDULLO: I believe there should
22 be some very clear and explicit statewide
23 guidelines that these lay judges, whether you
24 like the system or not, that's the system we

1 have, that these lay judges can point to
2 something in black and white and say, this is
3 what it says, this is what you need to do.

4 MR. CROTTY: What about changing the
5 system to a district?

6 JUDGE CIARDULLO: I am afraid that would
7 put me out of a job.

8 MR. CROTTY: Maybe you can be appointed.

9 JUDGE CIARDULLO: I know there's been a
10 lot movement in that area. Town and village
11 courts are constitutional courts. I believe
12 that's true. I think that would necessitate a
13 constitutional amendment. I am not sure. That
14 was my understanding. We are the only courts
15 that are constitutionally mandated. Judge Kaye
16 can change the other courts at her will, but I
17 don't believe that you can just eliminate them,
18 but, I am not sure.

19 The tension, there's tremendous tension
20 between justice courts and counties over money.
21 The courts cannot consider money when we are
22 deciding whether or not to appoint counsel. You
23 absolutely can't consider it. The counties
24 obviously are obsessed with it. So the judges,

1 what we are doing, the judges are making some
2 type of assignment. Those assignments are going
3 to the county and county through their program,
4 whether it's the public defender or assigned
5 program are making a determination that a
6 defendant is not eligible. Unfortunately, in
7 many situations, I know in my county that
8 determination never gets back to the judge.
9 Because, under the county law and under the
10 Criminal Procedure Law, it's the judge that
11 makes that determination. That's the message
12 that I am trying to get out to the judges. Your
13 responsibility is to do this. Whatever the
14 county says, that might be all well and good for
15 an initial assessment, but that is not the law.
16 The ultimate decision rests with the judge
17 which raises some question to us about what does
18 it mean when we sign a voucher? If we sign a
19 voucher, is that a court order to pay? Does
20 that mean the county must pay? Can county
21 refuse to pay? What's the remedy if the county
22 refuses to pay? Does the lawyer not get paid
23 until somebody brings a piece of litigation?
24 These are some of our questions.

1 JUDGE SMITH: The answer to your
2 question, because we have had it in my county,
3 you sign a voucher. Then, if they refuse to pay
4 it, tell your attorney to then apply to you for
5 an order. You sign the order. They have to pay
6 it. The only way they can appeal it is by way
7 of an Article 78.

8 JUDGE CIARDULLO: County would have an
9 Article 78.

10 JUDGE SMITH: If they don't pay within the
11 statutory period of time, you can file a
12 judgment, a lien against the county.

13 JUDGE CIARDULLO: That's the type of
14 information we need to get out to the justice
15 court. That information is not getting there
16 for whatever reason. That's my point in being
17 here. We need to educate these judges into what
18 these obligations are. That education can be
19 done quickly. It can be done simply. It
20 doesn't involve an overhaul of the system.
21 There just needs to be more communication. I
22 have heard some talk about eligibility
23 guidelines. We judges are struggling with that.
24 I had judges ask me in this program that I have

1 given, what do we do in a situation where we
2 have somebody who says they can't afford a
3 lawyer and they give you a financial
4 questionnaire and you see that all of the debt
5 that they are in debt for. They have no money
6 but they have got satellite TV, Internet
7 service, they have got this and they have got
8 that. What do you do with those people? Maybe
9 they don't have liquid assets. There's
10 discretionary spending there. It's not a
11 mortgage. We are not talking about a mortgage,
12 car payments to allow them to get to work.

13 JUDGE SMITH: You could suggest that you
14 could assign them under 722D. At the end of the
15 case the assigned counsel submits a voucher to
16 you. You sign the voucher and it gets filed as
17 a civil judgment against the defendant.

18 JUDGE CIARDULLO: I would like to have
19 you come and teach this program for me.

20 Can I have your number and can I follow
21 you?

22 JUDGE SMITH: I am kind of awestruck. I
23 thought this was common knowledge across the
24 state.

1 JUDGE CIARDULLO: It's not common
2 knowledge. These education programs, the county
3 and village judges are required to take 12 hours
4 of advanced certification a year. The basic
5 course is five days. You know, you can't -- you
6 have to cover everything. You have to cover,
7 you know, the entire gambit of legal subjects.
8 You have to have two hours of advanced
9 certification. There's time pressure. We have
10 this turnover again. So that's a constant
11 problem. Having a rule promulgated or having
12 something that emanates from this commission in
13 writing to us would be immensely helpful.

14 MR. CHAN: Have you had other town
15 justices complain to you about lack of assigned
16 counsel or lack of timely appearance by assigned
17 counsel and out of frustration these are
18 addressed or disposed of, these cases, without
19 counsel?

20 JUDGE CIARDULLO: I have never heard that.

21 MR. CHAN: Okay.

22 JUDGE CIARDULLO: I can tell you that
23 before the rates changed, in my court I had five
24 attorneys on my panel. That was it. That's not

1 a lot of lawyers.

2 CO-CHAIRMAN HELLERSTEIN: Did you allow
3 dispositions without counsel?

4 JUDGE CIARDULLO: Never. Never. Never.
5 I happen to be -- maybe I am a little unusual,
6 but, I happen to be very, very conservative when
7 it comes to jailing people. If there's any -- I
8 would rather let somebody go free and walk than
9 keep them in jail inappropriately. Not
10 everybody feels that way, I have to tell you
11 that. So, if there's somebody who is
12 unrepresented -- we -- we have a pretrial
13 release program that they interview the people
14 in the jail and if somebody makes eligibility
15 criteria, they will recommend release and put
16 them on a mini probation. So, it very often
17 leaves these people the release program. At
18 least they are out. Then we can work on the
19 issue involving counsel.

20 Judges struggle what to do with minors.
21 They struggle what to do monitoring county
22 decisions. We have heard that there's some
23 counties that require defendants who have been
24 now assigned by the judge to contribute to their

1 own defense or parents to contribute to the
2 defense of minors. To what extent is the judge
3 accountable to monitor those type of things to
4 see whether or not that's appropriate under the
5 circumstances? We really never get that
6 opportunity. That information doesn't flow
7 back to us. It's anecdotal. Improving
8 information between either the Public Defender's
9 Office and the Court or assigned counsel program
10 and Court I think is also critical to find out
11 what is going on. We really don't know.

12 That's all I have to say. I just hope
13 that I can answer any questions you that have.

14 CO-CHAIRMAN HELLERSTEIN: You sit in what
15 town?

16 JUDGE CIARDULLO: Town of Scrupel, in
17 southern Oswego County. We are considered to
18 be, we are considered to be in the top
19 30 percent in terms of volume of the courts. We
20 remitted to the state \$100,000 a year. I also
21 have to say to maintain court, the clerks, you
22 know, computers, everything you need to have to
23 well run court, we are a losing proposition for
24 our town. We do not cover our expenses. So the

1 town isn't really happy to throw more resources
2 at my court because it costs them money to have
3 me there. Some courts make money. We don't.

4 CO-CHAIRMAN HELLERSTEIN: Thank you.

5 JUDGE CIARDULLO: Thank you.

6 CO-CHAIRMAN HELLERSTEIN: Miss Horn.

7 MISS HORN: Good afternoon.

8 CO-CHAIRMAN HELLERSTEIN: Good afternoon.

9 MISS HORN: My name is Susan Horn. I am
10 executive director, attorney for the Frank H.
11 Hiscock Legal Aid Society.

12 Excuse my voice, I have a cold.

13 I am the executive attorney for the Frank
14 H. Hiscock Legal Aid Society, Onondaga County
15 and city of Syracuse. I am also a member of
16 the Board of Directors of New York State
17 Defender's Association and a member of the New
18 York State Bar Association Special Committee to
19 assure quality of mandated representation as
20 well as their committee on legal aid. I want to
21 thank the commission for the opportunity to
22 speak with you today and for the work you are
23 doing for many of us who have spent our entire
24 careers providing services to those in need in

1 our communities against often overwhelming
2 obstacles. This commission provides hope,
3 finally for that really needed change which may
4 finally come. You have asked us to tell you
5 what we think should happen. So, I will start
6 with that.

7 Like many of the other people that you
8 have heard here today and I am sure at previous
9 hearings, I am here to urge you to support state
10 funding of mandated legal representation, not
11 just defense services but all the mandated legal
12 representation establishments as far as
13 statewide county services and programs,
14 provision of those services and establishment of
15 independent public defense commission that would
16 be charged with the responsibility of setting
17 those standards and overseeing their
18 implementation. I can't urge you more strongly
19 to support the proposals put forward by Norman
20 Reimer here today and the New York County
21 Lawyers Association. I can't say anything
22 better than he did.

23 My conclusions in those regards are based
24 upon my 30 years of experience as a practicing

1 attorney which has included assigned counsel
2 work. My 21 years with the Hiscock Legal Aid
3 Society, the last 15 as executive attorney.
4 It's based upon the experience that the legal
5 aid society had last year which has been alluded
6 to by others.

7 CO-CHAIRMAN HELLERSTEIN: What happened?

8 MISS HORN: I will tell you what
9 happened. As a result of the increase in
10 assigned counsel rates Onondaga County engaged
11 in a review of the provision of mandated legal
12 representation and made a decision to terminate
13 the city court criminal defender program that we
14 had operated for 30 years. I strongly believe
15 that the lack of adequate state funding
16 standards and oversight formed the back drop for
17 that decision and together with a number of
18 other factors that I will address ultimately
19 drove that decision. It was clear that quality
20 of services to clients was not a factor. Indeed
21 was never addressed. By way of background, the
22 Frank Hiscock Legal Aid Society is a private,
23 non for profit organization that was founded in
24 1994 to provide free legal assistance to

1 indigent residents in Onondaga County. We have
2 provided civil legal services in Onondaga County
3 since that time including housing, domestic
4 relations and other civil legal service matters.
5 In 1965, shortly after the passage of our 18B,
6 we established an appeals program to handle all
7 of the criminal and family court appeals for
8 Onondaga County. In 1974 the society
9 established a city court criminal defender
10 program to provide representation in non felony,
11 non traffic cases in Syracuse City Court. The
12 society provided appellate city court services
13 from their inception through a subcontract with
14 the Onondaga County Assigned Counsel Program
15 which was and continues to be the primary
16 contractor with the county. In spite of always
17 inadequate resources and funding, the society
18 developed, I believe, a reputation for vigorous
19 advocacy on behalf of our clients and high
20 quality representation. Our city court defender
21 program had 30-year base of knowledge, systems,
22 forms as well as well developed system of
23 training and supervision of staff attorneys and
24 para-legals. My conclusion that we provided

1 good representation, perhaps Judge Fahey can
2 tell you his own opinion of that. He is a
3 distinguished alumnus of that society, we are
4 proud to say. Our city court program and its
5 attorneys were a resource to the community often
6 answering questions and accepting referrals of
7 clients from other human service providers and
8 provide forms, research and information to
9 assigned counsel attorneys. After the assigned
10 counsel rates increased --

11 PROFESSOR SHANKS: Let me ask you a
12 question. The way the contract worked, the
13 county paid assigned counsel and then they gave
14 to it a portion of their funds?

15 MISS HORN: Exactly.

16 PROFESSOR SHANKS: Was that portion
17 related in any way to your case load or numbers,
18 or how did it work?

19 MISS HORN: It was vaguely related to
20 case load and numbers. It was always a flat
21 fee, flat fee contract, and to this day we have
22 a flat fee contract now directly with the county
23 to provide family court and other
24 representation.

1 PROFESSOR SHANKS: When you were doing the
2 city court, how many lawyers were there and what
3 were their approximate case loads?

4 MISS HORN: It varied. I can tell you
5 that in the last few years when we were doing
6 this service, we handled around 4,000
7 assignments per year. Some of those assignments
8 we would get relieved of because of conflicts of
9 interest, ineligibility. But, that was the
10 number of assignments we handled. We had eight
11 attorneys that handled the case load including
12 our supervisor attorney.

13 PROFESSOR SHANKS: Full-time?

14 MISS HORN: Yes.

15 PROFESSOR SHANKS: Do you have parity with
16 the DA's office?

17 MISS HORN: Hardly. I will just give you
18 a quick summary. At the time that our contract
19 was terminated, our starting salary for entry
20 level staff attorneys was \$30,000 a year. The
21 starting salary of the DA and count attorneys
22 was at that time, and I think may be about the
23 same now, \$45,000 a year. So we were far from
24 parity. I agree with the previous speaker who

1 said that parity should not be viewed just in
2 terms of salaries. There are many other issues
3 in terms of both resources and the other issues
4 that were previously mentioned.

5 CO-CHAIRMAN HELLERSTEIN: You do appellate
6 work?

7 MISS HORN: Yes, and continue to do it.

8 CO-CHAIRMAN HELLERSTEIN: Within the eight
9 hours?

10 MISS HORN: We have a separate appellate
11 unit that's made up of four full-time attorneys
12 to strictly do appellate work.

13 CO-CHAIRMAN HELLERSTEIN: Attorneys who do
14 criminal work, were they able to be re-employed
15 in the family court work or did they have to get
16 jobs elsewhere?

17 MISS HORN: Those that wanted to, yes.
18 We continue them and we had a little bit of a
19 battle with the county over the need to train
20 attorneys. I was asked, why it was necessary to
21 train them? Aren't they attorneys who graduated
22 from law school? But, we did have a period of
23 transition in which we were able to train our
24 attorneys.

1 CO-CHAIRMAN HELLERSTEIN: When you say
2 battle with county, who specifically? What item
3 of county structure, what person in terms of
4 position?

5 MISS HORN: Let me say that the legal --

6 CO-CHAIRMAN HELLERSTEIN: Who made the
7 decision?

8 MISS HORN: Who made the decision, the
9 proposal to transfer the city court work that we
10 did to assigned counsel and to transfer family
11 court work which had previously been done by
12 assigned court as well as parole revocation
13 defense to us and extradition work was initially
14 made as a recommendation by the county of the
15 executive office and then approved by the county
16 legislature.

17 PROFESSOR SHANKS: It was done to save
18 money?

19 MISS HORN: Well, yes. There were many
20 troubling aspects to the process. The decision,
21 the stated rationale for the decision was that
22 the county could save money through the assigned
23 counsel program. I believe there were other
24 factors as well. I will address those. Let me

1 address the money saving rationale. It was a
2 counter intuitive decision. Our county is the
3 only one that has gone in that direction. But,
4 it's understandable that counties look at money
5 saving as an issue given the lack of state
6 funding and fiscal situation that most counties
7 are in. Onondaga County was in a very serious
8 crises over the last few years. There's
9 enormous pressure on counties to contain costs.
10 They put enormous pressure on counties to
11 contain their cost. This leads to policies that
12 restrict the provision of the constitutional
13 mandated services that we are here to discuss.
14 Our own local newspaper advocated for a
15 statewide commission for this very reason saying
16 in an editorial of June 17 of 2004, that the
17 goal of such insures that the poor have
18 competent legal representation should not be
19 motivated by providing legal help on the cheap.
20 I cannot agree more. But, among the issues that
21 come up with respect to cost saving, you have
22 heard many of them addressed. I will just
23 mention them briefly.
24 Eligibility. That's clearly the most

1 common method utilized to contain cost. The
2 number of people is reduced, that money is
3 saved. By reducing, restricting those who are
4 eligible for the services, we reduce the number
5 of people served. And, that is an issue which
6 doesn't only affect assigned counsel, it affects
7 those of us who are constitutional providers as
8 well because the counties require that we work
9 within the same eligibility guidelines that they
10 impose on assigned counsel. So, we are also
11 subject to some of those same pressures. Some
12 of the concerns that arise with respect to
13 eligibility. Again, they have been addressed
14 and I will mention them briefly. Limiting the
15 use of orders to continue by judges. There has
16 been enormous pressure put on Onondaga County on
17 both providers of the service and judges to not
18 issue orders to continue. The use of parental
19 income to determine eligibility for those under
20 21 years of age is a continuing problem. That's
21 a problem not in Onondaga County, but I think
22 across the state.

23 MS. ZUFLACHT: In New York State parents
24 have an obligation to support their children

1 until they are 21 years of age.

2 MISS HORN: They have an obligation to
3 support. Whether they have an obligation to pay
4 for attorneys fee is questionable.

5 JUDGE SMITH: It's not. I will give a
6 Court of Appeals decision. They have to. They
7 have to. If the child is under the age of 21
8 and is prosecuted on a felony, and parents
9 refuse to retain counsel, the child is not
10 eligible because the parents are both making a
11 good, living so to speak, you assign counsel as
12 the court. At the end of the case that will be
13 filed as a judgement against the parents. The
14 only thing they have a right to contest at that
15 point would be the fact, the actual value of the
16 service.

17 MISS HORN: They can do that. But, the
18 fact is that in most situations what is
19 happening is that the person under 21 is often
20 detained because the parents fail to cooperate.

21 JUDGE SMITH: That's where the court
22 should step in.

23 I am troubled by your remark you made
24 earlier, and if I may, I would ask you to

1 expound on what you meant by it, that judges in
2 Onondaga County are having political pressure
3 brought to bear on them.

4 MISS HORN: I didn't say political.
5 There's pressure being placed on them.

6 JUDGE SMITH: What kind of pressure?

7 MISS HORN: A letter for example was sent
8 to judges of the city court that urges them to
9 view themselves as gate keepers for the
10 allocation of county funds. It was accompanied
11 by a list of all the cases in which the
12 individual judge had ordered assigned attorneys
13 to continue in the case and how much each of
14 those cases cost.

15 JUDGE SMITH: Who generated that letter?

16 MISS HORN: It came from the assigned
17 counsel office.

18 It's, you know, we have been told as well.

19 CO-CHAIRMAN HELLERSTEIN: Do you have a
20 copy of that letter?

21 MISS HORN: I can provide it to you.

22 CO-CHAIRMAN HELLERSTEIN: Can you send it
23 to us?

24 MISS HORN: Yes.

1 I can tell you that the legal aid society
2 is under similar pressure to not request that
3 judges order us to continue on cases where
4 clients don't meet eligibility guidelines.
5 Again, you know, I am not criticizing any
6 individual. This is a systemic issue that is
7 caused by the fact that counties have been made
8 responsible for paying the cost of
9 constitutionally mandated representation that is
10 the responsibility of the state. So, you know,
11 my message to you and to anyone who would listen
12 is, this is the result of the failure of the
13 state to live up to its responsibility to
14 properly fund, indeed to provide almost any
15 funding for mandated legal representation.
16 Again, when the counties have to choose, someone
17 else said it very well, you have to choose
18 between providing mandated legal representation
19 or providing Medicaid. You know, those are the,
20 that's where the counties are, between a rock
21 and a hard place. It means that they instituted
22 cost containment measures. Those are among the
23 cost containment measures. Other eligibility
24 issues that come up are the use of property

1 other than income, and it's unclear actually
2 even to those of us in the field how we are
3 supposed to do that. You know, if someone owns
4 real estate, for example, or has a 401(k) plan
5 from a place they worked in 10 years ago, you
6 know, the question is, does that render them
7 eligible or not? That's unclear. The use of
8 posted bail to deny eligibility was mentioned
9 earlier. Eligibility screening systems to make
10 it more difficult for clients to access
11 services. The delays and treatment of attorneys
12 into cases. There are other policies and
13 practices that result from cost containment
14 pressure and the money saving rationale. You
15 heard about voucher reductions. There are
16 also contracts entered into with individual
17 attorneys to provide specified services, for
18 example, to do arraignment representation or
19 representation in community courts. So,
20 individual assigned counsel attorneys may be
21 provided with a contract to do that.

22 PROFESSOR SHANKS: Who provides that
23 contract?

24 MISS HORN: Through the assigned counsel

1 system.

2 And, finally, there is inadequate funding
3 of constitutional providers, you know, with
4 respect to, you know, this, again, I want to say
5 over again, this is not just about assigned
6 counsel programs. This affects all of us
7 constitutional providers such as public
8 defenders and legal aid societies to have the
9 advantage of being able to set and enforce our
10 own standards for performance and to provide
11 supervision and training for their staffs. Fro
12 example, you heard a great deal about jail
13 issues, jail visit issues. Hiscock Legal Aid
14 Society had a policy in place that we could
15 enforce that our attorneys were expected to see
16 their clients in jail within 24 hours of the
17 time of assignment. If they didn't, they had to
18 answer to me or to another supervising attorney.
19 It was also our policy that we would not dispose
20 of cases except under extraordinary
21 circumstances without having conducted a full
22 interview of the client. That, I will tell you,
23 is one of the things that got us into trouble
24 later. However, while we would all like to

1 believe that we provide the best possible
2 services to our clients, the reality is that we
3 are all hampered in that effort by inadequate
4 funding and resources. I am not here to tell
5 you that if we are constitutional providers
6 people are getting the best possible service
7 because we are all hampered. I know of no
8 provider that has parity with the prosecution
9 even in terms of salary or resources. For
10 public defenders and legal aid society, the
11 results of inadequate funding are inadequate
12 staffing, too high case loads, too low salaries,
13 all of which result in high turnover, constant
14 training of new attorneys and ultimately the
15 diminishing of the quality of representation.
16 The pressure of cost containment often put
17 constitutional providers in the untenable
18 position of having to choose between decent
19 salaries for our staff and adequate funding for
20 expert's services for clients and other support
21 services. When we were negotiating our recent
22 contract with the county, we were told that the
23 county would not pay for anything it was not
24 required to pay for by law. And, again, that's

1 an understandable position for them to take
2 given their fiscal situation. Again, this is
3 the direct result of a lack of state funding
4 standards and oversight. There are a number of
5 other pressures that are placed upon courts,
6 attorneys and providers that impact upon the
7 provision of our services to clients that I want
8 to address briefly that I don't think have
9 really been addressed before. One is the
10 existence of OCA's standards and goals. This is
11 not something that's typically addressed in
12 provision, in discussion about the provision of
13 mandated representation, but I do believe that
14 influences the decision in Onondaga County and
15 the impact of the practice of indigent
16 representation generally. Judges are under a
17 great deal of pressure to meet established
18 standards and goals in the face of heavy case
19 loads. Those of you who are members of the
20 bench, I am sure I am not telling you anything
21 you don't know. While the purpose and intent of
22 those standards and goals is honorable and
23 designed to insure that parties receive speedy
24 resolution of their cases, the pressure they

1 create has unintended consequences. Attorneys
2 and parties are often pressured to resolve cases
3 quickly moving cases along because it becomes
4 the primary goal often at the expense of due
5 process and proper representation. I just have
6 to tell you about a colloquy that happened
7 during the course of a meeting last year when
8 the county legislature was reviewing what to do
9 about mandated representation in our county. A
10 committee member legislative committee member
11 asked me the following series of questions in a
12 hostile tone of voice, starting with, isn't it
13 true that the legal aid society has a policy of
14 not disposing of cases at arraignment? I
15 answered that that that was in fact our policy
16 because we were never given adequate resources
17 to be able to meet our clients in jail before
18 arraignment or to have staff present to discuss
19 cases with them before arraignment. Therefore,
20 it would be a violation of an ethical
21 allegation to our clients to do so. The next
22 question was, isn't it true that you make
23 motions in every case? The answer unfortunately
24 was no. We don't have the resources to do that.

1 I indicated that we made motions in appropriate
2 cases and pointed out that the overwhelming
3 majority of our cases, far too many from my point
4 of view, were disposed of through the plea
5 bargaining process but that successful plea
6 bargaining requires the willingness to litigate
7 when necessary. The next question was, isn't it
8 true that you served demands to produce in every
9 case? The answer was, yes. That is the
10 statutory requirement to preserve our client's
11 rights to discovery. And, finally, I was asked,
12 isn't it true that you require a written
13 response from the DA's office to those demands?
14 Although my answer was that we received no
15 response to those demands. In fact, we knew
16 that their staff threw them in the garbage when
17 they received them. The complete answer should
18 have included the fact that the law requires the
19 DA to serve a written response. These questions
20 were very troubling because they imply that we
21 were doing something wrong by fulfilling our
22 legal and ethical responsibility to our clients
23 and that we were subjected to criticism for
24 providing vigorous representation to our

1 clients. I wanted to be clear about this, the
2 legal aid society was never accused of
3 improperly or unnecessarily seeking adjournments
4 or delaying a case for the sake of delay, nor
5 were we criticized for or subjected to a
6 complaint for making frivolous motions.
7 Nonetheless, I was subsequently told by a member
8 of the judiciary, not a city court judge, that
9 the word on the street was that we lost the city
10 court program because we delayed cases. My
11 response then and my response is, one person's
12 delay is another person's due process. I
13 believe that the underlying reason for this
14 overblown concern about delay is the pressure
15 among the issues involved is the pressure to
16 move cases along.

17 The other issue --

18 PROFESSOR SHANKS: Let me ask you, is
19 there a word on the street for having things
20 changed dramatically since you lost the
21 contract?

22 MISS HORN: I don't know that actually.

23 PROFESSOR SHANKS: You don't know if there
24 are a greater number of cases that are now being

1 disposed of or processed or resolved at the
2 arraignment stage?

3 MISS HORN: I believe there are.

4 CO-CHAIRMAN HELLERSTEIN: When you were
5 negotiating, if that's the appropriate word, to
6 remain in business, did you do any kind of a
7 cost effective presentation to the county that
8 would demonstrate a combination of your 30 years
9 of experience, etc.? Was that actually produced
10 in negotiation?

11 MISS HORN: Oh, yes.

12 CO-CHAIRMAN HELLERSTEIN: You had a
13 document?

14 MISS HORN: We had many proposals that we
15 put forward. The initial proposal was to do a
16 full defender program and that gradually got
17 dwindled down through negotiations.

18 CO-CHAIRMAN HELLERSTEIN: But, you
19 thought you made the case, that retention of the
20 case would be cost effective to assigned
21 counsel. Was there a response to that on the
22 issue of cost effectiveness?

23 MISS HORN: Well, they ultimately chose a
24 proposal that was put forth by assigned counsel

1 which indicated that it would cost less for
2 similar services by instituting some of those
3 cost containment measures that I mentioned
4 earlier. I wanted to complete my answer,
5 Professor Shanks, on the question of disposition
6 of cases at arraignments, because, to be fair,
7 the assigned counsel program a number of years
8 ago, it was actually as a result of a proposal
9 by the county to institute video arraignments
10 was -- it went by the wayside. As a result of
11 that, those of us on the defense side of
12 assigned counsel and Hiscock Legal Aid argued
13 that in order to do that, a person who waived
14 their appearance, their personal appearance had
15 to do so with counsel. Therefore, you had to
16 provide resources for attorneys to meet with
17 clients before they could waive their right to
18 appear. As a result of that, the county
19 actually did provide additional resources that
20 went to assigned counsel and they instituted a
21 practice of interviewing clients in the jail
22 prior to arraignment. Now, you know our
23 position always was we couldn't dispose of cases
24 because we didn't have that opportunity. Had we

1 had that opportunity and felt that we could in
2 fact conduct, you know, an interview that would
3 allow us to, with integrity advise a client
4 whether or not to dispose of the case, that we
5 would do so. But, we were not in that position.
6 So I am not --

7 PROFESSOR SHANKS: You asked for that and
8 it was denied?

9 MISS HORN: No. I won't say that we --
10 the system was set up long before I was there.

11 Our system was that we were always present
12 at arraignment, seven days a week.

13 JUDGE BAMBERGER: They got the room to
14 talk to the client, but you didn't?

15 MISS HORN: They go to the jail. They
16 meet with the clients. That was an arrangement
17 that we worked out with assigned counsel at the
18 time, that they would go to the jail. Remember,
19 we only represented misdemeanors in city court.
20 There were many other people in the jail who
21 would be arraigned by city court that would not
22 have been our clients. So that was an
23 arrangement that was worked out amicably between
24 us, that assigned counsel would take that role.

1 So, I don't want to mislead you into thinking
2 that people may be improperly entering into
3 dispositions. I make no judgment about that.

4 MR. CROTTY: Are you far along enough in
5 expert cost containment to know there has been
6 cost savings in Onondaga County and you can
7 point to specific reasons for cost reductions?

8 MISS HORN: No, I don't think it's gone
9 long enough.

10 We took over -- we began phasing out of
11 city court last year in March, at the end of
12 March and began phasing into family court.

13 MR. CROTTY: Not enough time?

14 MISS HORN: Not enough time to really see
15 it in practice.

16 The other issue that I want to mention
17 because it has impact on the services,
18 particularly the institutional providers that
19 give, but equally I think assigned counsel are
20 specialized courts. I am not here to address
21 pros and cons of specialized courts. They have
22 both. Different ones have different levels.
23 Hiscock Legal Aid Society was very involved and
24 instrumental in working with Syracuse City Court

1 and the DA's office and assigned counsel and
2 others in creating the Syracuse Community
3 Treatment Court which is a drug court as well as
4 Community Court. But, nonetheless, although we
5 were at the table in those discussions, the
6 defense never got any resources to handle those
7 courts or any other courts. So, I would urge
8 you to include in your recommendations that
9 innovation in the court system need to take into
10 account the impact on all of the providers in
11 the court. Our experience was that the courts
12 got additional staff. DA's office got
13 additional resources, often state funding,
14 sometimes other grants. The defense gets zero.
15 The impact, particularly on under funded under
16 staffed providers is that suddenly with the
17 institution of every new specialized court, you
18 have new parts to cover, new calendars to cover,
19 and we have the same number of people to cover
20 those courts. Then we hear afterwards, well, we
21 are waiting for the legal aid attorney and we
22 are having to delay cases, etc., etc.. We are
23 between a rock and a hard place with that. So,
24 you know, in conclusion, I just want to say that

1 the issues and problems that I have identified
2 here are not unique to Onondaga County. You
3 know that. Nor is Onondaga County, I believe,
4 worse than other county. In some respects it
5 may be better and in some respects worse.
6 Likewise, these problems are not the result of
7 bad people or bad motive. They are the result
8 of a system, as you have heard over and over
9 again, that is broken and must be fixed. The
10 failure of New York State to live up to its
11 responsibility to provide adequate funding and
12 resources to support these constitutionally
13 mandated services puts all of us, whether we
14 represent institutional providers or assigned
15 counsel programs in similar positions. The lack
16 of state funding and consistent standards forces
17 us into competitive bidding, sometimes against
18 each other and sometimes truly against ourselves
19 and results ultimately in a race to the bottom
20 in which our clients are the ultimate losers.
21 We know, for example, that if we seek parity
22 with the DA's office, if we seek additional
23 funding for additional staff and lower case
24 loads, someone else out there will come in with

1 a proposal to do it for less. That's the
2 reality that we are in without consistent
3 statewide standards. I urge you to look at the
4 standards recently adopted by the New York State
5 Defenders Association as well as those proposed
6 by the special committee of the state bar. They
7 should form the basis for statewide standards to
8 be adopted by an independent public defense
9 commission that I urge you to support. Such
10 standards coupled with adequate state funding
11 should go a long way towards removing the kind
12 of pressures and cost saving measures I have had
13 discussed and free us all to seriously address
14 the quality of representation provided.

15 Finally, just one more point, I know that
16 you are not here that you're charge is limited
17 to indigent criminal defense, but I have to say
18 that the experience of the Legal Aid Society in
19 this past year in family court has shown that
20 the same problems exist in that court where
21 consequences to clients are equally serious. I,
22 therefore, urge you to either address the issues
23 of mandated legal representation in family court
24 or to include a recommendation in your report

1 that these issues be taken up by another
2 commissions such as your own.

3 I thank you very much for your time.

4 CO-CHAIRMAN HELLERSTEIN: Thank you.

5 Mr. Klinger here, or Miss Rhodes?

6 Mr. Schlanger, can I ask you, you heard

7 Miss Horn refer to a letter concerning gate
8 keepers. Do you know anything about that?

9 MR. SCHLANGER: I haven't seen the actual
10 letter.

11 CO-CHAIRMAN HELLERSTEIN: Have you heard
12 about its existence?

13 MR. SCHLANGER: Not specifically. I know
14 what the issue is.

15 CO-CHAIRMAN HELLERSTEIN: Could you
16 enlighten us?

17 MR. SCHLANGER: To put it in perspective,
18 one of the most important problems that we have
19 been dealing with, that is the issue of
20 eligibility. It's true that there's a
21 tremendous amount of pressure from the county as
22 it would be in any county to maintain certain
23 eligibility criteria and stick to them. I would
24 agree that with other people who have spoken

1 here that this should not result in denial of
2 counsel to people who truly cannot afford to
3 hire counsel. One -- there are a lot of
4 different problems that were happening at the
5 same time which have been alluded to, and,
6 really do -- which need to be addressed. There
7 was some reference to some attorneys taking
8 advantage of the situation and trying to as we
9 call it flipping cases. I think that's
10 something that requires more investigation and
11 sanctions.

12 PROFESSOR SHANKS: Do you have prohibition
13 for the assigned counsel program about people
14 telling clients that if they want to go to
15 trial, they have to pay money or them taking
16 their bail? Isn't there a rule that says you
17 are not allowed to do that?

18 MR. SCHLANGER: I don't think we ever had
19 to make that an explicit rule because that's
20 already, I think that's already an ethical rule.

21 PROFESSOR SHANKS: You don't think there's
22 an ethical prohibition against that so it should
23 be --

24 MR. CROTTY: That's what he said.

1 MR. SCHLANGER: We didn't feel -- let me
2 preface this by saying that we have a great deal
3 of diversity of opinion in our board and trying
4 to establish policies is sometimes difficult to
5 get some kind of consensus. There are people at
6 one end who feel the program should be nothing,
7 no more than simply the conduit for the revenue
8 of paying attorneys. There are people at the
9 other end who feel that assigned counsel program
10 should take pro active positions as a provider
11 of indigent services and be a resource for
12 counsel and have really a great deal of
13 oversight over the activities of the lawyers.
14 When it comes to rules that are no more than
15 what the code of professional responsibility
16 provides, our rules specifically refer to the
17 code of professional responsibility and we
18 assume that all lawyers will abide by them and
19 that they are obligated to abide by them. Now,
20 as far as the issue of whether under any
21 circumstances a lawyer who is assigned a case
22 should end up or may end up representing that
23 client on a retained basis after full disclosure
24 to the Court, there are some rules that permit

1 that, and I understand that. My understanding
2 in the first and second departments that's flat
3 out prohibited. We have a rules committee that
4 is going to be revisiting this and other issues
5 in the very near future. Our rules are work in
6 progress.

7 Now, as to attorneys actually telling
8 people who they have been assigned to represent,
9 you have to pay me some money for me to take
10 this case too trial or for me to do a better
11 job, that is flat out wrong. My personal
12 opinion is, that if any attorney is doing that,
13 they should be terminated from the panel and
14 possibly referred for a grievance.

15 CO-CHAIRMAN HELLERSTEIN: I just wanted to
16 pose that question.

17 MR. SCHLANGER: I am trying to put this in
18 perspective. It's a complicated issue. The
19 perception, the procedure was that when a lawyer
20 gets a case, this was the procedure and that's
21 been changed that the lawyer had to collect
22 financial information. It's been changed a
23 little bit. The lawyer's job was to collect
24 financial information and provide that to the

1 assigned counsel office within a short period of
2 time and many attorneys were simply holding back
3 on that, continuing representation, sometimes
4 through to the end and then just simply
5 submitting an order to continue to the Court so
6 that they would get paid for the service without
7 eligibility ever having been determined. Our
8 goal was to make sure eligibility was determined
9 to make sure we are representing people who are
10 eligible and not representing people who are not
11 eligible, who would be drawing on the resources
12 that were meant for people who really need it.
13 That's why some of these rules were put into
14 place. The eligibility determinations are made
15 strictly by the director, by the administrator
16 and office staff. They are not supposed to be
17 made by the attorney. That's why the
18 information is supposed to be turned over to the
19 office almost immediately, and then when the
20 attorneys, if the attorney is notified that the
21 client is ineligible, then the attorney is
22 required to report this to the Court and let the
23 judge make the determination as to whether that
24 attorney should continue, and it's my

1 understanding that more often than not that's
2 what they do. Especially, in cases where it's
3 clear that the person, particularly minors, are
4 not going to be able to hire lawyers.

5 MR. GOLDMAN: Wouldn't he be inclined if
6 the attorney who has potential conflict of
7 interest stay away from that?

8 MR. SCHLANGER: I believe that's true. We
9 try to dance around that issue and make sure
10 that the attorney was not put into a situation
11 where he would, he or she would be compromised.
12 We think that the rule achieved that by just
13 putting the lawyer -- by not having the lawyer
14 deal with the financial issues directly.
15 Certainly we are open to suggestions and it just
16 brings us back to what everyone has said here,
17 is that when you start leaving it up to
18 individual providers to set these rules under
19 tremendous financial pressure, you are losing
20 sight of the real purpose of the program.

21 MS. ZUFLACHT: When legal aid was the
22 provider, would they make determinations of
23 eligibility?

24 MR. SCHLANGER: Yes, as far as I know. I

1 am just in a way speaking from my personal
2 experience. I worked there quite some time ago,
3 but I am assuming the situation is the same.
4 Maybe Miss Horn can answer that as to what it is
5 now. I don't know if there's anybody in-house
6 other than the staff attorneys who are making
7 that determination.

8 JUDGE SMITH: My question would be, if
9 your agency is the one that is making the final
10 determination from your perspective that the
11 defendant is not eligible, don't you think it
12 should be your agency's responsibility to
13 communicate that to the Court and take the
14 attorney out of the loop? You have too many
15 cooks in this one, it sounds like.

16 MR. SCHLANGER: I think that's along the
17 lines of what Mr. Goldman said. I would tend to
18 agree with that. I think it's important to take
19 the lawyer out of the picture entirely because
20 it presents a potential conflict.

21 CO-CHARIMAN HELLERSTEIN: Thank you so
22 much.

23 MR. CHAN: After that letter was sent to
24 that individual judge, do you know whether it

1 had a chilling effect on assignments that judge
2 gave?

3 JUDGE FAHEY: What was the letter?

4 MS. ZUFLACHT: One judge or all the
5 judges?

6 MR. SCHLANGER: I did not see the letter.
7 From what I heard today that was sent to the
8 city court judges.

9 JUDGE FAHEY: Can you just indicate the
10 thrust of the letter?

11 MR. SCHLANGER: The judges were expected
12 to be gate keepers, I believe, was the term that
13 was used, of the allocation of county funds and
14 strongly discourage orders to continue based on
15 ineligibility.

16 JUDGE FAHEY: It did not come to county?

17 MR. SCHLANGER: I don't know the net
18 results. Some of the judges might be a little
19 more careful in reviewing requests for orders to
20 continue or requests to withdraw. We have made
21 some other -- instituted some other procedures
22 where people, where a judge can order persons
23 who are marginally eligible or perhaps able to
24 contribute to the cost of representation to work

1 out a payment arrangement with assigned counsel
2 program. That's resulted in people being
3 represented and the county recouping some of the
4 funds. I don't think we have had to go to the
5 extreme of filing judgments against people in
6 that situation.

7 MR. CROTTY: The motivation for your
8 sending a letter was what, to preserve your role
9 with a positive contract in relation to the
10 county?

11 MR. SCHLANGER: I believe that would
12 probably be the case. Our program is still
13 under the same pressure to maintain the bottom
14 line.

15 MR. CROTTY: It gets back to the issue,
16 just to follow up, you find the agreement -- the
17 county was under engaging in begging your
18 neighbor to drive the price down as far as
19 possible by setting people against one another
20 where indigent criminal defendants are put at
21 risk so that the county can save money.

22 MR. SCHLANGER: That would be correct.
23 That is part of the systematic problem.

24 MS. ZULFACHT: If an attorney is assigned

1 and the defendant is found ineligible, is that
2 attorney paid for the time he spend prior to the
3 determination?

4 MR. SCHLANGER: Yes. Yes. As long as
5 they haven't withheld the financial information,
6 as I said before.

7 CO-CHAIRMAN HELLERSTEIN: Thank you, Mr.
8 Schlanger.

9 Mr. Schick here? We would like to take a
10 20-minute recess. I hope that doesn't
11 inconvenience you.

12 MR. SCHICK: All right. I am scheduled
13 to be here at 1:30.

14 CO-CHAIRMAN HELLERSTEIN: We will be back
15 here in 10 minutes. Ms. Weissman and Ms.
16 Miller, we will be as quick as we can.

17 (Whereupon a recess was taken.)

18 CO-CHAIRMAN HELLERSTEIN: Wait a minute.
19 All right.

20 Mr. Schick.

21 Welcome, Mr. Schick. Thank you for coming
22 today.

23 MR. SCHICK: Before I talk about what I
24 intend to talk about, I would recommend to this

1 panel that we not spend too much of your time
2 focusing on this issue of eligibility.

3 CO-CHAIRMAN HELLERSTEIN: Let me
4 interrupt and say, state your full name and your
5 office that you represent.

6 MR. SCHICK: Stephen Schick, Executive
7 Director of Sullivan Legal Aid Panel, Sullivan
8 County, New York. My agency would gladly
9 represent everybody in Sullivan County accused
10 of a penal law crime. You are wasting your time
11 and taxpayers money if you try to change this
12 system to weed out people who legal aid
13 represents are ineligible or vice versa. The
14 amount of people that, in New York State,
15 especially outside of New York City that can
16 afford to hire a competent criminal defense
17 attorney, if they are charged with a penal law
18 offense is probably negligible, if any people
19 exist at all. Any person who wants to hire a
20 private defense attorney who is very wealthy
21 will do so. I don't ever recall in 27 years
22 representing any millionaires. Any person who
23 falls just over the eligibility guidelines that
24 we represent didn't cost taxpayers one cent

1 extra and that person didn't get any less
2 representation than anybody else did. So, I
3 don't think there's a problem with eligibility,
4 to say the least. Where I differ with other
5 people who spoke is, sitting in back of the
6 room, I would get the impression that if you
7 would deliver a tractor trailer full of cash to
8 every legal aid in Sullivan County, everything
9 will be wonderful, the indigent defense system
10 would work perfectly and that's what we really
11 need. I don't think that's true. I think you
12 are going to waste a lot of time and taxpayers
13 money if your main focus is going to be to
14 respond to a lobbying effort by criminal defense
15 attorneys, be they private or legal aid, saying
16 how the government has to give them more money,
17 more money and that's going to solve the
18 problem. That's not going to solve the problem.
19 I have been a criminal defense attorney
20 concentrating on representing indigent
21 defendants for 27 years. I am here to tell you
22 that I represent criminals not innocent people.
23 98 percent of the clients that I represent are
24 guilty of committing crimes. They are not

1 innocent. What we need is not more defense
2 attorneys, what we need are more social workers,
3 more psychologist, more teachers, more drug
4 treatment specialists and we are going in that
5 direction because Judge Kaye apparently, and
6 some of the more well read people in the OCA
7 understand that part of the system that's broken
8 is the adversarial part, not the
9 representational part. So, they have started
10 with drug courts. If you notice, the drug court
11 aren't adversarial. Everybody that goes in
12 there is guilty. We have a drug court in
13 Sullivan County that everybody in there is
14 guilty. The question is not whether your client
15 is guilty or not, the question is, what do you
16 do? How should he be treated? How do we
17 prevent him from going out and committing
18 another crime? That's where our money and
19 resources have to be spent, not giving him five
20 defense attorneys to spin, waste treaties for
21 motions that are ridiculous. I spend most of my
22 day doing something I consider to be immoral and
23 unethical. I make motions for suppression
24 hearings which I know are improper because I

1 know that my client is guilty. Sometimes they
2 tell me that they are guilty.

3 CO-CHAIRMAN HELLERSTEIN: You think it's
4 improper to make a motion for subpoenas because
5 you have a guilty client?

6 MR. SCHICK: It's unethical. I think it's
7 proper. I do it because if I don't -- I do it
8 to protect my back. But, in 27 years I probably
9 represented clients in thousands of pretrial
10 hearings alleging that a confession they made
11 was in violation of their constitutional rights
12 when it wasn't. This may surprise you --

13 PROFESSOR SHANKS: I am curious as to how
14 it is that you know that 98 percent of your
15 clients are guilty.

16 MR. SCHICK: I don't think that it's 98
17 percent. I can tell you that after representing
18 criminal defendants for 27 years, that the
19 police do not go around New York State looking
20 for innocent people to arrest on trumped-up
21 charges so they can railroad innocent people to
22 imprisonment. That is the tremendous exception. As
23 a matter of fact, I don't think in my 27-year
24 career of all the people that I have gone to

1 trial and gotten acquittals, all the people that
2 I represented were innocence. They weren't
3 being railroaded by the police. There was
4 another private citizen who made a false
5 complaint against them. The point that I am
6 trying to make is that --

7 PROFESSOR SHANKS: Just so that I can be
8 clear, I am geographically impaired, where is
9 Sullivan County and where is it in relationship
10 to the counties where the police are now in
11 prison for having manufactured evidence?

12 MR. SCHICK: I don't know of any police
13 in Sullivan County that have ever been accused
14 of doing that.

15 CO-CHAIRMAN HELLERSTEIN: Where is
16 Wallkill?

17 MS. ZUFLACHT: Ulster.

18 PROFESSOR SHANKS: Pretty much what you
19 have decided is that if your client tells you
20 that they are innocent but that they are lying,
21 the police would also be telling the truth, so
22 that --

23 MR. SCHICK: I am not trying to tell you
24 anything, I am saying what I need to do under

1 the current law. What I am suggesting to you is
2 that if you change a few laws, you would be more
3 -- you would be going in the direction of
4 getting more justice instead of wasting money.
5 I would suggest to you to look at how the
6 criminal justice system works in Western Europe
7 and England and Germany, France and Scandinavia.
8 None of those countries is of the feeling that
9 an injustice is being done and people aren't
10 being given due process. I would suggest to you
11 that if we change a few of our statutes to go
12 along with the theories that they have over
13 there, you would be going a long way towards
14 helping my clients and helping the community and
15 helping the sentence and helping the taxpayers.
16 We are overly taking justice not only in civil
17 but criminal cases. Because, I have, in my
18 career I probably have represented thousands of
19 people charged with selling drugs. We have gone
20 to trial. We have had pretrial motions. We
21 have gone on and on and on. They admitted to me
22 that they sold the drugs. What's the problem?
23 The problem is that the penalty, the sentence is
24 so harsh that the only way to try to get a

1 decent plea bargain is to make pretrial motions
2 alleging that confessions had been beaten out of
3 people, the police did something out of
4 character. We need pretrial hearings. We need
5 to do this or that. The issue really isn't that
6 he sold a \$5 bag of drugs. Does he deserve to
7 go to prison for ten, 15 years to prison for
8 selling a \$5 bag of drugs? I have gone to
9 trial in cases where a defendant is guilty of
10 two or three counts of an indictment but under
11 our law you can't plead guilty to what you are
12 guilty of and go to trial on what you are not
13 guilty of, you have to go to trial on
14 everything.

15 MR. CHAN: I don't mean to be facetious,
16 But you mentioned Western Europe. Let's take it
17 to the limit and say, why don't we adopt the
18 Chinese system where there's a hundred percent
19 conviction because there's a hundred percent
20 confession?

21 MR. SCHICK: I think you are
22 misinterpreting what I am saying. I am not
23 saying 100 percent of my clients are guilty. I
24 am not saying that innocent people should be

1 convicted. I am saying to you, if you want to
2 know the reality of the way the criminal justice
3 system works, the reality is the defense
4 attorney and prosecutor agree on whether
5 somebody is guilty or not. That's not the
6 issue. The issue is what should be done with
7 the person? In our system, I have to argue to a
8 jury that a guilty person is not guilty in the
9 hopes of trying to get some form of justice
10 because if he is found guilty, he will get an
11 outrageously punitive sentence. I have spent a
12 lot of time in Germany. I have a family member
13 over there who is a criminal defense attorney,
14 does a lot of indigent criminal defense in
15 Germany. You don't have to argue that your
16 client is not guilty. You can argue to a three
17 judge panel, yes, he is guilty. But, this is
18 what happens, here is why he deserves a
19 mitigated sentence. You can't do that here.
20 The judges' hands are tied. There's not just
21 mandatory sentencing laws in federal but there
22 are mandatory sentencing laws in district
23 courts. If you are convicted of certain crimes,
24 the mandatory punishment is so great that you

1 have to go to trial and hope for an acquittal.

2 JUDGE SMITH: Could I ask you a question?

3 Do you see anything at all that would be an
4 improvement? We are talking about the future
5 of indigent services. What do you think we
6 should be doing?

7 MR. SCHICK: I think that the best thing
8 to do for indigent defense service is to reform
9 the sentencing laws and get rid of the mandatory
10 sentences and let judges decide the sentence,
11 what he deserves to get, not what he must get
12 based upon some formula that has nothing to do
13 with that person, that defendant.

14 JUDGE SMITH: Assume for the sake of
15 argument that that, that some time in the future
16 that occurs and probably not in my life time,
17 don't you think there's a separate question as
18 to the quality of -- that we should be looking
19 at, as to the quality of the representation that
20 indigent defendants are getting?

21 MR. SCHICK: If the issue is --

22 JUDGE SMITH: Do you see a problem with
23 it?

24 MR. SCHICK: Yes. If the issue is what is

1 a fair sentence for someone who has committed a
2 particular crime. You don't need a lawyer, you
3 need an advocate. You need --

4 JUDGE SMITH: You don't think a lawyer is
5 is supposed to be advocate?

6 MR. SCHICK: No. I think that's the
7 problem. I think we are trying to make lawyers
8 do social work. We are trying to make them
9 criminologists and pathologists. The lawyer
10 should be representing people who are innocent,
11 not people who are guilty.

12 JUDGE SMITH: I am getting the sense that
13 you are blurring the distinction between moral
14 guilt and legal guilt. There's a big difference
15 between the two.

16 CO-CHAIRMAN HELLERSTEIN: Let me
17 interject. I don't mean to cut you short, Mr.
18 Schick. Our mandate is tough enough as it is.
19 Our mandate is to come up with the best system
20 to provide competent counsel. Issues of
21 sentencing have been addressed. There's been
22 movement. I think that in terms of wasting
23 time, it would be a colossal waste of time for
24 this commission to get into the issue of

1 sentencing when in fact there are people who we
2 represent, those of us who are defense attorneys
3 or have been, that aren't interested in going
4 into a drug resolution or remind us there's a
5 Bill of Rights that have specific provisions.
6 Before you can convict somebody, the police and
7 government have to turn square corners. Then
8 you can worry about it. So, speaking
9 personally, I get frightened when I hear this
10 commission being addressed about subjects that
11 have nothing to do with competent
12 representation. How can an attorney represent
13 competently an individual who may have had a
14 door broken down without a warrant or who may be
15 innocent? You don't know if they are innocent
16 if we don't get full discovery. If you would
17 answer those questions, I must say, I am puzzled
18 as to how you get up in the morning and do your
19 work.

20 MR. SCHICK: Well, it gets more difficult
21 as the years go by. Maybe it's surprising --

22 PROFESSOR SHANKS: Let me remark --

23 MR. SCHICK: I probably have the best
24 acquittal rate in my tri-county area. My office

1 does an outstanding job. But, the issue of
2 competent defense counsel really is a non issue.
3 I don't really see very many incompetent
4 criminal lawyers. I see a broken system.

5 JUDGE RUSSELL: One comment comes to mind.
6 Different cultures may have different
7 perceptions. Those from different economic
8 backgrounds may have different perceptions of
9 representations, competency and with regards to
10 the law enforcement practices.

11 PROFESSOR SHANKS: Can I ask --

12 MR. SCHICK: Let me say one thing. If
13 you don't feel that my comments are what you
14 want to get into --

15 CO-CHAIRMAN HELLERSTEIN: It doesn't take
16 us anywhere.

17 MR. SCHICK: I don't consider competent
18 representation of a client to be getting him out
19 of the criminal justice system as quickly as
20 possible. The result being that he goes out and
21 commits another crime.

22 CO-CHAIRMAN HELLERSTEIN: That doesn't
23 necessarily follow.

24 MR. SCHICK: Maybe not to you, but after

1 doing it for 27 years and having experienced it
2 for 27 years, I would be doing a better job
3 representing my client if when he was done with
4 this criminal case, he did not go out and commit
5 another crime and the great, great majority of
6 my clients, I see them one time and I then see
7 them 20 to 30 more times because maybe myself or
8 the lawyers in my office got them a great deal,
9 got charges dismissed only to have them go out
10 and be right back within a week, a month later
11 and charged with a more serious crime. I
12 haven't done him any great competent indigent
13 representation without trying to stop him from
14 committing another crime and the way the system
15 works now. You are being asked to say, we need
16 tons of money so we can have these highly
17 trained cross examiners and people can do great
18 motions, answers, do all of this stuff so these
19 guys who commit a crime can get out without
20 having their problems and the reasons why that
21 crime was committed addressed. I think --

22 CO-CHAIRMAN HELLERSTEIN: The assumption
23 you are making of what we are being asked to do
24 is wrong. We have been asked to include in our

1 concerns and possibly our final recommendations
2 concepts of laws that provide the types of
3 services that in your view of things seems to
4 suggest, have to come from other parts of the
5 system.

6 MR. SCHICK: I would suggest the best
7 thing you can do, and I agree, I just didn't
8 repeat it, I agree it has to be -- it has to be
9 state, it can't be local. I wanted to give you
10 a different prospective rather than repeat
11 everything that's been said.

12 CO-CHAIRMAN HELLERSTEIN: You are
13 conceding --

14 MR. SCHICK: I am telling you the best
15 thing you can do is recommend that the
16 sentencing, the statute -- you are talking about
17 Section 16 and Section 70 of the Penal Law be
18 reformed so that the function of the court and
19 judge is to concentrate on what happens to
20 somebody that comes before them and not pushing
21 them through with a plea bargain, or pushing
22 them through trial and get found not guilty, or
23 pushing them through a trial where he is found
24 guilty and then he gets out and does something

1 again. That's the problem. You are going to
2 spend less money and have a more competent
3 indigent defense fund if those problems are
4 addressed than shoving tons of money for more
5 lawyers, more investigators. What you need is
6 to fix the system. That's all I have to say.

7 Thank you.

8 CO-CHAIRMAN HELLERSTEIN: Thank you.

9 Ms. Weissman.

10 MR. WEISSMAN: Good afternoon. My name is
11 Marsha Weissman. I am very pleased to be here.
12 It's sort of interesting and perhaps apropos
13 that I followed the last speaker. I am speaking
14 not as an attorney, I am speaking on behalf of
15 the Center for Community Alternatives of which I
16 am the Executive Director. We are a
17 not-for-profit organization that provides direct
18 services, training, technical assistance and
19 research on issues related to criminal and
20 juvenile justice. And particularly pertinent to
21 my appearance here today is the work that we do
22 with defense attorneys through what is known as
23 defense-based-advocacy. The programs for
24 clients and specific planning --

1 PROFESSOR SHANKS: Where are you located,
2 what area?

3 MS. WEISSMAN: We are located in Syracuse,
4 New York, Manhattan, and Brooklyn. Our
5 sentencing services are not bounded by any
6 jurisdiction. We really have worked locally
7 with every jurisdiction.

8 CO-CHAIRMAN HELLERSTEIN: What is your
9 title?

10 MS. WEISSMAN: Executive Director. So,
11 our role and what I will be speaking about
12 today, our work with defense attorneys,
13 essentially providing them with mitigation
14 services, social work services to aid in their
15 representation of the defendants. In my view
16 reflecting on the last comment that there is
17 indeed an important role for social workers, if
18 you will, I will use that as a short cut. But,
19 I certainly don't think it replaces the role of
20 a defense attorney. I know that if my son or
21 daughter was in trouble, I would want them to
22 see a real lawyer before they see a real social
23 worker. But then I want the lawyer and social
24 worker perhaps to work together. So I want to

1 thank you for the opportunity to speak with you
2 today and particularly commend Judge Kaye for
3 her concern that led to the creation of this
4 commission.

5 JUDGE BAMBERGER: Who pays for your
6 services?

7 MS. WEISSMAN: We work with both
8 attorneys who are privately retained and in
9 those cases the clients or the attorneys will
10 retain us for our services. We have a grant
11 from the State of New York through the division
12 of probation and correctional alternatives. We
13 have had that funding since 1981. We were the
14 first ATI, alternative to incarceration
15 Program funded and we serve indigent defendants
16 through that grant. So when a lawyer refers a
17 case to us, it's the attorney that is assigned
18 counsel or legal aid attorney or public
19 defender, that's our criteria. We don't ask any
20 questions about eligibility. We do the work.
21 The majority of the clients that work with are
22 indigent clients.

23 CO-CHAIRMAN HELLERSTEIN: You use the
24 branch office in New York City?

1 MS. WEISSMAN: Yes. Yes.

2 CO-CHAIRMAN HELLERSTEIN: How big are
3 those offices?

4 MS. WEISSMAN: All told we have about a
5 little over a hundred people working. They
6 don't all do defense based advocacy work. 45 in
7 Syracuse and the rest in cities split between
8 both offices.

9 MS. ZUFLACHT: Any connection to the
10 public defender in Brooklyn? You are in
11 Brooklyn and Manhattan?

12 MS. WEISSMAN: Brooklyn and Manhattan.

13 We work closely with the Brooklyn defender
14 service. We get referrals from their assigned
15 counsel. We occasionally get referred from
16 legal aid. Less common than assigned counsel
17 for the new defenders because legal aid has
18 their own in-house advocates and Bronx defenders
19 also has in-house advocates.

20 I want to speak about the frame of
21 reference that I bring here today. I really
22 have the utmost respect for attorneys who
23 represent indigent defendants. It really comes
24 from growing up and seeing like Perry Mason and

1 Judd for the defense, seeing representation of
2 defense attorneys as very admirable, smart and
3 principled individuals. Those defenders were
4 portrayed as advocate for the underdog and more
5 often than not the innocent. I have grown-up a
6 little bit. I know that those images are too
7 simplistic. But, I still think that the defense
8 function is a vital function whether one is
9 representing somebody who is innocent and indeed
10 there are still people who are innocent or
11 whether somebody is guilty. I have been
12 increasingly troubled by not only our direct
13 experience which is most important but the
14 depiction of the defense role in the public and
15 media, the nightly Law and Order show that
16 depict defense attorneys as slobs, tricksters
17 and/or snakes crawling out from from under
18 rocks. I think it becomes very difficult to
19 muster the courage and will to do this work.
20 But, I understand changing the public perception
21 is not the role of the commission.

22 JUDGE BAMBERGER: Yes, it is. We have a
23 major function to make public officials, that
24 came up earlier in our discussions today, to

1 have public officials and the public appreciate
2 and understand that this is a chair that has
3 three legs. Without the third leg, the system
4 doesn't function. And that the defense has a
5 very, very significant role. Whether there are
6 some lawyers who come to court and don't do what
7 they are supposed to do and who fit the image of
8 the snake from under the rock, that's another
9 issue. But, I don't know if it comes within our
10 domain but certainly within our domain is making
11 the public understand the importance of the
12 defense attorney.

13 MS. WEISSMAN: I think that's wonderful
14 that you are going to pick up that issue as
15 well. I think, again, reflecting on the
16 previous speaker, that I am going to use the
17 term PD for brevity that represents someone who
18 has most likely committed a crime and thus must
19 be brought to justice, he is held accountable
20 and deterred and punished. But justice is more
21 than a pursuit of the perpetrator of crime.
22 It's more than an arrest, prosecution and
23 sentencing. It is also about ensuring that
24 constitutional requirements are adhered to and

1 that the sentence fits not only the crime but
2 the person who has committed it. So in
3 reflecting on our experience and preparing the
4 testimony today, the opening words of A Tale of
5 Two Cities came to my mind. It was the best of
6 times. It was the worst of times. It was the
7 age of wisdom. It was the age of foolishness.
8 In the almost 25 years of our doing this work,
9 we have worked with some public defenders who I
10 would have entrusted my life to as well as the
11 lives of my children were they ever to get in
12 trouble and get past me. On the other hand, we
13 have worked with lawyers who don't return phone
14 calls to us, let alone their clients, who don't
15 visit their clients in jail, who don't
16 investigate the case and don't take even the
17 briefest peek into their client's background and
18 history. We work with attorney who on the one
19 hand really demand perfection from us in our
20 work. They read every line and they challenge
21 us on what we are writing. And then we have
22 attorneys who read nothing that we have prepared
23 for them and they are supposed to be the vehicle
24 through which our material gets to the Court.

1 On the one hand you may cite that's a vote of
2 confidence in our work but I actually think
3 that's and inappropriate delegation of their
4 responsibility. We are not the lawyers on the
5 case. We are not lawyers. We need someone to
6 get this information --

7 CO-CHAIRMAN HELLERSTEIN: Do those lawyers
8 fall into particular categories, the ones who
9 you would classify as not competent in
10 recognizing what you have produced to them?

11 MS. WEISSMAN: I am not sure if I
12 understand your question.

13 CO-CHARIMAN HELLERSTEIN: You said you
14 get referrals from New York City, you get
15 referrals from Brooklyn defenders which is a
16 reputable organization, Manhattan, private
17 attorneys and your main base operation is up in
18 Syracuse.

19 MS. WEISSMAN: I would say that whenever
20 we get a referral from an attorney who has some
21 supervision, they tend to be more involved in
22 the case from our perspective, from our working
23 with them. They supervise the work. It's not
24 -- it's not uniformly too. We also had that

1 experience with assigned counsel that work with,
2 -- I guess, I can't totally just say it's the
3 institutional defenders. It may be more typical
4 because of the hierarchy, its organizational
5 structure. But, we also have worked with
6 assigned counsel that carefully review the work.
7 I think that the thrust of my comments today is
8 that our experience is that it is so different.
9 It is the luck of the draw who represents --
10 what kind of representation a defendant gets. I
11 can give you some examples. I have deliberately
12 chosen stories of cases that are not easy cases.
13 So it isn't about -- and, indeed, they were
14 guilty. So it's not just about getting the
15 client off. It is about what you can do even
16 within the framework of even mandatory
17 sentencing laws. We once worked on a case where
18 the young -- he was a relatively young man,
19 confessed to a crime of sort of tying someone up
20 and holding them hostage for several days so to
21 speak. We discovered after spending hours of
22 meetings and interviews with this individual
23 that he answered very strangely. It wasn't
24 immediately apparent because he had a rather

1 sophisticated vocabulary when he initiated the
2 conversation. But, whenever I would ask him a
3 question, his answers were yes, yes or just
4 nodding. I started to obtain the background
5 information on him, his school records and
6 discovered that he was developmentally disabled.
7 He was, he had been in special ed for his whole
8 life. He had a lot of other issues. This was
9 not discovered by the defense attorney who only
10 briefly met the defendant in jail and did no
11 investigation of his background. It wasn't all
12 that hard to discover. You had to take some
13 time to have a conversation with this person and
14 then write for the school records.

15 Another example, again, I deliberately
16 picked difficult cases, was a man charged with
17 sexual abuse of a child. The lawyer never went
18 to jail to meet this defendant. All
19 conversations took place in court. He never
20 asked him anything about his background and so
21 he never learned that the defendant had sisters
22 who could describe a history of horrific
23 physical and psychological abuse. We found the
24 sisters. They weren't this hard to find. The

1 sisters told us that while the father had abused
2 all family members, the brother was singled out
3 for particularly vicious abuse. It evidently
4 bothered the father that the boy would play with
5 his sister's toys. He was either locked in a
6 closet or stuffed in his sister's clothes and
7 thrown out and locked out of the house, left on
8 the lawn of the house so that the whole
9 neighborhood could ridicule him. Now, this
10 history of abuse does not excuse the defendant's
11 criminal behavior, but I think had this
12 information been provided to the Court prior to
13 plea, and, by the way, the lawyer didn't even
14 tell us that he entered into a plea before he
15 made the referral, that it might have made a
16 difference to the judge in meeting out the
17 sentence. This individual was a first offender.
18 He pled to, I think, I forget what the specific
19 charge was, but he got the maximum sentence on
20 that charge. These examples go on and on.

21 A lawyer who didn't know that his 14-year
22 old client spoke English -- did not speak
23 English. A lawyer who didn't visit his female
24 client at Riker's and therefore didn't know the

1 abuse she had suffered at the hands of the
2 co-defendant. These deficiencies mean that
3 lawyers don't do the things that they need to do
4 at the end of the day to shape an appropriate
5 sentence even for guilty folks. These
6 deficiencies mean that real human beings spend
7 more time in jail and prison than they would
8 have if they were properly represented, that
9 their families and children go without them for
10 longer periods of time, and once released, they
11 are less prepared to resume life in the
12 community. And, finally, even though
13 unintended, given the racial disproportionate
14 representation of minorities in the criminal
15 justice system, the failure of an adequate
16 indigent defense system has implications for
17 communities of color. There are many increasing
18 number of community organizations that can speak
19 to this.

20 JUDGE BAMBERGER: Has any lawyer asked for
21 your service at the beginning of the case in
22 determining whether to go to trial, whether to
23 take a plea, whether to have an insanity defense
24 or diminished responsibility defense?

1 MS. WEISSMAN: Yes. Absolutely. That
2 gets me -- I don't want to lead you to a litany
3 of complaints. That's the worst of times.
4 There are examples of the best of times. When
5 we work with lawyers who are, when they make the
6 referral to us, it's the minute after they get
7 involved in the case. They give us voluminous
8 amounts of material. We are working together as
9 a team. Our agency also does capital
10 mitigation. So, we learned from that field sad
11 as it might be, sort of what the best team
12 representations can represent. So, absolutely.
13 But, my point is, we get, it shouldn't be,
14 there's not really any differences in these
15 defendants. They are the same insofar as they
16 qualify for the a public defender or assigned
17 counsel. The difference is the luck of the
18 draw.

19 MS. ZUFLACHT: Do you provide counselling
20 or investigation?

21 MS. WEISSMAN: We provide not
22 investigation in terms of like the evidence of
23 the case. We don't do that.

24 MS. ZUFLACHT: The individual defendant?

1 MS. WEISSMAN: We provide the social
2 history investigation. We help the defense
3 attorney identify an appropriate expert if
4 that's relevant. For example, someone to do an
5 assessment of a developmental disability or a
6 health condition or mental health condition. We
7 will help provide sort of the wrap around
8 resources, if you will.

9 MS. ZUFLACHT: How much contact do you
10 have with the individual defendants? Do you
11 counsel them? Do you meet with them multiple
12 times?

13 MS. WEISSMAN: We meet with them multiple
14 times. On a fairly routine case, probably 40 to
15 60 hours to do the case.

16 JUDGE FAHEY: You also have cases where
17 your agency is involved in interim probationer
18 assistance?

19 MS. WEISSMAN: We do a lot of work.
20 Wherever possible, we will fashion an
21 alternative sentence as a recommendation to the
22 Court. But where not possible, we are working
23 to help craft a sentence that even if somebody
24 is going to go and reflect on what their issue

1 are, what their needs are. It makes an enormous
2 difference. We work with defense attorneys to
3 help them review pre-sentence investigation
4 reports. Those reports follow that defendant if
5 somebody is in for 20 years and has earned any
6 degree in prison and has done every prison
7 program. When they go before the board, it's
8 that pre-sentence investigation that counts.
9 Nothing else.

10 MS. ZUFLACHT: Do you have contact with
11 probation?

12 MS. WEISSMAN: We have contact with
13 probation. We offer to share our
14 recommendations with them, provide them with
15 information.

16 MS. ZUFLACHT: How are you funded?

17 MS. WEISSMAN: We are funded by the New
18 York State Division of Probation and
19 Correctional Alternatives through state grants.

20 PROFESSOR SHANKS: What's your case load
21 and if we want to recommend that you be
22 available statewide, what would you see as a
23 model? Would you be attached to office? Would
24 you have different satellites that attorneys

1 could access you?

2 MS. WEISSMAN: Well, thinking as I sit
3 here, I mean, I think that efficiently you would
4 want, if there was going to be sufficient
5 funding, you would want offices in, you do need
6 an office in every jurisdiction of the state,
7 But -- so we would be closer to other areas of
8 the state. I think on average somebody handles
9 about 50 to 60 cases a year. It's intensive
10 work. We meet with families, victims.

11 PROFESSOR SHANKS: Do you have any idea
12 given your budget how much that costs per
13 client?

14 MS. WEISSMAN: The last time I looked, it
15 was probably about \$2,500 per client.

16 CO-CHAIRMAN HELLERSTEIN: 2,500?

17 MS. WEISSMAN: Yes.

18 MR. CHAN: Can -- in your experience, have
19 any people employed by your group ever been
20 subpoenaed if the case falls through and goes to
21 trial, subpoenaed by the DA's office to testify
22 against the client or perhaps have to give up
23 reversible Rosario material?

24 MS. WEISSMAN: Knock on wood, no. I know

1 that that happened several years ago in
2 California. Because we are members of the
3 National Association of Sentencing Advocates. I
4 think the outcome was that the sentencing
5 advocate was ultimately not required to give up
6 that information. When we get a referral from
7 an attorney for this work, we ask the attorney
8 to refer to us as part of the client/attorney
9 privilege and our work is major.

10 JUDGE BAMBERGER: Do you do any work in
11 the Bronx?

12 MS. WEISSMAN: We do some work in the
13 Bronx. I know we have been in front of you
14 Judge Bamberger.

15 JUDGE BAMBERGER: Very good results.

16 CO-CHAIRMAN HELLERSTEIN: Does the
17 attorney speak off your work or do your people
18 at times address the court themselves?

19 MS. WEISSMAN: It actually depends on the
20 jurisdiction and case. In New York City I think
21 that we are more often called by the judge to
22 speak directly. In upstate it tends to be
23 through the attorney. I have to say that there
24 are times when our recommendations don't fully

1 comport with what the attorney is recommending.

2 Now, if the attorney -- if the attorney

3 disagrees so vehemently about what we are

4 recommending, and this rarely happens, not the

5 best use of time to bring it up, then we won't

6 submit because we have no leave to submit.

7 There are times when we are saying, you know,

8 you are going to be arguing for probation, you

9 know, and we are going to be arguing for shock

10 probation. If the attorney is comfortable with

11 that, then he will disagree some with our

12 report. We do maintain some degree of

13 independence from attorneys and give them advise

14 on our perspective of what the sentence, what is

15 the sentence that makes sense. But, for the

16 most part, we work that out in conversation.

17 So I do just want to do justice to the

18 many attorneys who we work with who do a great

19 job. I have gone door to door with attorneys in

20 communities finding people who once knew a

21 defendant so they can describe the defendant's

22 life. These things make a differences in cases.

23 We can see someone -- we worked on a case where

24 someone was on the verge of getting a 20-year

1 sentence and got a 12-year sentence. That's
2 real time. In one case an attorney worked with
3 us to, it was a case involving a young man who
4 was shooting at someone who had once raped his
5 sister and was continuing to harass her. So the
6 brother sort of stepped up to the defense and
7 needless to say quiet in an inappropriate way,
8 and a police officer was going home from work
9 when this event happened and sort of intervened
10 in the course of the crime and arrested the
11 defendant. It was a gun crime. It was a
12 serious crime. The judge at the time was saying
13 all gun crimes, state prison. We got all of the
14 medical records of the sister about what had
15 happened to her at the hands of the victim and
16 then we approached the police officer to see if
17 he would read the material of our defendant who
18 had never been in trouble before, who was the
19 main support of his family and whether or not he
20 would agree with actually a probationary
21 sentence. The police officer indeed did do
22 that. The result was that that young man was on
23 probation, and served probation very well. We
24 are still in touch with him. He is now the

1 maintenance supervisor of a local hospital. By
2 the way, it turned out very well for the police
3 officer. He become chief of police of that
4 jurisdiction. So there are lawyers who leave no
5 stone unturned and I think very circumscribed
6 when they make pleas for cases. I think they
7 understand the currency, if you will, of the
8 sentencing system. So that kind of argument for
9 probation for a shooter would not have been made
10 in just any old case. But this was indeed an
11 extraordinary case. So the questions that these
12 stories lead me to ask the question is, that,
13 why some defendants get the wisdom and some get
14 the foolishness, and I think that representation
15 should not be left to the luck of the draw. I
16 am going to leave you with my testimony. I am
17 going to skip to the end and give you my vision
18 of what an indigent defense system would like
19 look like that was in the E mail to me.

20 Defense attorneys for the indigent would
21 receive training on the broad range of issues
22 pertinent to quality defense work, technical
23 expertise and substantive expertise on matters
24 that affect most indigent defendants, mental

1 health issues, drug addiction, institutional
2 racism, family violence. I am not saying that
3 lawyers should become social workers, but they
4 should have some command of these issues so they
5 can properly work with social workers so that
6 they can be attuned to what is going on in their
7 client's lives.

8 Defense attorneys for the indigent would
9 receive salaries and benefits roughly comparable
10 to those of prosecutors.

11 Defense attorneys for the indigent would
12 have access to a properly resourced back up
13 center for support on complicated issues and
14 cases.

15 Defense attorneys for the indigent would
16 have access to a range of expert services
17 including investigators, social workers, medical
18 experts, sentencing advocates.

19 Defense attorneys for the indigent would
20 have independent leadership at the local and
21 state level that would provide oversight and
22 monitoring based upon standards of the field.

23 Defense attorneys for the indigent would
24 have independent, articulate leadership that in

1 partnership with other stakeholders in the
2 criminal justice system, and particularly judges
3 would help restore a culture of pride and
4 dignity in the role of public defenders.

5 I think in closing that in order to begin
6 to take steps to this ordeal, if this is of
7 interest, that an independent public defense
8 commission should be created whose purpose would
9 be to set, monitor and enforce standards for
10 indigent defense. The New York State Defender's
11 Association has suggested that such a commission
12 be appointed by the legislature, the Governor,
13 the courts and comprised of bar associations and
14 other civic groups and organizations concerned
15 with matters related to the provision of quality
16 defense services. I support that calling and
17 urge that the commission also endorse it or
18 something quite similar. It would seem that it
19 is in the state's interest to have such a
20 commission. It seems reasonable to have a means
21 to ensure accountability for the considerable
22 public expenditures made on indigent defense.
23 It would seem wise to have a body that can
24 monitor whether or not poor people in New York

1 are getting the representation that is available
2 to people with means. We should not have two
3 systems of justice in this state. Thank you
4 very much.

5 CO-CHAIRMAN HELLERSTEIN: Miss Miller.

6 MS. MILLER: Thank you.

7 CO-CHAIRMAN HELLERSTEIN: Miss Miller,
8 welcome.

9 MS. MILLER: Thank you. Thank you for
10 having the interest to look into this matter for
11 us. My name is Connie Fern Miller. I am the
12 Public Defender of Schuyler County. I may be
13 one of the few public defenders in the state who
14 has also been a district attorney, assistant
15 district attorney in Schuyler County.

16 CO-CHAIRMAN HELLERSTEIN: You were the
17 district attorney?

18 MS. MILLER: Yes.

19 MR. CHAN: You seem to like that?

20 MS. MILLER: To tell you the truth, I
21 like defense work even better. I will say one
22 thing --

23 PROFESSOR SHANKS: I used to be an
24 assistant district attorney.

1 CO-CHAIRMAN HELLERSTEIN: Can you put that
2 in a time frame?

3 MS. MILLER: I was the DA for a four-year
4 term from January 1, 1990 through the end of
5 1994. So that's 11 years ago.

6 I am going to talk about money. I am not
7 going to talk just about money, but about parity
8 and funding. That is what concerns me. I am
9 not going to sit here and say that I wouldn't
10 welcome a truckload of cash into Schuyler
11 County, but I think that's unrealistic. What I
12 would welcome would be to have some semblance so
13 that I feel that my office has enough staffing,
14 we have enough resources. We have enough access
15 to service such as investigative services, that
16 we can be on some kind of parity with the
17 prosecution in our county. I thought that I
18 would start out by giving you a little overview
19 of the structure of the Schuyler Public
20 Defender's Office. We are kind of unique. We
21 are a very small county. We are the -- one of
22 the poorest, if not the poorest county in the
23 state.

24 CO-CHAIRMAN HELLERSTEIN: County seat?

1 MS. MILLER: Watkins Glen.
2 Our Public Defender's Office consists of
3 one full-time public defender, that's me, one
4 part-time assistant public defender. His name
5 is Stuart McGivitt. Both my office and the DA's
6 office are out of our own privately owned office
7 space. There's no provision of office space,
8 library, computer, coffee machines, any
9 equipment whatsoever provided by the county. I
10 will add, however, that the county pays me a
11 stipend of \$2,000 a month to cover some of our
12 overhead office expenses. It doesn't cover all
13 of it. It covers about two thirds of it. So
14 that oddly enough, even though I'm the full-time
15 public defender of Schuyler County, that's a
16 full-time job, I am also permitted to maintain a
17 limited private practice without which I could
18 not afford to do the job of Public Defender.
19 That limited practice consists primarily of
20 things which would not conflict with my Public
21 Defender role such as wills, estates and real
22 estate matters.
23 I handle in Schuyler County, the Public
24 Defender's Office handles not only criminal

1 defense work, we handle all the family court
2 matters that used to be on an assigned counsel
3 system. I don't know if you are interested in
4 knowing about that.

5 CO-CHAIRMAN HELLERSTEIN: One full-time
6 with a wills, estate practice. A part-time
7 defender handling the -- the one and a half of
8 you.

9 MS. MILLER: There's one and a half of us,
10 yes.

11 CO-CHAIRMAN HELLERSTEIN: You handle allt
12 he criminal?

13 MS. MILLER: All the criminal work.

14 CO-CHAIRMAN HELLERSTEIN: Family as well?

15 MS. MILLER: Exactly, yes. I would say we
16 do it very well. We do it with passion which is
17 something that is lacking in the DA's office.

18 PROFESSOR SHANKS: In terms of parity,
19 what's the relationship of your pay to the DA
20 and your pay as a PD?

21 MS. MILLER: I have that in my notes. I
22 will get do that.

23 Yes. I am paid a salary of \$72,000. As I
24 mentioned, I do receive a stipend toward office

1 overhead of 2,000 a month. The APD receives
2 \$36,000 and nothing to cover his office expense.
3 He also has to, of course, he is part-time, but
4 he maintains a pretty active private practice
5 also.

6 CO-CHAIRMAN HELLERSTEIN: He is physically
7 apart? He is not in the same office?

8 MS. MILLER: We are in two different
9 villages in Schuyler County. I am Watkins Glen
10 and he is in Montour Falls.

11 PROFESSOR SHANKS: Do you have a secretary
12 or anything like that that's paid for by the
13 county?

14 MS. MILLER: Yes. My secretary who is
15 also the administrator of the public defender
16 assigned counsel plan for the county is paid
17 about \$26,000 a year for that. That sort of
18 raises an additional issue that I didn't have in
19 my notes. When I was first approached, back
20 when the assigned counsel rate was about to jump
21 in December of 2003, or in the fall of 2003 when
22 I was first asked by the county attorney if I
23 would be interested in doing this job, I said to
24 the county attorney that would be fine, but I

1 really think that we still need to have an
2 administrator to administer, to receive the
3 applications for assigned counsel, public
4 defender, review those, make assignments of
5 counsel where there's a conflict, and I don't
6 think that person should be in the public
7 defender's office. I think that should be in a
8 separate office apart from me. Well, that got
9 shot down because that would be too expensive.
10 So what I have tried to do in my office is
11 create a fire wall between what I do as Public
12 Defender and what she does as administrator of
13 the plan.

14 PROFESSOR SHANKS: She is your secretary?

15 MS. MILLER: She is also my secretary.
16 She is does two roles. As my secretary there's
17 no fire wall. In terms of her accepting
18 applications for public defender services or
19 assigned counsel, making determinations, who is
20 financial eligible and in cases of conflict
21 finding attorneys, assigning attorneys to handle
22 those cases, I have no input into that because I
23 don't want to be in a position of being accused
24 of having a conflict of interest in picking and

1 choosing the attorneys who are going to be
2 opposite me in cases, including family court
3 cases.

4 JUDGE BAMBERGER: Who evaluates the
5 qualification of the lawyers who apply to be
6 assigned counsel?

7 MS. MILLER: Nobody, really. What we did,
8 this is interesting because in Schuyler County
9 there are no attorneys available to take
10 assigned counsel cases. We have a very small
11 bar association. Every attorney in Schuyler
12 County is employed in some capacity either by
13 county or state, so that it would be a conflict
14 for them to take assigned counsel cases. Any
15 cases that are assigned out in cases of conflict
16 are going to attorneys in Tompkins County,
17 Chemung, Steuben County primarily. What we did,
18 when I first took over the job is, we sent out a
19 questionnaire to all the -- we got lists from
20 the bar associations of the surrounding
21 counties. We sent out questionnaires to all the
22 attorneys and asked them, would they be
23 interested in being on our assigned counsel list
24 for criminal cases and family court cases,

1 whichever they wished. We also asked them if we
2 had clients, people who applied for the public
3 defender who were not financially eligible,
4 where they can't afford huge fees, that's one of
5 the problems with the system, there's no sliding
6 scale, but we did ask attorneys, if they would
7 indicate for us whether they would be willing to
8 do cases on a sliding scale, whether they would
9 be willing to do cases privately at the assigned
10 counsel rate, \$75 an hour, whether they would
11 let people make payment plans and that sort of
12 thing. We actually have a list that we handout
13 to people that we turn down for the Public
14 Defender's Office because they are not
15 financially eligible under our guidelines. We
16 give them a list of attorneys who will take that
17 kind of case and we have indicated what
18 attorneys are willing to make financial
19 arrangements with people. So that's one of the
20 services.

21 JUDGE SMITH: What's your case load
22 between you and your assistant public defender?

23 MS. MILLER: My case load?

24 JUDGE SMITH: How many cases did you

1 handle, for example, in 2004?

2 MS. MILLER: Last year, I believe, I only
3 done this in 2004 and this year. We just
4 submitted the report to the state, I think we
5 have about 120 criminal cases.

6 JUDGE SMITH: Felonies and misdemeanors?

7 MS. MILLER: Right. And about 80 family
8 court cases.

9 I didn't bring that documentation with me.

10 CO-CHAIRMAN HELLERSTEIN: I think we have
11 it if you filed it.

12 MS. MILLER: Okay. We filed it then.

13 CO-CHAIRMAN HELLERSTEIN: Okay.

14 MS. MILLER: Let me just go down and I
15 was going to describe for you the kinds of cases
16 that we handle. Of course, we handle all
17 indigent criminal defense and felony cases and
18 that responsibility falls on me. I handle all
19 the felonies including any preliminary hearings
20 that are required. I don't necessarily handle
21 all felony appearances in the local court
22 because the assistant PD is regularly in the
23 local court and so if people are being,
24 appearing there on bail reviews and that sort of

1 things, he is handling that. But if there's a
2 preliminary hearing scheduled, I go to do the
3 preliminary hearing. We handle all misdemeanor
4 criminal cases for indigent defendants and we
5 have eight town and village courts which the
6 part-time APD handles. We have a drug treatment
7 court in Schuyler County and the APD is on the
8 drug treatment court team and so he has a
9 minimal commitment of two or three hours a week
10 as part of that responsibility and sometimes
11 more. Sometimes he has to defend people when
12 they are being terminated from drug court and
13 this sort of thing.

14 We also have, as I mentioned, all family
15 court matters for indigent clients. Most of the
16 family court matters are handled by me. This
17 includes practically all of the Article 10
18 proceedings in our county, child neglect and
19 abuse cases. That is, because most of the
20 people who are accused of child abuse and
21 neglect are indigent and so that burden falls on
22 me most of the time. There are many of those
23 cases. Oddly enough, I spend more time trying
24 cases in family court, defending Article 10

1 proceedings than I do trying criminal cases. I
2 will try to explain why it's topsy-turvy. The
3 reason the county attorneys office has a
4 full-time person who is assigned to the
5 Department of Social Services to prosecute these
6 cases, she is a bull dog. Furthermore, there's
7 very little incentive to compromise, to settle
8 these cases because, basically, the Department
9 of Social Services is saying we want a neglect
10 finding, we want removal of the children and we
11 are not talking about jail, we are not talking
12 about prison. So plea bargaining doesn't come
13 into it very often. It's my responsibility to
14 defend these people, and I do. I go into court
15 and we have hearings and hearings and hearings
16 on those cases.

17 I also handling in connection with the
18 family court matters a number of things which
19 the DA's office and county attorney's office has
20 nothing to do with. That is, all custody cases
21 for indigent people. Most of whom are, I
22 shouldn't say most, many of whom are eligible
23 for public defender services. And, of course,
24 where there's one spouse or one partner then

1 there's usually assigned counsel for the other
2 party. I also handle family offense cases. The
3 statute says that family offense cases have to
4 be handled, if the person is indigent, has to be
5 handled by the public defender. I find this to
6 be an odd position. I find myself in an odd
7 position in some of those cases because the
8 statute says, I must handle those both for the
9 petitioner and the respondent. So, this is the
10 one kind of case where I could be in a role of a
11 prosecutor rather than my usual role which is
12 defending. The assistant public defender
13 handles some family court matters. Those are
14 limited to paternity cases and support
15 violations, simply because those cases are heard
16 on Wednesday and I need one day a week that I
17 can have free to do things in my office. So he
18 handles those cases. I also handle all felony
19 preliminary hearings, parole violation hearings,
20 SORA reviews, appeals to the county court, New
21 York State Central Registry hearings and other
22 miscellaneous proceedings. Some of the work
23 that my office is not currently handling that,
24 although we probably should be doing it, but,

1 we, I simply do not have the person power to do
2 it are appeals, except the appeals to county
3 court which I have been doing. We have been
4 deferring to the Appellate Division and having
5 them assign counsel to do appeals. Of course
6 that comes out of our budget, but I don't have
7 the time to do that. We also, yes, I'm sorry --

8 MR. CHAN: What's the staffing for the
9 DA'S office? I don't mean to interrupt you.

10 MS. MILLER: That's in my notes here. I
11 was going to get to that.

12 CO-CHAIRMAN HELLERSTEIN: I am looking at
13 your filing, last year ending December 2004, 72
14 felonies, 137 violation of misdemeanors, 123
15 family court, 6 appellate, 6 pending. You don't
16 have any appeals in the appellate level box.
17 Total dispositions, one homicide, 39 -- was that
18 a trial?

19 MS. MILLER: We did not have a homicide
20 trial. I had a competency hearing that I
21 handled in that case.

22 CO-CHAIRMAN HELLERSTEIN: 39 felonies, 112
23 violation misdemeanors, 211 dispositions, family
24 court 59. That's all done by you and the

1 assistant?

2 MS. MILLER: One and a half people handle
3 the cases.

4 CO-CHAIRMAN HELLERSTEIN: What about
5 investigators?

6 MS. MILLER: I was going to get to that.

7 CO-CHAIRMAN HELLERSTEIN: Yes.

8 MS. MILLER: I was asked a question about
9 DA's office. We have a full-time DA. We have a
10 full-time ADA. We have a part-time ADA. We
11 have a full-time person in the county attorney's
12 office who is assigned to do all the DSS Article
13 10 cases. So I am county, three and a half
14 prosecutors, one and a half defense attorneys.
15 The district attorney made a comment, well, you
16 don't have to handle all the criminal cases
17 because there are people who retain counsel.
18 That is true. But, he also does not handle
19 parole violations. He is not doing any family
20 court work. My time is pretty well filled up.
21 It's a good thing that I have a very good
22 secretary, paralegal who helps me with my
23 private practice and knows how to do real estate
24 work, because I would have little time to devote

1 to that if it weren't for her. Other cases that
2 we're supposed to be handling that we are not, I
3 understand that visitation cases oddly enough
4 the statute says respondents in visitation cases
5 are supposed to have either a public defender or
6 -- public defender or assigned counsel if
7 indigent. We have not been doing that. We just
8 don't have enough people to do that.

9 CO-CHAIRMAN HELLERSTEIN: Are you familiar
10 with the study that was done by the NCAAP Legal
11 Defense Fund?

12 MS. MILLER: Yes.

13 CO-CHAIRMAN HELLERSTEIN: Yes.

14 CO-CHAIRMAN HELLERSTEIN: Describing the
15 situation in Schuyler County with respect to
16 unrepresented defendants? Give us your views on
17 that.

18 MS. MILLER: Yes. That was one of the
19 things that was laid on me when I first agreed
20 to take over the job. I would comment on the
21 fact that many of the things that were pointed
22 out in that report have been remedied by my
23 office. I have made it a point, I am in the
24 Village of Watkins Glen which is the county

1 seat. The jail is a few blocks from my office.
2 I should say the jail for men. Women are not
3 housed in Schuyler County. If I have a woman
4 defendant, I have a problem with communication.
5 One of the things that I do is, I go to the jail
6 two or three times a week. I meet a with my
7 clients there. I also go to the jail any time
8 they send a note or call my office that they
9 would like to see me. I have instituted an open
10 telephone line from the jail. Initially, when I
11 started as public defender, I discovered that
12 anyone trying to call me from the jail had to
13 call, make a collect call. So I went to see the
14 sheriff. I said I wanted an open line from the
15 jail. These are my clients here. They deserve
16 to be in contact with their attorney when they
17 feel the need to do so just as a privately
18 retained attorney would be available to the
19 client, and so we have a telephone in a secure
20 area of the jail where the people on the phone
21 can have some confidentiality and they can use
22 that phone any time they have the need to call
23 me. Believe me, they do. I also made myself
24 available for preliminary hearings and that

1 often means that I attend preliminary hearings
2 in felony cases even before we have reviewed the
3 applications for public defender and I have been
4 officially assigned because of the short window
5 of time that's involved. I take the position
6 that if there's a felony charge, if there needs
7 to be a preliminary hearing, I am available to
8 do that and if later it turns out the person is
9 not eligible for my services, well, then, no
10 harm done, at least their rights have been
11 preserved for that purpose. We do not have
12 people languishing in jail without seeing an
13 attorney, without being before a court, without
14 having bail reviews as was mentioned in the
15 NCAAP report. Many of the things that have been
16 resolved have been.

17 MS. ZUFLACHT: Do you cover justice courts
18 throughout the county?

19 MS. MILLER: The assistant public defender
20 handles all the justice courts.

21 MS. ZUFLACHT: How many of them are there?

22 MS. MILLER: Eight of them. Interestingly
23 enough two of them actually have two judges.
24 You could either call it eight or ten courts.

1 He has a rotating schedule of appearances in
2 every justice court in the county. He is not in
3 every one every week, but he is in every one in
4 at least every month.

5 PROFESSOR SHANKS: Do you have a budget
6 for investigators and expert witnesses?

7 MS. MILLER: I have a budget for
8 investigators and expert witnesses of \$7,500.

9 PROFESSOR SHANKS: For the year?

10 MS. MILLER: For the year. Last year in
11 order to hire a psychiatrist to do -- to assist
12 me on the murder case where the issue of
13 competency arose, it cost me \$9,800 for the
14 psychiatrist. So I blew the entire budget on
15 one expert for which I was reprimanded by the
16 legislature. I have in my budget --

17 JUDGE BAMBERGER: What did they suggest
18 that you do as an alternative proceeding?

19 MS. MILLER: One of the legislatures said
20 to me, why do you need to hire a psychiatrist
21 for this case? Why don't you just use the
22 district attorney's psychiatrist's report? That
23 was the question. I also questioned as to why
24 there's a need for a budget for assigned

1 counsel. I have \$8,000 in my budget. I asked
2 last fall for \$25,000 in the budget for assigned
3 counsel criminal cases and 25,000 for assigned
4 counsel family court cases. I was cut back to
5 \$8,000 in each category with the limit being up
6 to \$4,400 per case and I already run over that.

7 JUDGE SMITH: What does that mean? That's
8 in your budget. Assigned counsel vouchers are
9 going to be what they are going to be.

10 MS. MILLER: Exactly. That's the
11 position. Counsel has to be assigned.

12 JUDGE SMITH: Are you aware of any
13 vouchers not being paid because they exceeded
14 your budget?

15 MS. MILLER: No. No. All of last year I
16 had to go month by month. I was required to go
17 before the legislature and explain why I was
18 over budget on the assigned counsel. They also,
19 one legislature said to me, we don't understand
20 why you need so much money for assigned counsel.
21 That's why we hired you. So, I have explained
22 repeatedly that if you have multiple defendants
23 in a criminal case, I can't represent them all
24 and neither can the assistant public defender.

1 If you have family court where you have a
2 husband and wife, they are both accused of
3 neglect or abuse, you have to have separate
4 attorneys. Certainly in any custody case,
5 anything of that stature in family court, you
6 have to have assigned counsel. So we just sort
7 of plowed along and from time to time the
8 legislature will take money out of a contingency
9 fund and put it into the public defender budget.
10 That's how we have been doing it.

11 CO-CHAIRMAN HELLERSTEIN: Does the fact
12 that you were once a DA give you a modicum of
13 additional credibility/respect with legislature
14 or do you get the same treatment that someone
15 who is not a former chief prosecutor would get?

16 MS. MILLER: Well, I think I have -- I
17 know that I have a lot of respect in Schuyler
18 County just from practicing law there for
19 27 years and having done a very fine job of it.
20 I do know, I would say that there's a feeling
21 among the legislatures that it is certainly not
22 terribly important to fund the public defender
23 adequately because, after all, I defend guilty
24 people, and why should they waste money on that.

1 I have had comments to that effect. This isn't
2 my own feeling. People should just walk in and
3 they should plead guilty and that should be the
4 end of it. So it's kind of a waste of money to
5 provide defense services when really what we
6 need to do is to provide more prosecution.
7 That's the attitude.

8 JUDGE BAMBERGER: When do you sleep?

9 MS. MILLER: Sometimes I have trouble
10 sleeping or worrying about some of my clients.

11 CO-CHAIRMAN HELLERSTEIN: Given the nature
12 of your county, size, population, what would be
13 your wish list so that you could sleep and
14 everyone can be comfortably represented?

15 MS. MILLER: Somebody asked me about
16 investigative services. I have, when I need
17 investigative services, I call on an
18 investigator. I have someone who is a former
19 deputy sheriff who assists me with that. I have
20 him working on a rape first case for me. I have
21 called on other experts. I have had, I have an
22 individual who administers lie detector tests,
23 voice stress tests that I have used on occasion.
24 I have had a need for a psychiatrist in

1 one case. I have a need right now for a
2 chemical analysis to be done of some evidence.
3 When I need these things -- I have a
4 psychologist in a family court case who is
5 helping me on a matter that's pending. When I
6 need these things, I contact the people that I
7 know. They are experts in those fields. I hire
8 them to help me. I submit the bills to the
9 legislature to be paid. If there's not enough
10 money in the budget, my feeling about it, they
11 will have to pay it anyway. I did in 2004, I
12 proposed to the legislature entering into a
13 contract with an investigative service on a
14 contractual basis. In fact, I had a contract
15 written up for that and proposed that. Even the
16 county attorney thought that would be a good
17 idea. But, the legislature turned it down. The
18 contract was only going to be on an hourly basis
19 for \$40 an hour, but they turned that down. The
20 DA, I should add, does have an investigator
21 assigned to his office. It is a part time
22 position, but he has an individual who is a
23 former -- not former, but is presently a part
24 time deputy sheriff who is assigned to the DA's

1 office and is their investigator. They also
2 have a woman who is funded part-time through the
3 New York State Office for Domestic Violence.
4 She is a victim advocate. I don't have anyone
5 like that, so -- and, there is, there is also a
6 full-time secretary in the district attorney's
7 office. Then there is another woman that works
8 there part-time and I am not exactly sure what
9 she does, but it's some kind of advocacy service
10 also. You asked me to address what I would see
11 as helping to improve the system. I wrote down
12 three things that I would like to mention. One
13 of those would be uniformity throughout the
14 state. Right now I am sure I am not telling you
15 anything you don't know, but we have a
16 hodgepodge of systems which vary enormously from
17 county to county. Some counties have a PD
18 office. Some have both a PD office and conflict
19 defender office. Some counties rely exclusively
20 on the assigned counsel plan. There is no
21 consistency throughout the state as to whether
22 family court and criminal cases are handled by
23 the Public Defender's Office or by assigned
24 counsel. There is some confusion as to what

1 kind of cases should be handled by the Public
2 Defender's Office such as New York State Central
3 Registry hearings, support cases or just
4 violations to support, visitation cases, and, in
5 my case, appeals which I would do if I had more
6 help but I don't, so I don't do those in-house.
7 Fortunately, we haven't had too many appeals in
8 Schuyler County. Ideally, I would like to see
9 every county have a Public Defender's Office and
10 a conflict defender's office and sufficient
11 funding for assignment of counsel in cases where
12 there there still remains a conflict. The
13 Public Defender's Office and Conflict Defender's
14 Office would handle all cases where indigent
15 persons are entitled to counsel including both
16 criminal and family court matters. And, at a
17 minimum, this is to get to the question of what
18 would you think would be appropriate staffing,
19 at a minimum, there should be a full-time person
20 to handle felony cases, at least a part-time
21 person to handle misdemeanors, another full-time
22 person to handle family court cases and
23 investigator contractual or otherwise available
24 to be assigned to assist the PD office. The

1 Conflict Defender's Office should also be
2 adequately staffed with at least a part-time
3 person to handle felony cases, part time person
4 to handle misdemeanor and part-time person to
5 handle family court or a full-time and one
6 part-time person. Obviously, this would vary
7 with the size of the county and number of cases,
8 but I am thinking in terms of my small county,
9 this is what I would see as being necessary at a
10 minimum to really adequately provide the
11 services to indigent persons that we should be
12 providing services for.

13 If we had adequate funding, adequate
14 personnel, I note that we could probably also
15 handle appeals which we are not doing right now.

16 The second item that I would like to have
17 you consider would be parity. I don't mean
18 parity in funding, I mean parity in attorneys
19 and staff including investigators, and that it
20 should be equal on the prosecution side and on
21 the defense side. The district attorney's
22 office will argue that all criminal cases are
23 not handled by the PD office. This is true.
24 There are many other kinds of case the PD office

1 handles besides those which either the DA or
2 county office is not involved with at all.

3 JUDGE SMITH: Why should the DA get to
4 argue about that at all?

5 MS. MILLER: He argues about that to me.
6 You see, you shouldn't be paid the same as I am
7 because you don't have to handle all criminal
8 cases and I do. I pointed out to him that he
9 doesn't have to handle any Article 10 neglect
10 cases either. He also doesn't do any parole
11 violations. I have to do parole violation
12 hearings and the state comes down and does
13 those. Then there are the custody cases and
14 other family -- and other family court matters.
15 My point is that we are doing a valient job for
16 people. I would be doing a better job if I had
17 more help. By that, I mean, I would probably be
18 doing more motions, more discovery demands not
19 to say that I am not doing that now, but in many
20 cases I find myself feeling like I am not in a
21 position of power. Now having been the DA, I
22 know what kind of enormous power the DA has. It
23 needs to be used wisely. The DA is basically
24 there in control of people's lives. There isn't

1 an awful lot that the public defender or defense
2 attorney can do when the defendant has spilled
3 his guts to the police and they have a full
4 confession and they have all kinds of other
5 evidence and they have the backup of the
6 Sheriff's Department, village police, State
7 Police, State Police Lab and everything else.
8 The deck is already stacked. I would like to
9 feel that I am not handling every case by going
10 in there and sort of crawling to the DA and
11 saying, you know, what's the best you can do for
12 my client? I don't do that. You could check
13 with the records in my office, but, I have
14 brought a lot more motions, a lot more
15 preliminary hearings, a lot more discovery
16 demands and more vigorous defense of people than
17 you ever had in Schuyler County before. I don't
18 have unlimited resources. In fact, they are
19 restricted. So many cases are a question of my
20 going to the DA and advocating and negotiating
21 for my client for the best plea bargain deal
22 that I can arrange and the best sentence that I
23 can get for him or her. But, I do feel that if
24 I weren't quite so out numbered that I might be

1 able to at least have a feeling that I am in a
2 position of strength in negotiating for my
3 client.

4 Funding. The third item would be funding.
5 Just as there should be parity in staffing,
6 there needs to be parity in funding. Ideally, I
7 should receive the same salary as the DA. My
8 one assistant is paid about half of what the
9 assistant district attorney receives. He is
10 paid considerably less than what the assistant
11 county attorney receives and only about half of
12 what the part-time county attorney is receiving
13 in Schuyler County. I also would like to point
14 out to you that the State of New York is very
15 good at coming up with various grant money to
16 assist the prosecution such as grants from the
17 New York State Office of Domestic Violence, the
18 Stop DWI moneys which the PD office has never
19 received a penny, the aids to prosecution.

20 Maybe I have talked more -- well, I have
21 talked more than 15 minutes.

22 CO-CHAIRMAN HELLERSTEIN: You have given
23 us an ear full. We are quiet a bit behind
24 schedule. So, I would like to thank you for

1 informing us of what you are doing and what you
2 would like to do.

3 MS. MILLER: Thank you. I will say this,
4 I love being the public defender of Schuyler
5 County. It's my most favorite job that I have
6 ever done.

7 Thank you.

8 CO-CHAIRMAN HELLERSTEIN: That concludes
9 our proceedings for the day.

10 Thank you all. Have a safe trip.

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CERTIFICATE

This is to certify that I am one of the Senior Court Reporters of the Supreme Court, Sixth Judicial District; that I attended and reported the above-entitled proceedings; that I have compared the foregoing with my original minutes taken therein and that it is a true and correct transcript of the proceedings had therein.

Aaron R. Alweis, RPR, CRR, CSR,
Senior Court Reporter

Rena Bonczek,
Sr Court Reporter