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3 THE NEW YORK STATE COMMISSION ON THE FUTURE OF

4 INDIGENT DEFENSE SERVICES

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6 PUBLIC HEARING

7

Hall of Justice

8

Rochester, New York

9

March 11, 2005

10

11 Before:

12 HONORABLE BURTON B. ROBERTS, Co-Chairman
13 PROFESSOR WILLIAM E. HELLERSTEIN, Co-Chairman

14 and the following commissioners:

15 Christopher Chan, Esq.
Honorable Janet DiFiore
16 Carey Dunne, Esq.
John Elmore, Esq.
17 Klaus Eppler, Esq.
Honorable Patricia D. Marks
18 Honorable Martin Murphy
Laurie Shanks, Esq.
19 Honorable Martin Smith
John Speranza, Esq.
20 Lawrence Goldman, Esq.
Anita Khashu, Esq.
21 Honorable Elaine Jackson Stack
Michele Zulflacht, Esq.
22 Paul Crotty, Esq.

23 Reported by:
Meredith A. Bonn, CSR, RPR
24 Regina Zielke, RPR
Judy Ging, CSR, RDR
25 Official Court Reporters

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2 MR. HELLERSTEIN: Good morning and welcome to
3 the second hearing that the Commission on the
4 Future of Indigent Defense Services is having. We
5 are happy to be here and to welcome all witnesses
6 and all members of the audience.

7 I regret that my co-chair, the Honorable
8 Judge Burton Roberts is unable to attend, but he
9 will fully participate in our readings of
10 transcripts and be fully apprised of what went on.

11 We have a very long calendar. So I would ask
12 those witnesses that are already here to consider
13 that as they make their statements and if there are
14 written materials or statements that would
15 facilitate oral presentations we look forward to
16 receiving them.

17 I know that the Commission has certain
18 questions that we would like witnesses to focus on.
19 So I would like to begin by welcoming Mr. Ed Nowak,
20 Monroe County.

21 Mr. Nowak.

22 MR. NOWAK: Thank you, Professor Hellerstein.

23 It's going to be difficult in fifteen minutes
24 to summarize more than twenty-five years as chief
25 defender and the problems that I have faced here in

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2 Monroe County as well as the problems I have become
3 aware of in more than fourteen years of service as
4 President of the New York State Defender's
5 Association, but I will do my best.

6 I believe that you have a copy I provided at
7 the outset of the annual report that I file every
8 year with our County Legislature and I will be
9 happy to provide you with this year's report when
10 that becomes final, hopefully, within the next
11 three to four weeks.

12 I think what I would prefer to do is not to
13 talk about what we do in Monroe County that might
14 be positive, but rather to focus on the issues and
15 problems that I see in indigent defense services,
16 not only here in Monroe County, but throughout the
17 State. And it's not going to come to a surprise to
18 anybody on the panel, but the first issue is lack
19 of resources.

20 It's been highlighted in a number of reports.
21 Gideon's Broken Promise, I know you have that
22 report.

23 Our budget 2003-2004 was approximately 6.1
24 million dollars. We were expected to handle well
25 over twenty thousand matters. To me when you look

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2 at that, that should be a sign that we have way too
3 many cases and not enough resources when you can
4 breakdown the average cost of any case to about
5 three hundred dollars.

6 We look at the reasons why the budget has
7 been where it is. When you look at the handout
8 I'll be giving you shortly you'll see we had an
9 increase in our budget in the last year. We got no
10 new staff, but what happened for the reason for the
11 increase was that certain issues at the State level
12 that trickle down to the County compel that, such
13 as requiring counties not to contribute to the
14 pension of employees, which never was the case.

15 There was a grace period where the Office of
16 the Controller said to the counties you don't need
17 to make the employee contribution for your county.

18 Well, when the State was facing a fiscal
19 crisis, change, sorry, start contributing again.
20 Well, that meant three hundred thousand dollars
21 that the County had to find in my budget, which
22 wasn't there. So it gets attributed to my budget,
23 you see an increase, but I get no new staff. It's
24 just that the State changed their funding formulas.

25 That happens on every level I think, you

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2 know, Medicaid, welfare, every level the State is
3 changing formulas to localities. In the end
4 counties are facing a budget deficit. When I go to
5 the County Legislature or budget office, I need
6 resources, look at my case load, they say we are
7 sorry, Ed, you're doing a good job, keep it up, but
8 we have no more money for you.

9 This is not only in Monroe County, but
10 throughout this State. It is a problem.

11 On top of that the State has new initiatives
12 that they come out with. We all know about drug
13 courts, integrated domestic violence courts,
14 domestic violence courts. All of those courts have
15 been started. Where has any money come for the
16 defenders in those courts?

17 I'm telling you there was no money, and I'm
18 telling you the counties didn't provide additional
19 resources for those courts. We were asked to take
20 on additional work, more assignments, more court
21 coverage with no new resources.

22 We have sex offender registration
23 reclassification process. Who is going to do that
24 work? Oh, just give it to your defenders. Okay.
25 They can do more.

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2 Rockefeller resentencing. Who will do that?

3 Oh, call the public defender. They will do that

4 too.

5 So on top of an already overburdened system

6 defenders continually are being asked to do more

7 with no additional resources when changes in the

8 law occur.

9 An issue that I'm currently facing has to do

10 with the death penalty. Oh, we have a capital

11 defender's office. So that doesn't affect you, Ed.

12 Oh, no, it does.

13 How does it affect me? There are cases where

14 individuals ultimately enter a plea of guilty to

15 life without parole. They want to appeal. Who is

16 going to do the appeal? The public defender.

17 The capital defender doesn't do those

18 appeals. So we have a volume of records that comes

19 in, boxes upon boxes from a death penalty case and

20 we are supposed to do the appeal.

21 We had a situation recently in a death

22 penalty case where after meeting with our client

23 that client wanted to pursue an appeal.

24 The capital defender's office is calling us

25 to say you really shouldn't do that appeal because

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2 if you are successful they will be facing death
3 again. And the client is saying they are not my
4 lawyer any more, you are. Where is the continuity
5 of counsel in a death case?

6 Now you have an overburdened appellate
7 section in a defender's office being asked to do
8 what were death penalty cases, but because the
9 person has life that case falls to the defender.

10 The biggest appeal we have in our office that
11 will take the resources of one or two attorneys for
12 an entire year or more had a trial in Monroe
13 County, a full trial in a death penalty case. The
14 defendant was found guilty and at the penalty phase
15 the jury imposed life without parole.

16 That entire record sits in an office at my
17 appeals bureau.

18 MR. HELLERSTEIN: And you have a backlog even
19 without the capital case?

20 MR. NOWAK: Without that capital appeal I have
21 a backlog of two years. Clients are waiting two
22 years and one or two months right now.

23 MS. SHANKS: How many attorneys are in your
24 appeals bureau?

25 MR. NOWAK: We have eight attorneys in our

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2 appeals unit, eight assigned to two hundred and
3 fifty cases on an annualized basis.

4 MR. HELLERSTEIN: Trial cases all?

5 MR. NOWAK: All appeals of trial cases would
6 be hundred to hundred and twenty-five.

7 The productivity of the people in our section
8 I think has been extraordinary. Some of that is
9 highlighted in the annual report.

10 I think our office does an excellent job in
11 the appeals area. We are able to process or handle
12 twenty-two to twenty-five cases per attorney per
13 year in the appeals area, which I think is far
14 beyond what other statewide standards are and
15 offices do.

16 I believe the work product of that office is
17 also very good quality work product, but those
18 folks don't work your typical nine to five day
19 either because they know that we have a backlog of
20 appeals and we know what it means to our clients to
21 have to wait for two years to have their appeal
22 heard, but this death case is going to set us back
23 dramatically.

24 I asked Judge Pigott for an opportunity to
25 meet with him, who is the presiding justice of the

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2 Fourth Department, to discuss what we are going to
3 do if I take two attorneys off to do this appeal
4 for a year. Our backlog will approach four hundred
5 cases.

6 So those are the kinds of issues I don't
7 think people focus on when they look at what is the
8 state of public defense. Has nothing to do with
9 the public defender. Yes, it does. That's just
10 one example. I'm sure there are others throughout
11 the State. So with this reduction in State aid we
12 face major funding issues.

13 What I would like to do is the Spangenburg
14 (phonetic) Report; A, and Gideon's Broken Promise
15 has a chart. I will hand out the chart for
16 distribution.

17 The reason for handing this out, you will see
18 the first page merely sets forth the report's
19 finding in New York State statewide the State
20 provides approximately eighteen percent of the
21 money to defender services and the counties are
22 responsible for about eighty-two percent. That's
23 just the first page. Simple.

24 In the State of New York, the second page
25 that's being handed out is the actual for Monroe

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2 County. I would like you to know that it is my
3 opinion that we do better in Monroe County than
4 most other Upstate counties.

5 What you will see here is the vast majority
6 of aid I believe flows to New York City. As a
7 result when you look at the very first chart, table
8 one, 1999, the best year we ever had 16.77 percent
9 of our cost was paid for by the State of New York,
10 leaving 83 percent, close to what the Spangenburg
11 (phonetic) report indicates.

12 '99 to the current state of 2005 right now
13 Monroe County is being asked to basically pay
14 ninety percent of the bill and the State of New
15 York will be paying ten percent of the bill.

16 I would submit to you when you look at other
17 counties in the Upstate region you will see in
18 Upstate we get very little state aid as a compared
19 to Downstate.

20 Again, that contributes when I go to ask for
21 resources. I can't get them.

22 MR. HELLERSTEIN: Does that suggest to you,
23 Mr. Nowak, that the entire structure in terms of
24 county as the main provider is flawed? Do you have
25 any thoughts about a system that runs directly from

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2 the State and the State has sole responsibility?

3 MR. NOWAK: I do. And I do believe it is
4 flawed to have a county based system. My
5 conclusion is going to be that we need to look at
6 State funding and State takeover of defense
7 services.

8 The one aspect that I want to address that
9 can't be left out before I move on is the Family
10 Court area. Many defender offices don't provide
11 Family Court services, but we do in Monroe County.

12 It is a responsibility under 18B to provide
13 those mandated services. Many counties will find a
14 way to contract out, use assigned counsel and
15 whatever.

16 In Monroe County the legislature, again, gave
17 us that responsibility in Family Court. And this
18 is an area where case loads have exponentially gone
19 up and resources have not. We face in not only my
20 office, but offices in New York State that do this
21 work a serious crisis in providing adequate
22 representation.

23 MR. HELLERSTEIN: This is beyond --

24 MR. NOWAK: Abuse, neglect respondents in
25 Family Court. And so our case load has gone up

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2 from maybe eight hundred years ago to maybe two
3 thousand four hundred cases with a staff of eight
4 lawyers expected to do over three hundred abuse and
5 neglect matters each on an annualized basis.

6 It's my opinion that the case load should be
7 similar to a felony case load, somewhere in the
8 area of hundred twenty to hundred and fifty.

9 I would indicate to you when I was first
10 given this responsibility when the law was amended
11 back in 1977 the Administrative Judge of our Family
12 Court, Don Corbett came in and testified to the
13 County legislature that he believed the case load
14 should not exceed a hundred and fifty and in that
15 very first year for six hundred cases I was given
16 four attorneys.

17 It's never been the same since. As the case
18 load has grown that six hundred to twenty-four
19 hundred I have grown from four attorneys to eight
20 attorneys.

21 MS. SHANKS: Is there an investigator that
22 works just with Family Court?

23 MR. NOWAK: We have a position added to Family
24 Court. They all do Family Court work. They all do
25 criminal. So I just mentioned excessive cases.

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2 MR. HELLERSTEIN: Does the excessive case load
3 contribute to turnover in your office? Do
4 attorneys burn out more rapidly and leave your
5 office or is it fairly constant?

6 MR. NOWAK: No, I would say it is a factor. I
7 think everyone is a little bit different in terms
8 of their makeup. Some of us stay on no matter what
9 the work load is, as you know, and keep grinding it
10 out. There are others who come in to me in tears.
11 I love the job. I love the work in here. I just
12 can't do this.

13 I've had folks come in after two weeks, come
14 in after two months and two years in an emotional
15 state and just wishing they could do it because
16 it's a job they love, but they know physically and
17 mentally they can't.

18 JUDGE STACK: Mr. Nowak, you thought State
19 funding was critical. What about State oversight?
20 You certainly are familiar with defense services
21 around the State in twenty-five or more years.

22 MR. NOWAK: There's no doubt oversight in my
23 opinion would be helpful. The problem is oversight
24 needs to be done with standards in place and
25 guidelines.

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2 An example that I can give to you, and I have
3 here a letter that was sent to the Second Judicial
4 District of the United States from the Federal
5 Defender in the Western District, and I would
6 recommend to this committee you look at how Federal
7 Defender services are provided because the model
8 exists.

9 They submitted their budget for 2006. What
10 they did is they took graph of their case load.
11 All the data is provided by the court system. It's
12 sent to the Second Circuit. They said they
13 experienced an increase in case load and to comply
14 with National standard and average they needed two
15 more attorneys because there was a spike in cases.

16 In talking to the Federal Defender from the
17 Western District they will be provided those
18 attorneys because they have a case load standard of
19 seventy-five cases. Right now they are in excess
20 of that and to bring them into compliance what is
21 necessary is two more attorneys who they will get.

22 He doesn't go in to see the County Executive
23 facing requirements for cuts in funding. They
24 showed the data. Two more attorneys get added to
25 bring them in compliance with case load.

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2 The Federal defenders got a phone call. Your
3 offices are too small when we add this staff. You
4 need new offices. They don't comply with Federal
5 standards and regulations. Regulations call for X
6 amount of office space for their offices. They
7 were recently moved to a new building, new
8 accommodations because they were not in compliance
9 with Federal standards.

10 So if you have standards and if you have
11 oversight and enforceability and the power to put
12 those standards into place then I think you could
13 have a system that would work.

14 I would just like to highlight another area
15 that I think you will find in Upstate New York is
16 one that you should have some concern about, and
17 that is the work of the public defenders in the
18 local city courts or the busy village courts.

19 As my report has highlighted to the
20 legislature consistently now for the last six or
21 seven years with no additional resources being
22 given my staff is being required to handle in
23 excess of one thousand misdemeanor cases per year.

24 I think that is in my opinion outrageous.
25 National standards and goals for many, many years

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2 have said four hundred should be maximum case load
3 guideline. I cite that guideline repeatedly to our
4 budget office.

5 Our attorneys get a six month rotation now in
6 City Court. During that rotation they will pick up
7 in excess of five hundred cases and then when they
8 are done with that they go back into another part
9 one for another six months and pick up five hundred
10 more cases. One attorney is doing a thousand cases
11 in a calendar year.

12 When you ask other people in other
13 jurisdictions it is higher. It's unconscionable
14 yet common in New York State.

15 Where do we look for a solution? Where do we
16 go? I ask you please consider the Federal model.
17 I ask you to consider Assembly Bill A-5394 calling
18 for an independent public defense commission.

19 It is my hope that that bill will be
20 re-introduced this year and hopefully it will be
21 done next Tuesday on Gideon Day in Albany when I
22 and others are going to Albany to ask them to look
23 at the material problem we have in this State and
24 introduce a new version calling for a public
25 defense commission.

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2 It's my belief that commission can then take
3 a look at what's going on in New York State, what's
4 working, what's not, what can we do to improve this
5 whole situation in the State. And it may
6 ultimately lead and have the power to recommend the
7 State takeover of defense services.

8 That's where I believe ultimately we need to
9 go. But I believe the correct path to that is
10 through a State commission is independent and has
11 the time to make sure that the good things we have
12 in this State are kept in place, but the things
13 that need to be improved are.

14 MR. HELLERSTEIN: Thank you, Mr. Nowak.

15 Our next witness is Mr. Horton, Public
16 Defender in Genesee County. Welcome.

17 MR. HORTON: Thank you.

18 Before I begin with what I had prepared to
19 tell you, I'd like to follow-up on a couple things
20 Ed Nowak mentioned and put in context.

21 My practice, which is in a small county, one
22 of the things he had mentioned was the cost of
23 representing his clients in Monroe County.

24 In Genesee County we are a much smaller
25 county. We represent many fewer clients. Our

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2 budget is smaller, but surprisingly the cost per
3 client comes just about where Ed says, slightly
4 over three hundred dollars per client.

5 And I think you'll find that that is a figure
6 that you're going to see repeated from programs
7 from a number of counties, whether they are large
8 or small.

9 The other thing that I would like to
10 follow-up on as far as Ed's comments would be the
11 increase in Family Court. We also represent both
12 criminal cases and Family Court cases.

13 Our criminal court case load has remained
14 fairly steady over perhaps the past five years.
15 Our Family Court case load is increasing. And on
16 top of that programs that we are dealing with now
17 and are going to be dealing with soon increase the
18 number of appearances necessary to process a
19 matter, increase the time that an attorney has to
20 spend on an individual case.

21 Family Court in many ways is the orphan of
22 the system in that in my office my criminal court
23 staff is full-time. My Family Court staff is
24 part-time. I would prefer full-time, but the
25 funding is not there for them.

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2 And then, finally, following up on Ed's
3 comments would be with regard to State aid. In my
4 office we receive no State aid. We do have a State
5 contract to represent juveniles in juvenile
6 delinquency proceedings and PINS proceedings in
7 Family Court, which is somewhat rare and that helps
8 me to fund the adult Family Court program. And
9 that's perhaps less than ten percent of our total
10 budget, but that's a non mandated program for the
11 public defender's office.

12 So outside of that contract we receive zero.
13 All of our additional funding is from the county.

14 And now I'm going to go back to my prepared
15 statement which is a little bit more formal.

16 I have been involved in the defense of the
17 indigent during substantially all of my 29 years of
18 practice. I have been on the assigned counsel
19 panel in Genesee County, as well as Family Court
20 Law Guardian Panel. I've been an Assistant Public
21 Defender, the First Assistant Public Defender, and,
22 since 1991, Chief Defender in Genesee County.

23 Since 2000 I have served on the Board of
24 Directors with New York State Defenders'
25 Association, which has given me a view of the

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2 problems facing defense programs across New York
3 State.

4 I would like to take a portion of my time
5 today to discuss the state of public defense in New
6 York State as a whole and a portion to state my
7 problems and hopes for Genesee County.

8 The public defense system in New York is in
9 wretched condition. Our clients deserve nothing
10 less than competent, thorough and zealous
11 representation.

12 The system of public defense that has built
13 up over time in this State conspires to prevent
14 dedicated, well-meaning defense attorneys from
15 adequately representing their clients.

16 The basic flaw in our system is that each of
17 the 62 counties in the State independently decide
18 what shape their public defense system will take
19 and how well or how poorly it will be funded.

20 Imagine what the court system would look like
21 if each county decided how many judges it would
22 have, what support staff they would have, what they
23 would be paid and what facilities they would have.

24 This is exactly how the public defense system in
25 the State of New York functions.

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2 As a result, there is a huge disparity from
3 county to county in the quality of the services
4 that are rendered.

5 In the best of circumstances the client is
6 assigned an attorney whose caseload is too large to
7 be able to investigate each case and be able to
8 represent each client as they should. This is
9 wrong.

10 This carries out neither the intent of the
11 constitutional right to counsel nor the
12 responsibilities of the State to its citizens. The
13 citizens of this State deserve better.

14 The right to counsel should not be measured
15 by what is good enough, but rather by what is the
16 best practice, and there is no best practice
17 standard in the State of New York Public Defense
18 programs.

19 We need enforceable, statewide standards that
20 deal with issues such as adequate staffing to meet
21 caseload, adequate training opportunities, adequate
22 support staff such as investigators, paralegals and
23 social workers.

24 We need an independent agency to provide
25 oversight of both the appropriation of funds and

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2 the delivery of services.

3 Today Mr. Nowak mentioned to you the New York

4 State Public Defense Commission Act, and I know

5 it's been mentioned to you in testimony in prior

6 hearings.

7 This legislation would cure many, if not all,

8 of the ills that I talk about. I urge you to look

9 favorably on this bill until the day there is a

10 State Public Defense Commission. I urge you to

11 support the continued funding of the New York State

12 Defenders Association which provides invaluable

13 assistance to defense programs across the state to

14 counties like my own through training, technical

15 assistance and research.

16 Over the past five years the New York State

17 Defenders Association has been funded each year in

18 the State budget and has had to rely on adds to the

19 budget.

20 And now to Genesee County. When I first

21 joined the Genesee County Public Defender's Office

22 in the late seventies it consisted of two part-time

23 attorneys, no support staff, not even a secretary,

24 and no County provided office space or equipment.

25 Today, the office consists of four full-time

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2 attorneys, two part-time attorneys, a clerical
3 staff and a case manager/social worker all housed
4 in County provided office space.

5 In addition to criminal cases, we now handle
6 Family Court representation of adults and juveniles
7 by contract with OCA.

8 While this may sound as if there has been
9 substantial progress, it is still not sufficient to
10 provide the type of representation that we should
11 for our clients.

12 All of the attorneys in the office should be
13 full-time so that there are no divided loyalties
14 or juggling of responsibilities. The office should
15 have a full-time investigator.

16 The Family Court in Genesee County has
17 started a model court program for tracking abuse
18 and neglect cases, and will be instituting an adult
19 drug court and integrated domestic violence court
20 in the near future. These programs while being
21 potentially beneficial for our clients, require
22 many more court appearances than the more
23 traditional processing of a case and will be
24 difficult, if not impossible, to staff with my
25 current personnel.

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2 During my tenure as Public Defender, I have
3 attempted to institute a client centered program.
4 Client centered meaning listening to the client and
5 to the client's family and treating all of the
6 client's problems rather than just the charge.
7 Treat them as a human being attempting to meet the
8 client's needs.

9 Through a team approach of the defense
10 counsel and case manager in collaboration with
11 treatment programs and community groups we seek to
12 address such problems as mental illness, substance
13 abuse, educational deficiencies, substandard
14 housing and entitlement denials that contribute to
15 criminal activity.

16 By addressing such problems, we seek to
17 provide our clients with the tools and capability
18 to avoid re-arrest.

19 Our ability to be truly client centered,
20 however, is limited by the statutory mandate
21 contained within New York State County Law, which
22 basically provides the public defender's office can
23 only provide representation of the indigent in
24 criminal proceedings and certain Family Court
25 proceedings.

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2 Due to these restrictions, we are unable to
3 pursue for our clients all of the things that
4 relate to the case that brings them into our
5 office. We can't do educational advocacy on behalf
6 of juvenile clients. We can't seek administrative
7 review of entitlement determinations; Medicaid, et
8 cetera, which deal with our ability to get our
9 clients the help they need.

10 We can't deal with housing issues including
11 eviction, housing code violations, housing
12 discrimination, et cetera.

13 We can't even perform post disposition
14 follow-up of clients. We can't provide re-entry
15 programs for clients who are incarcerated locally
16 or in the State system who will be returning to our
17 community.

18 We can't bring special litigation where
19 necessary to address systemic issues and can't deal
20 with immigration issues. Although we have a
21 significant resident alien population in our county
22 of farm workers.

23 To be able to mount this type of program
24 would require a re-thinking of the role of public
25 defense in the justice system, just as treatment

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2 courts have required re-thinking of the role of the
3 courts.

4 Such programs exist. My model has been the
5 Bronx Defenders' program. Such programs need not
6 be limited to urban areas or a few model offices.
7 They are needed in the rural context as well.

8 MR. HELLERSTEIN: How about simple visitation
9 of clients in jail, are your attorneys, are they
10 able to visit them as they need to to discuss their
11 cases?

12 MR. HORTON: To a great extent I don't view
13 that as big a problem in our county because, again,
14 we are dealing with smaller numbers, a smaller jail
15 which is less bureaucratic.

16 Our case manager, one of the purposes of that
17 position is that she visits the jail every day to
18 determine if there are new people in the jail that
19 we have been assigned to that we don't know about
20 from courts yet. And I do think - our clients
21 might not agree - I think my attorneys visit their
22 jail clients as frequently as they should and need
23 to. The clients may not agree.

24 MS. ZULFLACHT: What's the physical size of
25 your county?

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2 MR. HORTON: 62,000 people.

3 MS. ZULFLACHT: Size wise are there a number
4 of justice courts you have to cover?

5 MR. HORTON: A number of courts we have to
6 cover. None -- the longest distance one justice
7 court to another is thirty miles. So it's a
8 compact county.

9 MS. SHANKS: What's the pay scale of your
10 attorneys compared to the district attorney?

11 MR. HORTON: That's an interesting question.
12 If you look at the county budget we are on the same
13 step and grade, my assistants and assistant
14 district attorneys, my First Assistant and the
15 First Assistant District Attorney. But because the
16 District Attorney is able to secure grant monies
17 for various initiatives, domestic violence
18 initiatives.

19 Two years ago he obtained a grant with regard
20 to gun crimes. We don't have a lot of drive-by
21 shootings in Genesee County, but those grants allow
22 him to add to the base common salary. So everybody
23 in the DA's office earns more in a like position
24 than my assistants do.

25 JUDGE STACK: Are there no grants available

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2 for defense services or is the getting of the grant
3 require almost a full-time person?

4 MR. HORTON: Getting of the grants is
5 difficult, but I think what you will find in any of
6 these initiatives; domestic violence, gun violence,
7 even down to DWI enforcement there is a prosecution
8 component. There is no defense component.

9 And each program that comes at us is like a
10 train coming through a tunnel because we know we
11 are going to have to staff the court appearances
12 required by these initiatives which are going to
13 increase arrests, going to increase court
14 appearances, but our funding is not increased.

15 MR. HELLERSTEIN: Even though specialty courts
16 come on you don't get commensurate increases at all?

17 MR. HORTON: I was instrumental in a drug
18 court being established in Genesee County, Batavia
19 City Court in 1999. I thought it would be good for
20 my clients. I wanted to see it happen and we did
21 receive a federal grant.

22 There was no defense component of that and
23 really the way I staffed that court is that I
24 staffed it.

25 MR. HELLERSTEIN: Okay. Thank you very

1

2 much.

3 MR. HORTON: Thank you.

4 MR. HELLERSTEIN: Our next witness, Mr.

5 Andrew Correia, Wayne County. Welcome, Mr.

6 Correia.

7 MR. CORREIA: Thank you.

8 JUDGE STACK: Before you begin, could you tell

9 us what city you're located in? We don't know all

10 the areas.

11 MR. CORREIA: Wayne County is just to the east

12 of Monroe County. Lyons is the seat. It's a very

13 rural county, about ninety thousand people. Three

14 County Court judges, twenty-one justice courts,

15 thirty-four local court judges, about four or five

16 of which are lawyers. The rest are lay judges.

17 I'm an Assistant Public Defender in Wayne

18 County right now. I've been a public defender for

19 about seven years now and over the last seven years

20 I have been able to see the delivery of indigent

21 defense services in almost every variation that

22 there is.

23 I was an intern down in Binghamton and Broome

24 County Public Defender, appeared in front of Judge

25 Smith about ten years ago. I'm sure he doesn't

1

2 remember me.

3 JUDGE SMITH: Yes, I do.

4 MR. CORREIA: Good. I'm not sure if that's

5 good or not.

6 I was a law student in New York City and I
7 worked as an intern for the capital defense office,
8 also in the Legal Aid office.9 I went from law school to the New Hampshire
10 Public Defender where I worked three and a half
11 years. What's very interesting about the New
12 Hampshire Public Defender in terms of the
13 conversation we are having today is that it is a
14 private law firm and it has a contract to supply
15 indigent defense services for the entire state. It
16 has a central office. It has eight regional
17 offices.18 Maybe a little easier to set up a program
19 like that in a small state like New Hampshire where
20 it's about a million people, but that was a good
21 experience to be in that environment.22 Now I'm at the Wayne County Public Defender.
23 Smaller office, couple of full-time attorneys.
24 Rely heavily on part-time attorneys as well, but
25 what I want to do is focus on five issues.

1

2 The first three I just want to discuss
3 briefly really just kind of touch upon and then
4 spend more time on the other two.

5 I feel compelled every time I have the chance
6 to talk to somebody about the criminal justice
7 system to talk about criminal discovery in New York
8 and what -- I hesitate to use the word joke, but I
9 just used it.

10 If you sue somebody over a large sum of money
11 you get every piece of paper, you get depositions.

12 If you're charged with murder the State essentially
13 gets to hide the ball on you until the very last
14 second and that is our system.

15 True open file discovery would save us all a
16 lot of time, money and effort. Plea bargain
17 agreements, knowing plea bargain agreements could
18 be reached a lot sooner. Less litigation is my
19 belief.

20 If witness statements, police reports, grand
21 jury minutes were produced to the defense
22 immediately upon indictment or as soon as possible
23 thereafter and the cases that should go to trial
24 they would still go to trial, but overall the whole
25 system would be a lot more just if the information

1

2 was handed over.

3 Second, I do want to, you've heard repeatedly
4 about statewide commission and how a statewide
5 office would be a good idea.

6 I want to join in that chorus. I
7 wholeheartedly agree with that. 62 counties, 62
8 systems, haphazard patchwork, inefficient use,
9 whatever terms you want to describe it. It seems
10 it's not the best way to do it.

11 It should be completely overhauled. The
12 mandatory standards proposed by New York State
13 Defender's Association have a lot of merit. I
14 think it should be one of this Commission's highest
15 priorities.

16 Next subject I want to touch on briefly is a
17 subject that is near and dear to my heart. Student
18 loan forgiveness.

19 When I went to law school myself and my
20 classmates came out, many of us with six figures in
21 debt. And it is extraordinarily difficult to
22 dedicate yourself to this profession in indigent
23 defense when faced with that kind of crippling debt.

24 MR. HELLERSTEIN: Can I ask what law school?

25 MR. CORREIA: NYU. I knew what I was getting

1

2 into. I don't want to complain in that sense, but
3 it doesn't go away, at least not for twenty some
4 odd years.

5 My point is some sort of student loan
6 forgiveness would contribute to keeping talented
7 people in these jobs. Would it come through the
8 State or Federal system? I've heard it discussed
9 for prosecutors from time-to-time.

10 It was to my knowledge a proposed portion of
11 the Innocence Protection Act that was recently
12 passed by Congress, but as far as I can tell, the
13 student loan forgiveness portion of that act
14 managed to get cut out before the bill was actually
15 passed and into law.

16 A demonstrated commitment over a period of
17 time to public interest work merits an easing of
18 educational debt.

19 Okay. The next thing I want to talk about is
20 I would encourage the Commission to do what you can
21 to change the approach to what constitutes the
22 right to counsel.

23 A lot of times historically, especially in
24 this State there's been an artificial division
25 between you have a lawyer, that's your right to

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2 counsel.

3

Services other than counsel, investigation,

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mental health experts, social work treatment

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advocates, that's part of counsel. Now, and I want

6

to make an analogy to the U.S. Supreme Court

7

recently citing evolving standards of decency when

8

they talk about limiting the death penalty in some

9

circumstances.

10

If you look at the American Bar Association,

11

the New York State Defenders, National Association

12

of Criminal Defense Lawyers and LADA, in the last

13

ten years they have all promulgated different

14

standards about what it means to provide defense

15

services effective, holistic defense services.

16

I think there's an evolving standard of

17

expectation about what defense counsel means and

18

what your obligations are to your clients.

19

Now, we need to do more for our clients.

20

More is expected of us than ever before and I want

21

to talk in detail about a couple of different

22

things.

23

Investigation, everybody knows Perry Mason

24

would go to trial. He would get that last bit of

25

information from his investigator and win the case.

1

2 Okay. Everybody knows Perry Mason.

3 Does anybody know what his Investigator's name
4 was?

5 JUDGE MURPHY: Paul Drake.

6 MR. CORREIA: Thank you. So Paul Drake is his
7 Investigator. The reason I bring that up, I'm
8 fortunate in Wayne County, we don't have a crushing
9 case load.10 I feel like I can spend time on my cases. We
11 had nearly two thousand cases last year. Pales in
12 comparison to Monroe County, I understand that. We
13 have one full-time investigator and I tell you I
14 feel lucky we have him given the state of criminal
15 defense in New York State right now.16 I don't want to lose sight of the fact, less
17 we lose sight of disparity in resources. Despite
18 the fact I'm happy to have a full-time investigator
19 our counterpart at the Wayne County District
20 Attorney's Office, they have one time full-time
21 investigator.22 They also have on-call the State Police;
23 County Sheriffs, including jail staff that conduct
24 investigations sometimes depending on the case; the
25 FBI; a medical examiner's office in Monroe County

1

2 that have their own investigators; an entire
3 forensic unit for DNA, ballistics, fingerprint
4 testing.

5 Every police department in the county is
6 responsive to the District Attorney, Grand Jury
7 with subpoena power and fairly easily available
8 grant monies from Federal, State and private
9 organizations.

10 Judge Stack, you asked about grant monies. I
11 have spent a fair amount of time trying to track
12 down grant monies for my office and I've had a very
13 hard time. Very hard time.

14 Not for lack of trying, but given that
15 disparity in resources no one in their right mind
16 would believe this is a fair fight. No one.

17 I don't want to just focus on the cases that
18 go to trial. That is absolute bear minimum. Most
19 people you think you investigate a case to go to
20 trial. That's the end result in five to ten
21 percent of the cases.

22 How about the other ninety to ninety-five
23 percent of cases that don't go to trial? You need
24 investigative resources to help your client make a
25 rationale decision what to do with the case before

1

2 they go to trial. And they are at risk for much
3 higher sentence than they might be if you know the
4 facts.

5 That gets back to discovery. Because
6 discovery is so limited, investigative resources
7 are more limited in this state because you have to
8 investigate everything and reconstruct the case
9 yourself to some degree.

10 The only way to substantiate actual innocence
11 when it comes along, and it does come along from
12 time-to-time, or even just to attempt to level the
13 playing field is to do a thorough, time-consuming
14 investigation that takes trained, experienced
15 staff. And that means money. There's no way
16 around it.

17 Mental health experts, essentially the same
18 thing, but it's even accentuated in the public
19 defender's office or indigent defense system
20 because the people who require our services
21 frequently have mental health issues, acute mental
22 health issues. That's why they have come to our
23 office. That's why they need us.

24 And all these clients, even the ninety to
25 ninety-five percent, have a right to have these

1

2 issues investigated, identified and evaluated by
3 skilled, confidential people.

4 Same thing with treatment and mitigation
5 experts. Drug court has come up a couple of times.
6 I think drug court is a great example of
7 expectations that is coming upon us now.

8 As defense counsel drug court has taught
9 everybody about addiction. It's taught everybody
10 about a need for placement in effective,
11 appropriate treatment.

12 Staff at the public defender's office should
13 be able to facilitate social work histories, mental
14 health histories, family mental health histories,
15 documentation of that and placement in appropriate
16 treatment.

17 My point is, right now the assigned counsel
18 rates have been increased and you have seen how
19 counties are forced to react to that. Setting up
20 offices that may not have the resources necessary
21 to achieve these goals, that is tragic.

22 What used to be considered collateral
23 services are truly anything but collateral. There
24 is absolutely no services, no substitute for that.

25 MS. SHANKS: Did they set up a conflict office

1

2 in your county?

3 MR. CORREIA: It has been discussed since the
4 increase in assigned counsel rates. Virtually
5 every option was discussed from disbanding the
6 public defender office to creating a conflict
7 office in our county. We don't even have an actual
8 assigned counsel administrator.

9 The courts are kind of left on their own.
10 They have a list and make phone calls on their own
11 to bring in people for assignments of these cases.

12 That leads to a delay, big delay which is
13 especially a problem in felony cases when time
14 lines begin pretty quickly. Our County has looked
15 into it, but no move had been made yet.

16 My understanding they are waiting to see how
17 numbers come back and how much assigned counsel
18 costs. I don't mind saying I am concerned if
19 conflict defender office is set up it wouldn't have
20 county's incentive is to manage the bottom line.

21 I understand that, but we need to aspire to
22 do more than that.

23 MR. GOLDMAN: Let me ask you how you would
24 want this to work. I mean, you want mental health
25 experts and the like. How many prosecutors are in

1

2 your office?

3 MR. CORREIA: Defenders. Two full-time. The
4 head public defender is actually a part-time
5 employee and six part-time beside.

6 MR. GOLDMAN: Obviously you don't expect a
7 full-time mental health expert or full-time --

8 MR. CORREIA: I'm willing to start slow. I
9 would take a social work mitigation person would be
10 the first reasonable step. Someone who can
11 evaluate, is familiar with treatment system to
12 assign, find out and apply for spaces at treatment
13 program would be a great first step.

14 MR. GOLDMAN: Given your case load that's a
15 good step?

16 MR. CORREIA: A hybrid investigator slash
17 social work mitigation expert. It's not that
18 unusual to have a mitigation expert in the capital
19 arena that can handle a lit bit of both sides.

20 MR. GOLDMAN: Let me ask a global question.
21 Would there be sense to have a regional defender,
22 some offices handling six rural counties maybe
23 total population of the two hundred and fifty to
24 three hundred which would have at least one person
25 in mitigation, one person social work?

1

2 MR. CORREIA: I do think that would make some
3 sense.

4 Obviously there's a huge division in New York
5 State between Downstate and Upstate and even the
6 pockets of population across the center of Upstate.
7 There's going to be big differences in rural
8 problems. I think the problem you will run into
9 logistically let me answer your question about me.

10 Regional office would make sense. It would be
11 hard to consolidate and make it a full-time
12 position. You'll have a problem with far flung
13 nature of the counties.

14 In my own county so many justice courts then
15 you're talking about a different kind of overhaul
16 which I was going to talk about today, I chose not
17 to, but one thing consolidating local courts would
18 be an answer to that.

19 MR. GOLDMAN: Can you speak just a few
20 seconds, one of the problems a lot of us have seen
21 is that there is no representation in village
22 courts. Someone is brought in. No attorney. Case
23 put over for a week for counsel, languish in jail
24 on some cases, one case fifty thousand dollars
25 bail, for something minor maybe five hundred

1

2 dollars bail.

3 MR. CORREIA: Right now to avoid that problem

4 you're talking about staffing the court full-time

5 having an attorney there on call on a regular

6 basis.

7 MR. GOLDMAN: Do you cover all these village

8 and town courts?

9 MR. CORREIA: I'm assigned myself to three

10 different courts, local courts in the county and

11 also assigned to one County Court docket and also I

12 am assigned to drug court in my county and also

13 providing support to the part-time attorneys.

14 MR. GOLDMAN: Does this kind of thing happen,

15 are people arraigned in village courts without

16 counsel?

17 MR. CORREIA: People are arraigned constantly

18 without counsel. Arrested, brought in in the

19 middle of the night. Obviously they are not there.

20 We are given notice the next day because we

21 have a computer hook up at the jail. People are

22 booked in and we have a staff person that goes to

23 visit them as soon as possible, twenty-four,

24 forty-eight hours at the jail.

25 We are given information and excellent

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2 pretrial release agency in our county and in minor
3 cases we can a lot of times get them out quickly,
4 but attorneys are rarely there for arraignment,
5 virtually never.

6 MR. HELLERSTEIN: Does it happen in your
7 county where some defendant him or herself will
8 negotiate a plea with the District Attorney without
9 ever having an attorney?

10 MR. CORREIA: Absolutely.

11 MR. HELLERSTEIN: How frequent?

12 MR. CORREIA: Local courts?

13 MR. HELLERSTEIN: Yes.

14 MR. CORREIA: It's extraordinarily difficult.
15 We are never involved. I've heard about it and the
16 way I hear about it sometimes frequently on motor
17 vehicle cases, on misdemeanor charges somebody
18 comes in with an AUO third misdemeanor driving
19 without insurance charges that judges shouldn't be
20 taking pleas on without doing a search and inquiry
21 about their right to counsel and whether they
22 really want counsel.

23 And then they get another ticket few months
24 later, look back in the record and say who was your
25 lawyer for that. I didn't have one. I just asked.

1

2 DA, he let me plead and he said okay.

3 MR. ELMORE: The question I have for you, you

4 talked about statewide public defender office. How

5 would you propose assigning salaries given the

6 disparity in the cost of living Downstate versus

7 Upstate?

8 MR. CORREIA: That is a very difficult

9 question. And I have to be honest with you, I have

10 given that question absolutely no thought at all.

11 I could make something up.

12 The cost of living in New York City, I have

13 lived there, I know what it's like. The salary I'm

14 making now at the Wayne County Public Defender

15 would have me on the street in New York City.

16 So that is a significant problem that I don't

17 have an answer for you right now.

18 MR. HELLERSTEIN: Thank you.

19 MR. CORREIA: Do I have one minute?

20 MR. HELLERSTEIN: One minute.

21 MR. CORREIA: I just want to say we have been

22 talking about money. I've had to speak to money

23 here. My final analysis of this this is not about

24 the money.

25 This is about setting priorities and finding

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2 the political will to do the right thing. I hope
3 this Commission will take the opportunity to go
4 back to Albany and remind them again and again and
5 again that this system is not working. It needs to
6 be changed. When they decide that I guarantee you
7 the money will appear.

8 MR. HELLERSTEIN: Thank you.

9 MR. CORREIA: Thank you.

10 MR. HELLERSTEIN: Next is Sanford Church.

11 MR. CHURCH: Good morning.

12 MR. HELLERSTEIN: Good morning. Orleans
13 County Public Defender.

14 JUDGE STACK: Mr. Church, could you tell us as
15 the prior speaker did, give us some geographic
16 focus.

17 MR. CHURCH: I have to confess I've been here
18 five minutes. I'm from Orleans County, a county of
19 about forty thousand people.

20 MS. SHANKS: Give us the city.

21 MR. CHURCH: There is none. Albion is the
22 County seat. Twenty miles north of Genesee County.
23 Thirty miles west of Monroe County. Between Monroe
24 and Niagara basically right on Lake Ontario.

25 We are real small.

1

2 MR. HELLERSTEIN: What problems do you have?

3 MR. CHURCH: The one I just heard mentioned,

4 people arrested sitting in jail without attorneys

5 and, in fact, in our county that could easily

6 happen for twenty-nine days probably.

7 That's in our county. I don't think ours is

8 the only county where one night a month we have I

9 think about twelve towns and villages in the

10 county. Translates into about twenty to

11 twenty-four justice court sessions a month where

12 there's a representative from the District

13 Attorney's office and a representative from my

14 office at the sessions.

15 A lot of the towns have two judges. They

16 each sit basically once a month.

17 MR. HELLERSTEIN: How large is your office?

18 MR. CHURCH: I have three total attorneys.

19 MR. HELLERSTEIN: Full-time?

20 MR. CHURCH: All part-time. I have one staff

21 person who is full-time.

22 JUDGE MARKS: For the record, I'm Judge

23 Patricia Marks from Monroe County.

24 Mr. Church, do you have any practice within

25 your office whereby you have contact with the jail

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2 or if there's a pretrial services organization in
3 your county where you check to see if someone is
4 sitting in jail without a lawyer, without
5 representation, without an adequate bail
6 application?

7 MR. CHURCH: There's no pretrial services
8 organization of any type in the county.

9 The ones we definitely hear about real
10 quickly, although it takes sometimes twenty-four to
11 forty-eight hours for the courts to get us the
12 felonies where there should be maybe criminal
13 hearings, that type of thing.

14 Other than that it's informal jail calls if
15 someone is sitting there. There is no formal
16 system where town justices notify us.

17 JUDGE MARKS: What about the jail
18 superintendent or sheriff, your relationship with
19 them where they might call you and say, you know,
20 Will Hellerstein has been in jail ten days without
21 a lawyer.

22 MR. HELLERSTEIN: Thank you, Judge.

23 JUDGE MARKS: Just an example. Do you have
24 that type of relationship? I know Monroe County
25 does.

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2 MR. CHURCH: I have such a good relationship
3 where I'm sure that could be set up. It's just
4 sheriff's department as opposed to town judges.
5 Yeah, I'm sure we could without much work at all
6 actually sit down with them.

7 MR. GOLDMAN: Let me ask you this: If there
8 were a legal requirement where state and local
9 departments of corrections and sheriffs were
10 required to notify the local public defender's
11 organization if someone was arrested without
12 counsel would it work, would they do it?

13 MR. CHURCH: Yeah, sure. You're saying the
14 Court or the arresting agency? The Court, they
15 would do it, it's just it would take time.

16 OCA has done a good job instructing the town
17 judges and bringing the quality of what they do up
18 over the years. It takes time to get them to
19 understand, and their staff.

20 MR. HELLERSTEIN: Do you have a lot of farm
21 workers in your county?

22 MR. CHURCH: Yeah.

23 MR. HELLERSTEIN: Do you have special
24 problems in terms of language?

25 MR. CHURCH: Yes. The language, yeah. It's

1

2 more -- I think it's more cultural thing than
3 language, but language creates an extra problem. A
4 lot of them might be illegal in the country,
5 migrant workers coming up.

6 They don't completely understand English and
7 what's being said to them.

8 MR. HELLERSTEIN: How does your office deal
9 with that?

10 MR. CHURCH: We usually end up using -- the
11 courts are getting much better about having
12 certified interpreters present at the court, again,
13 on the DA nights and the PD nights.

14 MR. EPPLER: What do your lawyers do?

15 MR. CHURCH: We have to either use those
16 interpreters. I do all the felonies and that's
17 what I mostly do. The judge let's us go in the
18 back with the court interpreter if we need to do
19 that.

20 We have had cases obviously where they are in
21 the jail. I don't have an interpreter on staff. I
22 don't have any attorneys who speak Spanish.

23 I do it case by case. I try to find --
24 there's a volunteer organization that helps out
25 with farm workers. If we need it they'll supply.

1

2 It gets touchy sometimes on type of case and what
3 you're talking about.

4 Lots of times family members want to do it.

5 I'm real leery of that particularly on the most
6 serious cases.

7 MS. SHANKS: How do you address the
8 immigration issues if the interpreter is hired by
9 the court? How do you discuss that with them prior
10 to the court?

11 MR. CHURCH: So far I just discuss it with
12 them in private, get an understanding it's
13 confidential. Again, there's also interpreters for
14 the court. All they do is sit there and interpret
15 for the court.

16 MR. EPPLER: What about investigators, do you
17 have access at all to any investigator?

18 MR. CHURCH: I have three thousand dollars in
19 my budget that I can use to hire an investigator.
20 I do it case by case.

21 JUDGE SMITH: Do you have a staff member that
22 goes to the jail every day?

23 MR. CHURCH: No. In Orleans County we have --
24 I was trying to count the number of attorneys with
25 offices in our county. I think it's seventeen

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2 total lawyers in the county. Of those maybe five
3 of us do criminal defense work leaving three or
4 four total available to do assigned work and then
5 me as assistant.

6 My two assistants, neither one of them live
7 in the county. At the time I was hiring nobody in
8 the county wanted them. So they are in far
9 reaching counties part-time. They are getting
10 pretty low salaries. I do not have anybody set up.

11 JUDGE SMITH: Do you have a sense for, any
12 sense at all, for how long defendants arrested on
13 felony charges who have to be remanded by local
14 judges to the jail, how long they sit in jail
15 before they have a bail appeal heard in County
16 Court or have an attorney talk to them?

17 MR. CHURCH: There are two separate questions.
18 Generally speaking the practice in Orleans County
19 would not involve a bail application in County
20 Court.

21 Quite frankly, the cases that I end up with
22 the District Attorney and I will talk about them
23 and bail might be revised in local court, but no
24 process where there's a bail review in superior
25 court. They get arraigned in local court, get set

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2 down for another appearance in local court.

3

JUDGE SMITH: Well, yeah, but my question I
4 guess do you have a sense how long they are sitting
5 in the county jail?

6

MR. CHURCH: Some of them could sit -- you
7 mean without bail being adjusted or because they
8 can't post bail?

9

JUDGE SMITH: I'm thinking more in the lines
10 of a 180.80 motion.

11

I mean a felony hearing has to occur within X
12 amount of time or the defendant -- are the
13 defendants even aware of this when they are
14 arraigned in local courts?

15

MR. CHURCH: The practice in our county right
16 now when the town judges are arraigning the
17 defendants, quite frankly, I'm not sure all of them
18 have figured out where they are assigned.

19

They set preliminary hearings right away, give
20 a date, securing order will say come back for
21 preliminary hearing that day. Then what happens if
22 they get to my office I talk to the DA, a lot of
23 them get taken care of with bail reductions.

24

I don't always go to jail to talk to the guys.

25

I communicate by phone or get a message bail is

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2 down, whatever it is, that kind of thing.

3 Frequently end up reserving on preliminary hearing

4 so jurisdiction stays in local court.

5 JUDGE SMITH: To facilitate a negotiated plea?

6 MR. CHURCH: Hopefully.

7 MS. SHANKS: How many trials do you have per

8 year, you and your assistants?

9 MR. CHURCH: A handful in County Court. Last

10 year I did one all the way from the beginning to

11 the end. I may have started one or two others that

12 started quickly because they ended in pleas. I've

13 been doing this I think in my seventh year

14 consistent at the felony level.

15 At lower court level I have two assistants,

16 two, three trials a year for them.

17 JUDGE STACK: What do you do in cases of

18 conflict, who do you call on?

19 MR. CHURCH: The way the system is set up in

20 our county we report to the judge. Each judge has

21 their own list of people.

22 If we see a conflict we tell the judge. The

23 judge or their clerk has their own list of

24 attorneys that might take assignments from that

25 court.

1

2 MS. ZULFLACHT: Are the defendants able to
3 call you from jail?

4 MR. CHURCH: Yes.

5 MS. ZULFLACHT: Collect?

6 MR. CHURCH: No.

7 MS. ZULFLACHT: Do they have to pay for the
8 call to you?

9 MR. CHURCH: Maybe five years ago there was a
10 problem, but from county jail they do not have to
11 pay to call and they do.

12 JUDGE SMITH: You just indicated that the
13 judges do the assigning and they have their own
14 lists of assigned counsel?

15 MR. CHURCH: Yes.

16 JUDGE SMITH: How does an attorney in your
17 county get on the list?

18 MR. CHURCH: I think all they do is call 'em.

19 JUDGE SMITH: The judges, you indicated are
20 all lay judges?

21 MR. CHURCH: In our county all but one.

22 I have, for what it's worth, I think with law
23 guardians, guardians ad litem there could be
24 some -- could be some suggestion would be basic
25 training type thing could be done before they get

1

2 on the list.

3 A lot of them issues you still only get,

4 despite increase in assigned counsel rate, you only

5 get a certain level of experience.

6 Certainly out in Orleans County certainly,

7 again, where we have a limited pool they miss

8 stuff, whether it's youthful offender or things

9 like that.

10 MS. SHANKS: Do you do training?

11 MR. CHURCH: Yes, I do it. I don't have big

12 formal training.

13 MR. ELMORE: John Elmore from Buffalo. I made

14 a few appearances in your county. Largely white,

15 but many African-American defendants. How many

16 African-Americans defendants in your county?

17 MR. CHURCH: I don't keep that stat. I would

18 say felonies I would say fifty percent or higher.

19 Quite recently we are seeing a lot of crack cocaine

20 arrests. Those are almost one hundred percent.

21 MR. ELMORE: African-Americans are outside the

22 county like from Buffalo?

23 MR. CHURCH: More and more.

24 MR. ELMORE: Does that bring cultural

25 differences between rural attorneys that don't have

1

2 contact with African-Americans? When I come to
3 your county they cling to me.

4 MR. CHURCH: Not only are lawyers white I have
5 male and female both white. All judges are white.

6 MR. ELMORE: Everybody that lives in the
7 county is white.

8 MR. CHURCH: Just about.

9 MR. ELMORE: But fifty percent of the case
10 load is African-American.

11 MR. CHURCH: That's off the top of my head.

12 MR. HELLERSTEIN: We asked you a lot of
13 questions, haven't heard you tell us, do you have a
14 wish list given that you are a rural county
15 practitioner, what would you like to have to
16 deliver services in the context of your county to
17 meet the standards that you had shared?

18 MR. CHURCH: Well, I was going to address it,
19 he didn't want to. I think one of the things that
20 would help, probably never happen is to somehow
21 consolidate, reduce the number of justice courts.

22 We can have some courts where there is five
23 cases. We have to have a staff person both DA and
24 PD's office staffing it. Their time could be more
25 efficiently spent somewhere else.

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2 In Orleans County there's no cities, two,
3 three villages. Two village courts.

4 They started last time two towns did go
5 together, consolidated their courts. Two other
6 towns are starting to do it again.

7 Just if we could get that number down then I
8 think you could increase the frequency of DA
9 nights.

10 The answer to the jail question is not an
11 easy one because, again, with part-time staff
12 everybody full-time and that's money stuff. You
13 have to figure out how to do it and, obviously, I
14 would prefer to have a couple full-time people.
15 That's way up on the wish list. I don't know how
16 it would ever happen.

17 MR. HELLERSTEIN: I think that's what we are
18 sort of trying to do here, but you're saying that
19 what kind of staff given case load you have in your
20 county, what kind of a full-time staff would you
21 want so that you could enjoy your practice and
22 deliver Sixth Amendment Gideon promises?

23 MR. CHURCH: Two I guess.

24 MR. HELLERSTEIN: That's all?

25 MR. CHURCH: Just so you understand out here

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2 case load DA reported, last report filed in Albany
3 twelve hundred total prosecutions for the year and
4 there's maybe a hundred up at the superior court
5 level, indictments, SCIs, the whole year and we
6 maybe get two-thirds of them. So for my office,
7 and then maybe another hundred or so that are
8 assigned out maybe.

9 So we are not talking huge numbers.

10 JUDGE SMITH: Twelve hundred criminal filings
11 local as misdemeanors and felonies?

12 MR. CHURCH: I think that's what I saw on that
13 report.

14 JUDGE SMITH: Your office does two-thirds,
15 eight hundred?

16 MR. CHURCH: Right.

17 JUDGE SMITH: Two part-time assistants?

18 MS. ZULFLACHT: You're full-time.

19 MR. CHURCH: Part-time. They get twenty-six,
20 thirty thousand is about where they are at right
21 now.

22 JUDGE SMITH: If I may ask how much your
23 part-time assistants, how much time in a week would
24 they put into it?

25 MR. CHURCH: Most of the court sessions they

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2 cover the way I have it set up I basically do all
3 felony stuff during the day. They do night court
4 stuff.

5 Only one justice court meets during the day in
6 Orleans County. So I figure they have about twelve
7 sessions a month or three a week almost on average
8 where they are out in various night courts and, you
9 know, two, three hours depending on what calendar
10 is.

11 Even if it's five on the calendar it takes an
12 hour or two to get through it.

13 JUDGE RUSSELL: I'm Robert Russell, Judge
14 Russell, from Buffalo.

15 Are some individuals detained in a local
16 police station for a period of time prior to being
17 transferred to county jail? Are there holding
18 facilities where you may not even know?

19 MR. CHURCH: Other than a few hours?

20 JUDGE RUSSELL: Yes.

21 MR. CHURCH: No.

22 JUDGE RUSSELL: So the practice in your county
23 upon arrest they are processed at the county
24 facility?

25 MR. CHURCH: Yeah. They wait for town justice

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2 down wherever they are, get arraigned and stuff and
3 then they go. There is no place like overnight if
4 that's what you're asking.

5 JUDGE RUSSELL: Yes.

6 MR. CHURCH: No.

7 JUDGE RUSSELL: So arraignment will usually
8 happen several hours after arrest?

9 MR. CHURCH: They call guys down three in the
10 morning, arraign them. Not with an attorney. They
11 arraign them and then put them in county jail.

12 JUDGE SMITH: Do you see a high bail being set
13 by local court judges, lay judges on misdemeanors?

14 MR. CHURCH: No -- well, for our clients they
15 are usually indigent. Almost any bail is high.
16 Thousand, two thousand tops is what I see. A lot
17 of them are a lot less than that.

18 MR. HELLERSTEIN: Thank you.

19 MR. CHURCH: They do set them, couple of them
20 do it on felonies as soon as they see prior felony
21 conviction there's no bail. We can fix it, but we
22 have to get on board with the DA's office and do
23 it.

24 MR. HELLERSTEIN: Thank you, Mr. Church.

25 MR. CHURCH: Okay. Thank you.

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2 MR. HELLERSTEIN: Next witness, Ray Kelly on
3 behalf of the National Association of Criminal
4 Defense Lawyers.

5 MR. KELLY: I'm President Elect of Criminal
6 Defense Lawyers, New York State affiliate of the
7 National Association. Malia Brink was supposed to
8 be here. I don't know what happened.

9 We have prepared remarks given to everybody,
10 passed them out. I don't like to read things. I
11 like to keep it interactive, keep it to what we are
12 talking about.

13 Basically I come to you with thirty-one years
14 of service in criminal justice system, two hundred
15 forty, two hundred fifty trials. I had over sixty
16 homicide trials. I'm in my eighth death penalty
17 case. I Teach all over the state. I do boot camp
18 at RPI for the new people who are coming to the
19 field of criminal defense.

20 I say to all of you and ask all of you, I
21 have been doing it since 1987. I give up one week
22 of my time every year, it's unreimbursed, I don't
23 get paid. We do it eight in the morning until nine
24 at night and the State of New York hasn't got a
25 clue that we are doing it.

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2 Not a clue. All right. I travel all over
3 the state. I go from Cheektowaga, go down to
4 Staten Island to the Public Defender's Office in
5 Staten Island. I go down there on a yearly basis.
6 All we do is sit down and talk about doing criminal
7 cases.

8 I have written a book that's a practical
9 trial book that we could give to everybody in the
10 State of New York who was coming to the field of
11 criminal defense if we could only figure out a way
12 to distribute it and get it out and have some
13 training programs so that the people that are
14 coming out of law school or people who want to go
15 into criminal defense work have an idea what to do
16 before they walk out there.

17 I don't know why it is that -- you know, by
18 the way, I wanted to preface or start the remarks
19 this way, we have an attorney general in this
20 state. We all know who that is. Who is the
21 defender general and why don't we have one? Why?

22 JUDGE STACK: Mr. Kelly, if you had your wish
23 list of how you would see indigent defense changed
24 in New York, and you certainly have a great deal of
25 experience and back and forth across the state for

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2 many, many years. How would you in general or
3 specifically shape indigent defense for the future?

4 MR. KELLY: It should be shaped, number one,
5 with the view that the criminal defense lawyer is
6 the most important and integral part of the
7 criminal defense system.

8 We are the people -- lawyers are where the
9 rubber meets the road in our legal system every day
10 on a private basis across this State when we talk
11 with a client about a closing, a will, a business
12 transaction -- and, by the way, in Enron, I keep
13 asking the question where the hell were the
14 lawyers? Who let that happen?

15 All right. We are the people who sit down
16 and we explain to people on a daily basis what the
17 law is. We are the ones who are truly the fabric
18 of what the law is and we spread it by virtue of
19 every single representation.

20 Why don't we do it in the criminal justice
21 system? Why haven't we built the criminal justice
22 system such as the Bronx Defenders? Why can't we
23 take and create across this great state a system
24 whereby we utilize the lawyers who are involved in
25 public defense, and indeed at any defense because

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2 there shouldn't be any difference between the
3 degree of representation that is given to someone
4 who is poor versus someone who comes in and pays
5 you fifty grand.

6 There's no difference. Why haven't we
7 generated with the judiciary in the State and why
8 hasn't the judiciary stood up to the politicians of
9 this State and said, look, there's a better way of
10 running the criminal justice system. That way is
11 by incorporating humanity into the criminal justice
12 system by hiring people who can love what their
13 doing are.

14 Why is it that we don't have a system in
15 place where people who want to go to law school --
16 go back to when you went to law school. Did you go
17 to make a bazillion dollars or did you have the
18 ideals that a lot of young people have? You wanted
19 to make a difference. You wanted to do what was
20 right.

21 Why is it that the system that we have set up
22 has made it so that people after two months, three
23 months, four months who come in and who want to
24 give are completely disillusioned and completely
25 taken out of the system.

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2 Why are their ideals destroyed? What should
3 we have?

4 There should be established in the State
5 standards, there should be established in the State
6 education, there should be a mandate placed upon
7 the law schools.

8 I often wonder why it is when you go over to
9 England and look at England and they split their
10 bar down, go two years and then either become a
11 solicitor or a barrister. If you want to be a
12 barrister you have to two more years, you have to
13 go out two more years for barristry.

14 Why is it in this state we allow our brand
15 new lawyers to practice on real life human beings
16 while new surgeons have to practice on cadavers
17 first? When is that going to stop?

18 We need a commitment from everybody. We need
19 a commitment from the State. We need a committment
20 from the State.

21 Gideon versus Wainwright, when they enacted
22 722B of the County Law it says right in the bill
23 jacket, it says traditionally the cost of indigent
24 defense has been a County responsibility and will
25 remain so under this bill. That was the State of

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2 New York thumbing its nose at Gideon.

3 That's exactly what happened. It's time for

4 the State of New York to fulfill its obligations

5 under Gideon. It's a State responsibility. It is

6 now a county responsibility.

7 It is not something counties should have to

8 put up with, with unfunded mandates where we have

9 well in excess of a hundred different providers,

10 systems over the course of 62 counties. No two of

11 which are alike except by accident.

12 What we need is some -- there should be

13 established somebody who said there should be an

14 economic incentive, people who want to perform

15 public service, people who care should be given the

16 opportunity when they get out of law school

17 whatever time in their career they decide they want

18 to do it.

19 If somebody said, look, I want to go into

20 public service, somebody says I want to be a

21 prosecutor, somebody should be a defense lawyer,

22 why can't they start at the same grade level, same

23 salaries with the same benefits, with the same

24 opportunities for advancements for the same

25 requirements of CLE on a yearly basis.

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2 That is not CLE that is irrelevant to what you
3 do, but CLE that is mandated that deals with what
4 it is you do as a lawyer.

5 This nonsense of CLE I can go do State
6 practice and fulfill, the Appellate Division
7 doesn't have a clue whether you are doing the right
8 work to keep up as a lawyer. The rules aren't in
9 place.

10 So what I'm suggesting is that before the
11 litigation comes, because it's coming, the
12 litigation is on its way, it's being investigated
13 right now. It's time for the State of New York to
14 step in and say, wait a minute, you know what, we
15 do have a responsibility and it's time for us to
16 bite the apple and it's time for us to create
17 either a public defender system or a defender
18 general office statewide.

19 MR. GOLDMAN: Can you tell us how the State
20 defender system would work?

21 MR. KELLY: How would it work? It would work
22 with standards that would be imposed, guidelines
23 imposed. There would be mandatory CLE.

24 There would be a defender system whereby --
25 for example, within the New York State Association

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2 of Criminal Defense Lawyers we have a list. I
3 furnish my motions to people all over the state who
4 call me up and ask me for them. I don't charge
5 anybody to do it. Why do I do it? Because the
6 State of New York doesn't do it and some how or
7 other every citizen accused in this State, every
8 human being subjected to criminal justice process
9 is entitled to have a lawyer who is competent,
10 able, qualified to do the job.

11 The State of New York has no business making
12 us intentionally ineffective.

13 MR. HELLERSTEIN: You would establish a
14 statewide public defender with an operational
15 capacity across the state lines, regional offices
16 headed by one defender general as you described it,
17 regional offices staffed appropriately and a hiring
18 gun in a central place?

19 MR. KELLY: Independent of all politicians.

20 JUDGE MARKS: Independent of all politicians,
21 one office, not just a commission that will funnel
22 funds?

23 MR. KELLY: That's correct.

24 MR. HELLERSTEIN: A statewide public defender
25 changes the system even stated like New York Legal

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2 Aide Society, put them all under one big boss.

3 MR. KELLY: Place them all under one big boss.

4 You have room for differences in the areas. When

5 I'm out in Chautauqua the problems that exist for

6 the criminal defense bar and fellow human beings

7 that we defend out in Chautauqua are a lot

8 different than the ones we defend in New York City.

9 When you go across the expanse of Chautauqua County

10 to criminal defense service as opposed to being

11 centralized in New York State everybody can get

12 together.

13 There's a huge difference. People do not

14 understand, but that can be addressed by setting up

15 centralized office full-time, full-time people. We

16 are not talking about part-time. You cannot have

17 conflict that is built into a part-time.

18 I've been a part-time public defender now in

19 Albany County twenty-eight years. I can tell you

20 it's no way to conduct business.

21 It's no way to conduct business. You need

22 full-time people, full-time commitment by the State

23 of New York to defend fellow human beings. By

24 defending fellow human beings we do it properly, we

25 can make the criminal justice system actually start

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2 to work and make it a lot cheaper by creating a
3 fabric in which people feel the lawyers feel
4 empathy for their clients, the clients feel a
5 respect for the lawyers and all of a sudden the
6 best thing that can happen to you as a lawyer is
7 when you've done your best, your client has lost
8 and client comes up and says thanks for doing the
9 job you did and that doesn't exist in this state.

10 It does not exist.

11 I have one more thing. I'd like to just make
12 one suggestion to everybody that is in relationship
13 to the area of discovery.

14 I've been down in New York City and so
15 forth. I've been all over the state. I know what
16 it's like to get absolutely nothing constantly in
17 Upstate New York from the District Attorneys.

18 Let me make all of you a suggestion you might
19 want to incorporate that is this; it was my
20 privilege a couple years ago to represent SUNY
21 Albany students who decided to go over, not so rich
22 kids, go over to Williams College, Williams,
23 Massachusetts and decide to rip off sixteen of the
24 rooms at the college campus.

25 Anyway, I get in the case and I have to get

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2 admitted pro hac vice over in North Adams,
3 Massachusetts in their District Court in
4 Massachusetts.

5 I go to get admitted pro hac vice. They knew
6 who I was. He says, you don't have to submit the
7 papers. This is the way the case starts. Under
8 Rule Two Massachusetts whatever it is, I forget
9 what they call it, the police have a requirement of
10 filing a certificate of probable cause. To that
11 certificate of probable cause has to be annexed all
12 documents the police generated during the course of
13 their investigation.

14 Now, this investigation included the Vermont
15 State Police, Williams Town Police, Williams
16 College Police, Albany Police, New York State
17 Police and New York State Campus Police.

18 I get there, the police officers come up,
19 here's certificate of probable cause and there are
20 a stack of documents like this annexed to them.

21 I have never seen discovery like that before
22 in my life with all the death penalty cases I have
23 been involved with.

24 The police officer is brought up, he swears
25 that constitutes the investigation up to that point

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2 in time. The clerk of the court takes it in the
3 back, makes copies of everything, brings it back
4 out and says to the defense lawyer, you get the
5 first selection of which packet you would like.

6 Now, how enlightened is that? They trust us
7 over there and they understand. Now, what's the
8 difference? What's the difference between that and
9 New York State? The difference is this, that case
10 was done in three weeks and all those kids, five
11 kids involved, done.

12 Over here in New York State I sit in the
13 public defender's office. I have an obligation to
14 my client. The prosecutors think it's a morality
15 play. It's not a morality play.

16 I have an obligation to our system of justice
17 to find out whether or not there's legally
18 sufficient evidence that was acquired in a
19 constitutionally acceptable manner and until I know
20 the answers to those two questions I can't counsel
21 a client whether they should plead or not plead.

22 It's not up to me to run up to my client, did
23 you do it, meet and plead 'em lawyer, which is what
24 New York State likes.

25 I send a letter to the DA's office. I'm

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2 involved, send me discovery I need. I can perform
3 the investigation. Gleason 54 NY2d case, Brady
4 equivalent, turn over to defense any information
5 regarding suppression issues that is unfavorable to
6 the People's position.

7 I sends a letter to the DA's office. I get a
8 response back, you're not getting any of that.
9 Take your chances or we are going to indict it.

10 Now that case is going to twelve, fourteen,
11 sixteen months to get disposed of. When are we
12 going to wake up?

13 MS. SHANKS: One of the questions I have as
14 you're aware there are certainly other attorneys in
15 your office and in the capital district who do not
16 take that approach.

17 Is it your position if there were a statewide
18 office with standards that that would be mandated?

19 MR. KELLY: It should be.

20 MS. SHANKS: There would not be pleas without
21 discovery, whatsoever, without going to jail to see
22 the client.

23 MR. KELLY: There should never be plea without
24 investigation by the lawyer and lawyer has the
25 responsibility of knowing the facts of the case,

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2 knowing the facts of the police investigation.

3 MR. SHANKS: What I'm asking is it your belief

4 the Statewide standards would address that issue

5 for the attorneys to not take that position?

6 MR. KELLY: Without question. Should be

7 mandated without question. It's why it's

8 ethically -- ethically there is absolutely no

9 answer to anybody who does and you and I both know

10 what we are talking about.

11 MR. HELLERSTEIN: Thank you, Mr. Kelly.

12 MR. KELLY: One more. Go ahead.

13 MR. HELLERSTEIN: We don't want to keep people

14 late. Thank you.

15 MR. KELLY: It's a privilege to be here.

16 MR. HELLERSTEIN: Michael Wolford.

17 MR. WOLFORD: Yes, sir.

18 MR. HELLERSTEIN: Good morning.

19 MR. WOLFORD: Good morning. I have copies. I

20 didn't bring enough. I'll hand up what I have.

21 MR. HELLERSTEIN: We will reproduce it. In

22 light of that there's no reason for you to take us

23 through the whole statement. I'll make sure it

24 gets distributed.

25 Highlight the problems you see and what can

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be done to make things better.

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MR. WOLFORD: Well, as I briefly say in the statement I, in speaking here from the standpoint of President of a bar association, I have had criminal defense experience both in Federal and State Court.

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I represented some indigents in both those courts. I'm presently a member of the Monroe County Public Defender's Advisory Committee and I was very early in my career an Assistant United States Attorney charged with the Rochester office.

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My in a sense take, so to speak, is from the organized bar and I think not that we are looking for praise for our organization, but clearly the Monroe County Bar Association has played a very active role over the years in the area of indigent defense services.

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We were supportive of appointment of a public defender back in 1968. A few years after that there were problems that surfaced and the Bar Association was responsible for initiating a study of Monroe County Public Defender's office and indeed setting up a merit selection panel that ultimately recommended three candidates to the

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2 County Legislature for appointment as a new public
3 defender. That happened in 1974.

4 It occurred again in 1977. Ed Nowak was
5 appointed at that time and, of course, he still is
6 Monroe County Public Defender.

7 I was personally involved recently in
8 chairing a committee to interview and select
9 candidates for the position of assigned counsel
10 administrator and conflict defender. A conflict
11 defender has been established in Monroe County the
12 last few years to handle cases in which the public
13 defender would have a conflict and, obviously, the
14 County of Monroe decided to do that and to save
15 money rather than to be paying out the rates which
16 still, in my view, were quite low.

17 The point is, I think, that the bar
18 associations both state and local need to take a
19 more active role. I'm not suggesting that we have
20 taken enough. We have clearly been involved, but
21 we ought to be more involved.

22 For example, there was in the past I'd say
23 two or three years a freeze of all salaries in the
24 public defender's office and the district
25 attorney's office.

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2 I wrote some articles in support of lifting
3 that freeze. I'm not saying that's the reason they
4 were lifted, but there was at least in recent
5 months a decision by the County Executive to allow
6 some increases in both those offices and I believe
7 that probably saved some people leaving.

8 Before that there were a number of assistants
9 in both offices that unfortunately left.

10 The bar associations I think need to fill a
11 void that clearly is there. I mean, let's face it,
12 elected representatives are not going to go out of
13 their way to support indigent defense services. At
14 least I'm not familiar with any that have gone out
15 of their way and been outspoken and as a result the
16 bar association I think is the place where they
17 have to be in a sense supportive of those increases
18 in salary, increases in resources.

19 As I say here, I don't think it really takes
20 a rocket scientist to realize it takes two
21 principles to improve the system. One, you need to
22 get the best people available and, secondly, you
23 need to provide the necessary resources.

24 MR. CHAN: Excuse me for interrupting. Have
25 you taken it up with Gary Pellitore, (phonetic)

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2 Network of Bar Leaders?

3 MR. WOLFORD: I haven't.

4 MR. CHAN: As President of the Bar Association
5 you must be member of the Network of Bar Leaders.6 MR. WOLFORD: If I am -- I'm a member of the
7 State Bar Association and House of Delegates
8 member, Metro Bar Associations. I'm happy to
9 contact anyone who can --10 MR. CHAN: I'll make sure Mr. Bill Dorboe
11 (phonetic) knows about you and contacts you on your
12 suggestions.13 MR. WOLFORD: Fine. And I think we need to be
14 more outspoken in support. If we don't do it I
15 don't know of any organization that's going to.16 There was a mention by Mr. Kelly, who
17 obviously had extensive experience, much more than
18 I had, that judiciary should be more outspoken.19 Well, I think that role out to be the bar
20 association ought to be taking the heat on those
21 things. So I'm perfectly willing to do more and I
22 think hopefully other bar associations throughout
23 the state should be doing more, including being on
24 the advisory committee of the public defender's
25 office as well as being, as I characterized, being

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2 on committees that oversee both public defender's
3 and conflict defender's office. We need to know
4 whether there's problems that are happening before
5 they become public.

6 MR. HELLERSTEIN: But when you say the bar
7 association should have a greater role, is it a
8 greater role than simply saying more resources
9 committed to better people or also a role in
10 supporting a radical change in the structure of the
11 defense system on a statewide basis?

12 MR. WOLFORD: I'm not adverse to radical
13 changes. I'm simply suggesting, as I say here, I
14 would defer to Ed Nowak and others more intimately
15 involved whether the answer is a statewide
16 defender's office. That may well be the way to
17 proceed.

18 As Mr. Kelly describes, it sounds very
19 attractive, and if indeed that's something that is
20 going to be proposed I think it would be helpful to
21 get the bar associations behind it.

22 I've never been a fan of people shooting from
23 the hip if they don't know the facts.

24 MR. HELLERSTEIN: What percentage of county
25 legislators are members of the County Bar

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2 Association?

3 MR. WOLFORD: I think fewer and fewer because
4 in reality that has become more of a full-time
5 position, but I think lawyers find it to be less
6 attractive as far as their practice, but there's a
7 few, and there I think the -- actually the majority
8 leader of the County Legislature is a lawyer,
9 actually in-house lawyer.

10 You're finding less, as I characterize it,
11 practicing attorneys serving and practicing as
12 county legislators. By and large regardless of
13 party affiliation, county legislature has been
14 supportive of the public defender's office.

15 I think Mr. Nowak, as I know, has a good
16 relationship as evidenced by the fact he continues
17 to get re-appointed every two years.

18 MR. HELLERSTEIN: He doesn't seem happy.

19 MR. WOLFORD: He doesn't. I don't think Ed --
20 I think at his report -- I'm on his advisory
21 committee. I see the fact I believe he has a ratio
22 of one secretary to five or six lawyers.

23 I have a firm of nine attorneys. I couldn't
24 possibly have that type of a ratio and expect I
25 could effectively represent my clients. I think

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2 that's ridiculous, but, you know, should Ed be the
3 one who should be pushing for more secretaries?

4 I submit the bar association ought to fill
5 that void and that's the point I'm trying to make.

6 We should take the heat off of the public
7 defender's office, whether they be in Monroe County
8 or anywhere.

9 We ought to be the ones, as others have said,
10 that are supportive of Gideon v. Wainwright
11 principles.

12 MR. EPPLER: That is one of the
13 recommendations in the report.

14 MR. WOLFORD: Yes. I happened to see a
15 similar study of the Virginia public defender
16 system and I don't think you can go, regardless of
17 where you go, you are going to see the same
18 problems, same problems in terms of lack of
19 resources, lack of oversight, lack of monitoring,
20 and I'm simply saying bar association statewide,
21 national or local should be doing more to support
22 those services and to support whether it be radical
23 change or less radical, but improvements.

24 JUDGE SMITH: Do you think that the funding by
25 local government, county legislatures across the

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2 state of defense services is so politicized that
3 the only possible, rationale conclusion would be
4 that we do need to take it away from the county and
5 just go with a state public defender funded through
6 the state legislature?

7 MR. WOLFORD: Are you suggesting it wouldn't
8 be politicized on the state level?

9 JUDGE SMITH: Do you know here -- do you see
10 here in Monroe County, for example, let me ask the
11 question, I'm assuming, and this is an assumption,
12 I can't recall whether Mr. Nowak mentioned it or
13 not, that there is a disparity in salaries between
14 the public defender's office and the district
15 attorney's office?

16 MR. WOLFORD: I believe there is. I don't --
17 he makes considerably less than I know the district
18 attorney.

19 JUDGE SMITH: District attorney is set by
20 state law, that's different, but is there a
21 difference --

22 MR. WOLFORD: I think so.

23 JUDGE SMITH: -- per attorney?

24 MR. WOLFORD: That's a tough issue. I'm sure
25 Judge Marks or John Speranza probably know that

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2 better than I do.

3 My sense is that they are both overworked to
4 some extent, but I think there's probably some. I
5 notice just recently there was an adjustment
6 allowed in both offices and I think those
7 adjustments, although not significant, I mean
8 adjustments in salary both were in a sense in the
9 same range.

10 I hate to say something I'm not absolutely
11 certain of. I expect there maybe some disparity
12 and I'm not suggesting that there's not concern
13 over reasonable salaries in those offices, in
14 particular the public defender's office by the
15 County Legislature, but I don't -- I feel the bar
16 association would be of more help here if a -- if
17 they could support it at the county level.

18 It would be nice to have that removed from
19 the county and put in the State, but I guess my
20 concern is I don't know if that would necessarily
21 solve that problem.

22 MR. HELLERSTEIN: Thank you, Mr. Wolford.

23 MR. WOLFORD: Thank you very much.

24 MR. HELLERSTEIN: We are going to take a ten
25 minute break.

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2 (Whereupon a brief recess was held at this time.)

3 PROF. HELLERSTEIN: Our next witness is
4 Ms. Emily Chiang, associate counsel in the
5 Poverty Program at the Brennan Center for Justice
6 at NYU Law School. Welcome, Ms. Chiang.

7 MS. CHIANG: Good morning and thank you for
8 this opportunity to testify. For those of you
9 who aren't familiar with the Brennan Center, we
10 are a not-for-profit, nonpartisan public interest
11 organization based in New York City. We do a
12 variety of things, including work in areas of
13 democracy, criminal justice and poverty. And our
14 interest in indigent defense reform extends to,
15 you know, our long commitment to making sure that
16 adequate legal services are provided for people
17 regardless of their income level and for both
18 civil legal services and for criminal legal
19 services.

20 In the context of our mission to expand
21 access to justice for all people, regardless of
22 their income, we also work with the growing
23 national reform movement to try to improve the
24 quality of and funding for indigent defense
25 services in the effort to fulfill a promise made

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by Gideon forty years ago.

And from my personal perspective, my commitment to this issue stems from my involvement while I was at the law firm of Carvath, Swaine and Moore working as pro bono counsel on the ACLU lawsuit in Montana. You heard testimony from Vince Warren from the ACLU.

Today, I would like to focus on the issue of funding. With all due respect to the Public Defender earlier, it's not about the money, it's about the political will. They are intricately linked when you're talking about an issue that is politically not necessarily popular. Legislators faced with tough political choices are going to find it hard to advocate for more taxpayer dollars for indigent defense services, when they know this money in cash-strapped counties is going to come at the expense of funding for schools or client programs or you know, infrastructure improvements in the counties that will have political support. So without the proper incentives, the easy way out for legislatures -- which includes the one in New York State -- is to punt the issue by deflecting

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2 responsibility to the local county governments.
3 I think this commission has gotten an earful
4 already this morning about what the problem is in
5 those counties. I would also like to note that
6 the affect that this lack of state funding has
7 had with deflection of responsibilities has had
8 has been felt hardest by those who can literally
9 least afford it, people who live and work in
10 counties with low tax bases created by the same
11 socioeconomic conditions that also result in
12 higher crime rates. You know, as the commission
13 has heard, this lack of state oversight and lack
14 of state funding, not withstanding the commitment
15 of many talented people that you've heard from,
16 has resulted in a broken system. You have a
17 hodgepodge of service structures, the majority of
18 which fail to provide adequate legal
19 representation. You end up with defendants who
20 haven't yet been convicted of any crimes sitting
21 in county jails waiting to see their
22 court-appointed counsel. You have defendants who
23 are pressured to take guilty pleas by overworked
24 and underpaid counsel who lack the time or funds
25 to investigate the state's charges, to file

2 enormous morass that needs to be addressed. I
3 think that as you've heard from many of the
4 public defenders, a lot of public defenders are
5 already expected to perform many not traditional
6 functions. For example, helping defendants get
7 access to mental health counseling or helping
8 defendants to receive alternative sentencing.
9 And these are all services for which they're not
10 paid any extra compensation. I think that to the
11 extent that such services can be integrated, it
12 makes sense because it is efficient. If you have
13 a person before you who has, for example, a
14 clear, you know, housing issue or mental health
15 problem that you are familiar with, the person
16 trusts you, you have a working relationship and
17 it's part and parcel of part of their criminal
18 issues, I think it makes sense for one person to
19 be able to handle all of that. I think that, you
20 know, that vision of a wholly integrated
21 wholistic service provision is far, far off in
22 the future, given the state of, you know, just
23 the core criminal defense services function that
24 public defenders are, you know, obligated to
25 fulfill. But that's a model to which, you know,

3 MR. CROTTY: Ms. Chiang, can I ask you one
4 question. We heard in the New York hearing --
5 this is Paul Crotty. At the New York hearing
6 that the ACLU and the New York Civil Liberties
7 Union was now preparing litigation challenging
8 the adequacy of the indigent defense service as
9 well they might be based on experiences they've
10 had in other states. Do you think the structure
11 and what the appropriate structure is just as a
12 litigation strategy ought to come before what the
13 dollar amount is? We've heard a number of
14 suggestions here about open discovery, having the
15 right kind of personnel in place, all which don't
16 necessarily deal with salaries. Do you think
17 it's the structure that ought to come first
18 rather than the dollar amount? Because I would
19 think as a matter of Constitutional principles,
20 it's very difficult to say one million is
21 inadequate, but two million is adequate.

22 MS. CHIANG: Absolutely.

23 MR. CROTTY: So I wonder if you could give
24 us a little more on what you think the
25 appropriate structure is for delivering adequate

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2 indigent defense services.

3 MS. CHIANG: Sure. First off, let me say as

4 one of the organizations who's been looped in,
5 you know, to the network of organizations such as
6 ACLU and NYCLU, looking at the provision of
7 services in New York, no one wants litigation to
8 be necessary. Everyone hopes that this
9 commission, you know, will succeed in
10 implementing reform, sufficient reforms in the
11 system such that adequate services are being
12 provided and that litigation, you know, is
13 completely unnecessary. That's to address your
14 question specifically. I think that the issues
15 of structure and funding are inextricably
16 intertwined because you can't have an adequate
17 structure to provide Constitutionally-required
18 services without adequate funding. I'm not here
19 to discuss what the actual dollar signs should
20 be. I don't think that any of us has any basis
21 to make any speculations as to what it should be,
22 because we don't know. The provision of services
23 in New York has been so severely underfunded over
24 the decades that it's almost impossible to say to
25 put a dollar figure on okay this is the amount

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2 the state needs to spend. I do think that the
3 commission should spend some time exploring what
4 sorts of substantive reforms need to be

5 implemented. There are several options that I
6 think that New York in particular could consider,
7 having spoken with, for example, David Carol over
8 at the NLDA and some other interested parties.
9 For example, Oregon has a structure whereby there
10 is a state commission that has responsibility for
11 general oversight and supervision, but all of the
12 services are done via contracts. So that you're
13 not adding to the state payroll, per se. You're
14 not creating a huge government state bureaucracy
15 of, you know, 2,000 state employees. But you're
16 contracting services out to various counties
17 within the various counties and the counties have
18 some flexibility in terms of who they're going to
19 contract those services out. In New York City,
20 for example, this may mean Legal Aid. In a more
21 rural county, it may mean you have various
22 assigned counsel providers. However, what's
23 important about the system in Oregon is the
24 contracts themselves encapsulate and guarantee
25 that the basic national standards are being met.

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2 So, for example, the contracts contain case load
3 and work load regulations. They contain
4 provisions that govern, you know, when counsel
5 needs to first meet with their clients. They

6 contain provisions that govern, you know,
7 conflict of counsel provisions. You know, when
8 counsel needs to be kicked out to another service
9 provider. And, so, that's one option, for
10 example, for New York to look to and for this
11 commission to look to.

12 In Indiana, there's another system whereby
13 there is, again, a statewide commission generally
14 responsible for oversight and supervision, but
15 there that commission is responsible for
16 funneling state dollars to the various counties
17 based on their compliance with state-wide
18 standards. You don't comply, you don't get any
19 state money. That's another option. I think
20 that there are a variety of ways, perhaps some
21 combination of existing ways for this commission
22 or any future public defense commission to
23 address the specific needs of New York State
24 while making sure that services everywhere comply
25 with, you know, standards so that services under

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2 Gideon are being properly provided.

3 PROF. HELLERSTEIN: Let me see if I
4 understand your -- commission can rely, we'll
5 know about and already have spent a lot of time
6 looking at other systems and writings about it.

7 But from the Brennan Center's point of view,
8 you're not -- are you representing any particular
9 option as preferable to many different systems
10 that you've mentioned?

11 MS. CHIANG: No, we're not. I think that
12 the key hallmarks of any Constitutionally-
13 adequate system will be some amount of state
14 funding that is significantly more substantial
15 than the state currently provides and some amount
16 of state oversight and supervision to ensure that
17 standards are being met. Those are the two core
18 necessities, so to speak, for any adequate
19 system. I think that that's something you've
20 heard echoed in all of the testimony thus far.
21 In terms of what that system actually looks like,
22 I think that the one in Oregon is particularly
23 promising given the existing way of providing
24 services, rather than creating, you know, a whole
25 new, for example, setup where you have, you know,

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2 state employees being set up and building
3 everything from the ground up. It would be able
4 to make use of existing relationships and service
5 providers.

6 PROF. HELLERSTEIN: The federal defender
7 model for the State of New York would not appeal

8 to the Brennan Center?
9 MS. CHIANG: No. I think that would be
10 another viable option for this commission to look
11 at. The key from the Brennan Center's
12 perspective is keeping in mind that the system
13 needs to be adequately funded and it needs to
14 meet standards and someone needs to be minding
15 the store. Someone needs to make sure and have
16 responsibilities that those standards are being
17 met. To have the authority to say, okay, you
18 Mr. Public Defender in so and so county are
19 consistently failing to meet these national
20 standards. We're sorry, we're not going to renew
21 your contract.

22 PROF. HELLERSTEIN: Thank you.

23 MS. CHIANG: I would like to continue to
24 talk a little bit about --

25 PROF. HELLERSTEIN: I think we're out of

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2 time.
3 MS. CHIANG: Okay.
4 PROF. HELLERSTEIN: The time is exhausted.
5 We have your very helpful statement. If there is
6 anything further you want to send to us on behalf
7 of the Brennan Center, we would love to have it.
8 I understand the Brennan Center is very active

9 throughout the country trying to get felons a
10 right to vote. If you're successful, that could
11 help matters.

12 MR. GOLDMAN: Maybe.

13 MS. CHIANG: Thank you.

14 PROF. HELLERSTEIN: Barbara DeLeeuw.

15 MS. DELEEUEW: Good afternoon. I'm Barbara
16 DeLeeuw and I'm the director of the Genesee
17 Valley Chapter of the New York Civil Liberties
18 Union. For the downstate folks, that's NYCLU.
19 The New York State Civil Liberties Union is an
20 affiliate of the American Civil Liberties Union.
21 NYCLU protects and defends the rights and
22 liberties embodied in the Bill of Rights and the
23 United States and New York State constitutions.
24 Before I go on, I want to tell you I am not an
25 attorney. So you won't go that way. I can't

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2 answer those questions.

3 As you know from testimony delivered to the
4 commission in New York City on February 11th,
5 2005, by Donna Lieberman, the executive director
6 of the New York State Civil Liberties Union and
7 Vince Warren, the senior staff attorney in the
8 National Legal Department of the ACLU Foundation,
9 we are deeply concerned about the broken indigent

10 defense system in New York State.
11 As you heard from Donna Lieberman, for a
12 year and a half, the New York State Civil
13 Liberties Union has been conducting
14 investigations of public defense systems in
15 various counties, including Albany, Onondaga, and
16 Schenectady, based on complaints and reports of
17 serious deficiencies in the provision of legal
18 services to indigent criminal defendants
19 throughout the state. In the Genesee Valley
20 region, we have yet to undergo such
21 investigation. Nonetheless, during my tenure as
22 the director of the regional office here, we have
23 received numerous calls and letters from poor
24 people accused of a crime in the counties
25 surrounding Rochester who have requested our

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2 help. In fact, the quality and quantity of
3 complaints indicate troubling patterns similar to
4 those that precipitated our county investigations
5 conducted so far, which have revealed that
6 indigent criminal defendants are being starved of
7 adequate effective representation.
8 When I first began this job as director
9 after working as a public school teacher for 30
10 years, clients called from all over this region

11 indicating they had not had a lawyer present at
12 legal proceedings. Or that they had met their
13 counsel only minutes before starting the
14 proceeding, or that the legal options had not
15 been explained to them or that their attorney had
16 insisted they cop a plea. Truthfully, in the
17 beginning, I did not believe them. I was taught
18 and later I taught my students that in the United
19 States, the Constitution and the Bill of Rights
20 are the essential documents that distinguish
21 American democracy from other forms of
22 governance. I taught that these documents
23 provide legal protection for all who reside in
24 America and that individuals accused of a crime
25 are: One, entitled to legal counsel and, two,

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2 are entitled to have free legal counsel provided
3 if they're unable to afford it. As director of
4 the Genesee Valley office of NYCLU, over the
5 course of two years of listening to the
6 continuous battery of callers, reviewing letter
7 after letter detailing horrendous stories, I've
8 become convinced that the system designed to
9 protect the legal rights of poor people accused
10 of crimes is in grave condition. My office
11 regularly receives calls and letters from people

12 accused of crimes in Steuben, Livingston, Yates
13 and Ontario counties who report egregious
14 experiences including their public defense
15 lawyer -- including that their public defense
16 lawyer has, included among other things, failed
17 to question witnesses or investigate questions of
18 wrongdoing, exerted excessive pressure on the
19 client to accept a guilty plea, often because the
20 accused is black and won't get a fair trial in
21 this county anyways.

22 MS. SHANKS: May I interrupt you for a
23 second?

24 MS. DELEEUW: Sure.

25 MS. SHANKS: Do you have any statistics

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2 about the percentage of African Americans or
3 Latinos in some of these counties in terms of
4 population and then in terms of their
5 percentages?

6 MS. DELEEUW: No, I do not. I know that
7 most of our callers have been black, Hispanic or
8 limited English speakers.

9 MS. SHANK: To what do you -- do you do
10 outreach in the jails?

11 MS. DELEEUW: I do speaking engagements in
12 counties. People are referred to us from other

13 agencies. Somebody told them to call the
14 American Civil Liberties Union. They looked it
15 up in the phone book because they believe their
16 civil rights have been violated. We are listed
17 as American Civil Liberties Union and we get
18 calls from all over.

19 MS. SHANK: So you don't know if the
20 percentage that calls you is representative --

21 MS. DELEEUW: I would just say that offhand,
22 that the percentage of minorities in those
23 counties tends to be fairly low.

24 MS. SHANKS: Okay.

25 MR. CROTTY: It's all recorded in the

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2 census.

3 MS. DELEEUW: I think if you look at the
4 numbers, the numbers is disparaged and we get a
5 higher number of those low numbers.

6 MR. ELMORE: Do you find there's a
7 difference in the quality of legal representation
8 in counties like Monroe or somewhere like Yates
9 or Steuben, is there a difference?

10 MS. DELEEUW: I can't answer that
11 specifically because I'm not a practicing
12 attorney. I can tell you we get more calls from
13 those counties I just listed than I do from

14 Monroe County. And the same with police
15 services, as a matter of fact, that we get more
16 complaints about inappropriate or aggressive
17 police action in those counties as well. If I
18 could just digress for a quick second. The
19 process that we use at the Genesee Valley office
20 to process calls, some of the other chapters have
21 people write letters so all of their legal intake
22 is done in a written manner. You get a recorded
23 message saying write us a letter and tell us
24 what's going on. In our office, we actually
25 field the calls, so we take a call that may be

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2 three, five, seven minutes long. Somebody is
3 calling saying somebody told me to call you, my
4 civil liberties have been violated, this is what
5 has happened. We have not begun investigations.
6 What we're seeing is trends. If there's cases we
7 have an interest in, we will then ask people to
8 write that up and it will go before a legal
9 committee of attorneys and so on and so forth.
10 So I don't know if that's helpful. Okay. My
11 office -- where did I stop here?
12 They fail to question witnesses or
13 investigate allegations of wrongdoing; exert
14 excessive pressure on clients to accept a guilty

15 plea because the accused is black and won't get a
16 fair trial in a particular county; fail to
17 consult with the client in a meaningful manner
18 about a case; refuse to answer client phone calls
19 or letters; neglected to pursue a bail hearing
20 where the client sits in jail for months;
21 misrepresents facts in court to the client's
22 detriment and/or refused to represent the client
23 in subsequent stages of proceedings. These
24 stories are unforgivable in the 21st Century. I
25 would suggest that the patchwork of inadequate

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2 indigent defense activities in New York State
3 disproportionately falls on the backs of blacks,
4 Hispanics, limited English speakers and poor
5 whites that are often harassed, detained or
6 falsely arrested particularly in the outlying
7 communities in this section of the state. They
8 languish in jail, inadequately represented and
9 sometimes are tried and convicted of crimes they
10 did not commit. Forcing counties to maintain
11 responsibility for indigent defense is
12 irresponsible. It has created a disjointed
13 system with serious and systematic deficiencies
14 and with no accountability, consistency and
15 fundamental fairness. The State of New York must

16 remedy the woefully underfunded, understaffed and
17 underresourced public defense system to ensure
18 that indigent persons are afforded quality
19 counsel who are capable of providing a
20 Constitutionally adequate defense. That means,
21 as you have heard from others and will
22 undoubtedly continue to hear, the state must
23 sufficiently fund indigent defense services and
24 set and monitor compliance with standards
25 governing the provision of quality services. As

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2 you heard from Donna Lieberman earlier, while we
3 are hopeful that the state will implement the
4 essential reform, if the state fails to act,
5 NYCLU is prepared to bring litigation to
6 vindicate the Constitutional rights of indigent
7 criminal defendants. Thank you.

8 PROF. HELLERSTEIN: Thank you. Mr. Wellman,
9 I have a request. Is Judge Farber here?

10 JUDGE FARBER: Yes.

11 PROF. HELLERSTEIN: I understand you are
12 under some time pressure?

13 JUDGE FARBER: Yes.

14 PROF. HELLERSTEIN: I would like to flip.

15 JUDGE FARBER: Thank you. I appreciate
16 that. I'll be brief.

17 PROF. HELLERSTEIN: Welcome, Judge Farber.

18 JUDGE FARBER: If I may, I would just like
19 to spend a couple of minutes telling you a little
20 bit about myself, because what I have to say is
21 directly related, obviously to my experience.
22 I've been a sitting town justice for eighteen
23 years in the Town of Penfield, which is southeast
24 of the city with a population of approximately
25 thirty-five thousand people. I've also been an

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2 acting part-time and full-time city court judge
3 here in Rochester for 12 years and I currently
4 serve as a judicial hearing officer in Monroe
5 County Family Court, which I've done for several
6 years now. You should also know that prior to my
7 ascension to the bench, I was with our local
8 Public Defender's office for quite a number of
9 years and among other things, was the special
10 assistant in charge of training and supervision
11 of our local court staff. I've only been here a
12 short time, but it appears to me that the key
13 issues involved with any assigned counsel plan
14 are, in fact, the funding, competence and
15 accountability. I can't speak for counties
16 outside Monroe, although I have been present at
17 the state magistrates' association. During my

18 travels, I was able to observe some of the courts
19 across the state, but I will say that we are
20 blessed here in Monroe County to have the very
21 competent assigned counsel. We have a bar of
22 exceptionally talented, competent attorneys and I
23 think that we're very fortunate. Having said
24 that, I know from my experience that in the more
25 rural communities, especially, it is very

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2 difficult to find qualified assigned counsel,
3 people who have the necessary experience in
4 criminal defense to adequately and competently
5 handle proceedings. What I really want to say is
6 I can't imagine on a statewide level that an
7 assigned counsel system could effectively compete
8 with the defender's system, the public defender's
9 system. Will it be federally funded or state
10 funded? Again, coming back to a number of issues
11 from my experience here, I will tell you, I have
12 never, never once had a problem with our local
13 public defender staff that I did not feel
14 comfortable in communicating to our Public
15 Defender, Ed Nowack, who always acted upon my
16 complaint. And they are rare. I can think of
17 two or three in maybe eighteen years, to be
18 honest with you. I know from my experience

19 within that office that the in-house training
20 that I believe I initiated and still is ongoing
21 is a very valuable tool in maintaining the
22 competence of the people on staff. I know that
23 the reason I brought up complaints is because
24 there is a measure of accountability with the
25 Public Defender's office that is missing from

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2 assigned counsel staff. So I think both in terms
3 of competence and accountability, which go hand
4 in hand in some respects, the Public Defender
5 system is a much preferred way of doing
6 business. Funding is not something I'm really
7 familiar with. All I know is I agree with the
8 prior speakers that without funding, it doesn't
9 matter how competent you are. You can only
10 handle so many cases at one time. There are
11 cases when I certainly believe that certainly
12 public defenders locally and assigned counsel are
13 stretched way too thin. So I can only say, based
14 on my experience, that I think both in terms of
15 funding and accountability, as well as overall
16 competence that our Public Defender system is the
17 much preferred way of doing business, for
18 whatever that is worth. I would be happy to
19 answer any questions, if anybody has any.

20 PROF. HELLERSTEIN: You think a system like
21 a statewide Public Defender system that could be
22 created that would function well in more rural
23 counties, you could create a structure that would
24 take care of those problems?

25 JUDGE FARBER: Absolutely. I think the

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2 rural counties, very frankly, although they don't
3 have the incidence of crime that we do, I know
4 from my experience in those counties that you
5 always have several exceptional attorneys who
6 people might turn to for criminal defense work.
7 The assigned counsel program that's in place is a
8 hit or miss proposition. There is no formalized
9 training, other than what's required through the
10 bar association and there's nothing to supplement
11 it. In terms of accountability, I know that when
12 I assign, just from my own experience in my
13 courtroom, any time I have an indigent accused
14 that I'm committing, will advise my staff and
15 want them to contact the public defender's
16 office, contact pretrial and I know within a
17 matter of hours, we've made the necessary
18 communication. When we contact the local
19 assigned counsel office, I'm not demeaning that
20 office, it's just not the same experience. In

21 terms of their effective and timely intervention
22 on behalf of the accused.

23 MS. ZUFLACHT: Are you talking about eight
24 years on the bench?

25 JUDGE FARBER: Yes.

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2 MS. ZUFLACHT: What your policy is, you can
3 choose either, and you just choose the Public
4 Defender?

5 JUDGE FARBER: Yes.

6 MS. ZUFLACHT: And in a conflict situation?

7 JUDGE FARBER: Well, we do have in this
8 county a Conflict Defender's office. We have
9 that in Family Court. I'm not sure -- I think
10 they have it in city court. I don't believe we
11 have it in the superior courts. That might be
12 another alternative. Sort of a subsidiary.

13 MR. CHAN: Good morning, Judge. Chris
14 Chan. One of our previous speakers had mentioned
15 about consolidating some courts. I don't know if
16 you were here for that testimony.

17 JUDGE FARBER: I was not.

18 MR. CHAN: Would you agree in some of the
19 rural counties, that might be a way to save
20 money, shall we say?

21 JUDGE FARBER: Well, it may well save

22 money. It would be -- it may well be cost
23 effective. That doesn't necessarily mean it's
24 the best way of producing those services. I
25 don't know that I'm qualified to speak on that,

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2 to be honest with you.
3 MR. CHAN: Okay.
4 PROF. HELLERSTEIN: Thank you, Judge.
5 JUDGE FARBER: Thank you.
6 PROF. HELLERSTEIN: Mr. Wellman.
7 MR. WELLMAN: Good afternoon. My name is
8 Jason Wellman and I would just like to say,
9 again, like Barbara, I'm not an attorney. I work
10 in her office. And I'm currently a criminal
11 justice student at Monroe Community College. I
12 volunteer and am an intern at the American Civil
13 Liberties Union.
14 I am here today to tell you what it was like
15 for me as a defendant in the Monroe County
16 criminal court system. I will tell you about my
17 experiences, but I think I speak for a lot of
18 defendants who have been in similar situations as
19 myself. I'm not going to go into what I call my
20 previous lifestyle, as it really doesn't matter.
21 The point is I was arrested on more than one
22 occasion and not having money for an attorney, I

23 already knew what the outcome was going to be.
24 This is the progression of events each time I was
25 arrested and went through the system. I was

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2 arrested, sent to booking, where I was to await
3 arraignment for the next day. Pretrial would
4 interview me and each time found me eligible for
5 pretrial release, but that was usually set aside
6 for one reason or another. I met an attorney
7 from the Public Defender's office at the
8 arraignment, who when I walked in said that we
9 were waiving pretrial motions, never asked me or
10 gave me advice for or against, but the decision
11 was already made for me. The attorney never
12 introduced him or herself and that person then
13 handed me a piece of paper with my next court
14 date and the name of a different Public Defender
15 that would be handling my case. I was then
16 escorted back to the holding cell without being
17 able to ask any questions, because there was no
18 time. There were at least another 60 to 75 men
19 and women being arraigned at the same time, so
20 apparently time was more important rather than
21 letting me know what I could and could not do,
22 even the most basic questions. I was escorted
23 back to the jail, back in the holding area for my

24 attorney to see me and to discuss my options. If
25 you don't know, Monday nights here at Monroe

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2 County lockup are Public Defender nights. I can
3 honestly say I have never met -- I've never once
4 met my assigned public defender on any of these
5 Monday night occasions to discuss possible
6 options. Even when I requested to do so, I was
7 informed that only those who really needed to be
8 spoken to would be spoken to. My Public Defender
9 never returned my calls from jail or answered any
10 questions I had sent through the mail. So I
11 guess my cases were not important enough to
12 discuss prior to court. I never saw a Public
13 Defender before my next court date. I had been
14 told repeatedly that the Public Defender's office
15 has a huge case load and there's only so much
16 that one person can do. I understand this fact.
17 When you're sitting behind bars wondering what
18 you're looking at and what the possible options
19 are, it would be nice to have at least one
20 meeting before you end up in front of the judge.
21 There's a lot of frustration and stress that one
22 goes through while going through the process.
23 You're scared, you're worried and you ask
24 questions that only your lawyer is supposed to be

25 able to answer. And he or she is never around

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2 because their case load is too big to reach
3 everyone. On my next scheduled court date, I was
4 transported from my holding area to a main
5 holding area where inmates wait to be called for
6 court. I'd kind of like you to imagine this
7 scene. There's anywhere from 75 to 100 inmates
8 inside the holding cells. A Public Defender
9 comes to the gates, yells a name. It's loud,
10 you're due to go before the judge at any moment.
11 Inmates are being brought into and out of the
12 cells. Guards are yelling names. The doors are
13 slamming, keys are jingling, inmates are arguing
14 and there you are trying to carry on a
15 conversation with a lawyer as to what's going to
16 happen. Most of the time, that part is already
17 figured out for you because the first thing after
18 they introduce themselves as your attorney, they
19 say I've talked to the DA and this is the best
20 you're going to get, so you better take it
21 because if you don't, the deal is off and you're
22 looking at worse time. I ask about different
23 possibility, other alternatives, drug court,
24 probation, etcetera. Nope is usually the
25 response. This is the best you're going to get,

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2 so I advise you to plead guilty and take it now.
3 So there I am, amidst all the noise and confusion
4 and having spoken with a lawyer I only met for
5 five minutes and I need to make a decision right
6 then and there about the future of my life,
7 because my name is being called in the next few
8 minutes. Scared of getting more time and
9 figuring I better get the best deal I can, I take
10 it. In the back of my head, I'm saying what
11 about this certain issue, can we raise this at
12 trial, etcetera. With the preassure to get it
13 done and over with, I say yes and plead guilty.
14 I don't fully comprehend everything that is
15 involved in the sentence, just having the thought
16 reverb in my head, this is the best you can get,
17 so now -- I'm sorry. This is the best you can
18 get so get it now because it may not be there
19 later is enough to scare me into pleading. A
20 term of one-to-three years in prison sounds
21 better than getting three years for each count.
22 So overall, my cases from start to finish,
23 including in front of the judge and speaking with
24 a lawyer, took all of at most 45 minutes to
25 dispose of. That's being generous. I was not

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2 given adequate time to speak with my lawyer, and
3 to be honest, I never remembered their names.
4 Never was I given a response when I called my
5 Public Defender. I would call, leave a message
6 and never heard anything back. Same when I had
7 family members call. The only time I saw my
8 attorney was at arraignment for about two minutes
9 and a different attorney about five minutes
10 before I was to plead my case out. How might it
11 be different if I were able to employ my own
12 attorney? Suffice it to say, I believe it
13 would've gone a whole lot differently. Something
14 needs to be done and I'm not saying I didn't get
15 what I deserved. I just think I should have had
16 more time to talk to my attorney about important
17 things. Just because I can't afford an hourly
18 attorney does not mean I'm any less of a citizen
19 in the United States. The Constitution says
20 adequate representation. The Constitution states
21 we are all due adequate representation. And if
22 the representation I received is adequate, I
23 would really hate to see what inadequate is.
24 Thank you for your time and I'll field any
25 questions that anybody has. Would you like

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2 copies?

3 MS. SHANKS: Congratulations for being where

4 you are.

5 MR. WELLMAN: Thank you.

6 PROF. HELLERSTEIN: Thank you, Mr. Wellman.

7 MR. WELLMAN: Thank you.

8 PROF. HELLERSTEIN: Daan Zwick.

9 MR. ZWICK: I have a vision problem, so I'm

10 going to use this. My name is Daan Zwick. I

11 live in Rochester.

12 PROF. HELLERSTEIN: Welcome, Mr. Zwick.

13 MR. ZWICK: Thank you. I was, for many

14 years, a research scientist. I've been retired

15 for eighteen years and most of those eighteen

16 years have been spent in volunteer work and most

17 of that has put me in contact with people who are

18 the subject of the discussion here today,

19 indigent defenders. I visited people in state

20 prison in the western part of New York. I've

21 worked with the judicial process commission

22 answering letters from prisoners, inmates or

23 people who have gotten out and are asking for

24 help and I worked in the eighteen years of my

25 retirement with the Civil Liberties Union and the

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2 office here right. Now Barbara deLeeuw is my
3 current boss there. And so I've had a fair
4 amount of layman contact with the subject of our
5 discussion. Much of what I've experienced is
6 what you've just heard from Mr. Wellman, people
7 like him who are now in prison or in holding
8 cells or awaiting a trial. And they, as Wellman
9 said and was told, why don't you call the ACLU.
10 Without technology, I wouldn't be able to work in
11 my job. The largest single source of their
12 complaints has to do with what they perceive as
13 inadequate legal representation in their criminal
14 defense. Some complaints concern the quality.
15 An assigned attorney who specializes in real
16 estate may not be able to mount a good defense
17 for burglary. More often, the complaint is
18 quantitative, I did not see my Public Defender
19 until we met in court, there was no investigator
20 to get the facts for my defense or the only
21 advice I got was to take the plea bargain but
22 that had already been arranged. This is common
23 practice whether it's Monroe County or any of the
24 outlying counties. From these many contacts, I
25 have learned that while there are excellent

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public defenders and assigned attorneys, they almost always have such a large case load that they are not able to provide the level of defense available to those who can afford to retain a private attorney or the level of defense that I believe the Constitution demands. The plea bargain which is so often the defender's advice may be a bargain for the guilty person, but not for the occasional defendant who really needs a good defense because he did not commit the crime. If the innocent defendant demands a trial, he faces an overworked attorney who has now an extra case on his calendar and may be more reluctant to help an uncooperative client. And he faces a judge who also may be less sympathetic because he, too, has an already full calendar. My observations -- and they're just observations, suggest that the innocent indigent defendant may be more likely to get an inadequate defense than the guilty ones. To me, as a scientist, the topic of innocent defendants suggests an experiment that could be done both to document the existence of inadequate indigent defense and also provide a strong economic argument for

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2 increasing of support of indigent defense. I
3 don't have the statistics. I've asked for them
4 through the New York State Defender's
5 Association, of which I'm a lay member. I'm sure
6 the necessary numbers could be obtained to
7 support my argument. I suggest that we compare
8 the percentage of criminal defendants in New York
9 State in a given year who were cleared of charges
10 or received no incarceration time when
11 represented by a retained attorney with the
12 percentage of defendants depending on indigent
13 defense who are also cleared of charges or
14 received no incarceration sentence. From this
15 comparison, we can determine quantitatively if
16 indigent defense really is less effective than
17 that available to people with money and by how
18 much. If we then apply that percentage
19 difference, suppose, for example, five percent
20 more of these defendants that I described don't
21 get a jail sentence because they have private
22 money paid or representation compared to the
23 indigent ones, if we apply that to the total
24 population of indigent defendants in the state
25 that year, we could learn the number of indigent

3 inadequate defense. If we use that criteria of
4 being cleared of charges and not being
5 incarcerated in this comparison, we could get an
6 estimate of how many innocent indigent people
7 were convicted due to inadequate indigent
8 defense. We know the yearly costs of housing an
9 inmate in jail or correctional facility. By
10 multiplying the cost of the number of indigent
11 people who would not go to prison because they
12 received adequate indigent defense, we could
13 arrive at how much jail costs we could save by
14 having indigent defense now provided by the
15 private sector. For example, here's a set of
16 possible figures, just for illustration. Suppose
17 retained attorneys clear five percent more
18 defendants than indigent defense presently does.
19 Suppose we have 20,000 indigent defendants each
20 year. Five percent of 20,000 is one thousand
21 innocent or people who would not be serving
22 time. Suppose it cost 30 thousand dollars per
23 year to house an inmate. It would cost a
24 thousand times that or 30 million dollars a year
25 if all of these defendants were convicted. How

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2 much of that 30 million dollars would it take to
3 upgrade our indigent defense? Use of the

4 criterion and receiving no incarceration instead
5 of being cleared of charges would probably show
6 an even greater cost saving for having adequate
7 indigent defense services. These particular
8 figures, of course, are just a guess for
9 illustration. But the real numbers can be
10 obtained and should be, both to quantify the
11 problem we're dealing with today and to indicate
12 where money could come from to provide the
13 solution. You heard the point of a scientist now
14 looking at the problem.

15 PROF. HELLERSTEIN: Well, thank you very
16 much for that. We'll have a transcript so some
17 of us less talented, like myself, in mathematics
18 can try to figure out those -- or I'll get help,
19 but it sounds very --

20 MR. ZWICK: I have a couple of copies I can
21 give you.

22 PROF. HELLERSTEIN: That would also be very
23 helpful.

24 MR. ZWICK: Or even a floppy disk if you
25 want one.

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2 PROF. HELLERSTEIN: Whatever you like, we
3 would be glad to take. No virus, please.

4 MR. ZWICK: I have good protection.

5 PROF. HELLERSTEIN: Thank you. Welcome,
6 Mr. Effman.

7 MR. EFFMAN: Thank you. Good afternoon.
8 It's good to see some familiar faces and some
9 fresh faces.

10 PROF. HELLERSTEIN: Haven't seen you in a
11 while.

12 MR. EFFMAN: It's been a while. Yes. I'm
13 sure Judge Wolfgang would say hello as well.

14 PROF. HELLERSTEIN: Say hello back.

15 MR. EFFMAN: I didn't prepare any notes
16 because I got Paul Lewis' E-mail and was
17 contemplating what you could hear from me that
18 you haven't heard from Gary Horton, from Mark
19 Williams, from Ed Nowack and other people I know
20 who have already testified. And I guess as
21 always, I say I come from a unique position
22 within the public defense world because I am the
23 public defender in Wyoming County. I'll start
24 most of my testimony indicating what that really
25 means and where it's located. Wyoming County is

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2 halfway between Buffalo and Rochester. It's
3 south of both the county seats. It's
4 approximately fifty miles from Buffalo and fifty
5 miles from Rochester and it's famous for milk and

6 prisons. 40,000 people, 40,000 cows, 4,000
7 inmates which are part of the 40,000 people. The
8 two facilities that are in Wyoming County are
9 Attica Correctional and Wyoming Correctional.
10 You've heard of Attica. Wyoming is a medium
11 security facility which houses about 2,000
12 inmates. Each of those facilities house about
13 2,000 inmates. The county is rural, as rural as
14 you can get, I think. White. Mostly Protestant
15 and Catholic. Maybe my Brooklyn and Long Island
16 background could serve them well. I'm not sure.
17 I've been practicing criminal defense for over 35
18 years in both the private and public sector. And
19 I think we have a unique program. I don't know
20 what kind of reaction you've had from other small
21 public defender offices. Most of us, especially
22 those who associate rather closely with the
23 state-wide organizations such as the New York
24 State defenders sitting behind me and the
25 criminal defense lawyers as well as various state

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2 bar committees that some of you are on with me,
3 we feel that given our continued networking and
4 education, that we provide excellent service
5 within our counties. Yet, we're all aware of the
6 black holes either around us or in our own

7 counties.

8 Maybe that's what I want to talk about, the
9 black holes. I function in two capacities. One
10 as Public Defender and one as the executive
11 director of a stand alone Legal Aid agency for
12 prison litigation. We have a unique perspective
13 of the criminal justice system because I would
14 say a third of our felony case load involves case
15 load against inmates in our correctional
16 facilities. In our Legal Aid capacity, we handle
17 all of the challenges to disciplinary hearings in
18 those facilities. So we know how the prison
19 works. And the significant number of minority
20 clients, because of the prison population and
21 that population is as I'm sure you're aware,
22 somewhere between 70 to 80 percent minority. In
23 the many jury panels I've looked at, I have not
24 seen a person of color other than one Filipino.
25 So our juries are all white. Judges are all

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2 white. Prosecutors are all white. Defense
3 lawyers are all white. It's been interesting to
4 overcome our whiteness in dealing with our
5 minority clients and I think we have done so
6 successfully, primarily because we're successful
7 in court. It's perhaps surprising that we can be

8 successful under those circumstances, but on the
9 cases that go to trial out of the prisons, we're
10 running a 70 percent success rate on acquittals,
11 cases involving contraband and use of drugs.
12 It's because rural America has now been exposed
13 to the world. And the jurors are more likely to
14 understand that not everybody in uniform is
15 telling the truth and not everybody who is an
16 inmate is lying. So we have a great deal of
17 success in dealing with what most of you would
18 imagine would be an extremely difficult
19 situation. We think we do a great service within
20 our community in providing service. What I would
21 need to continue operating successfully within a
22 rural community is to overcome the budget
23 doldrums and catastrophe that we face yearly.
24 Not only from the county, but from the state. We
25 get a lot of state support in my county because

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2 of the prisons and various programs we run.
3 About -- if I take a look at my total budget,
4 probably forty percent of it or more is really
5 state money that floats in through our various
6 programs. That's why we're able to maintain a
7 full public defense service because of state
8 subsidies which many other counties do not have.

9 MS. SHANKS: How many full and part times do
10 you have?

11 MR. EFFMAN: We're all full time in one
12 sense or another. My public defender operation
13 is all part time. Legal Aid Society basically is
14 a full-time operation, but individuals have the
15 ability to practice privately so long as it
16 doesn't interfere with their obligations. It's a
17 very limited private practice that some of them
18 maintain. Mostly myself, but the others do not.
19 We have a total of four attorneys who wear dual
20 hats as Legal Aid lawyers and assistant public
21 defenders or the Public Defender. We have three
22 full-time secretaries. We used to have an
23 investigator. We lost that because of budget
24 problems. We have various lines to hire outside,
25 outsource investigations and social workers and

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2 things like that, but that's very limited because
3 that's all county money. So our problem in a
4 small Public Defender's office, even if you want
5 to do the right thing is number one, the number
6 of specialty courts that have come about in the
7 last three or four years. I see Judge Russell
8 here being one of the leaders in specialty
9 courts. We in Wyoming County have a Family Drug

10 Treatment Court, felony and misdemeanor drug
11 treatment court. We have an Integrated Domestic
12 Violence court. We don't have any more lawyers
13 to basically man or woman those courts because we
14 still have all the other courts to be there.
15 What I have found in the last three to four years
16 as specialty courts develop is that my attorneys,
17 including myself, are spending probably double
18 their time in court rather than doing the other
19 work that we have to do, which includes appeals
20 and a lot of our Article 78, which are not
21 criminal but deal with inmates. We have far
22 fewer people being able to do their in-office
23 work because somebody is in court almost every
24 day of the week because of the specialty courts.
25 I'm sure if you took a look at the proposals

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2 for specialty courts, there's no economic impact
3 because we're getting federal money and we're not
4 using any additional DAs or Public Defender's.
5 The impact is work load. We simply are being
6 drowned in the ability to cover each of these
7 courts even though they have a worthwhile
8 endeavor. They serve our clients well. We want
9 these courts to protect our clients. We need the
10 resources. So if the system continues to exist

11 in any way like it exists now, we need
12 resources. We need the ability to add staff. We
13 need the ability to add social workers. We need
14 the ability to add investigators. I can't go to
15 my county to get them because they won't give
16 them to me.

17 The darkest hole I see in the rural areas is
18 the assigned counsel program. I'm very
19 familiar -- I think Bob Lonski already testify.
20 I'm familiar with his program in Erie County.
21 I'm familiar with the various oversight
22 committees down in the city. There is a
23 tremendous difference even if there are problems
24 in assigned counsel between those assigned
25 counsel programs run by Mr. Lonski, for example,

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2 where there are qualifications mandated and some
3 oversight, mentoring and assurances that people
4 who are assigned felony level cases have felony
5 experience. None of that exists in a rural
6 community. Last time I looked, there were
7 probably 25 lawyers in Wyoming County and because
8 of conflicts, there are probably five who can do
9 any criminal defense work. So clearly we go
10 outside of our county for the assigned counsel
11 program. We have an assigned counsel coordinator

12 who is also our county attorney. And while it's
13 an administrative job only because his staff
14 really does all of the work and he's simply the
15 figurehead in finding attorneys to do the work,
16 the problem is, even with the increase in rates,
17 we're lucky to get not only a body, but a warm
18 body to be there. There simply aren't people who
19 are willing to travel out. You can get 75 bucks
20 an hour in Erie County in Buffalo. Why would you
21 want to make the 50-mile trip through the snow to
22 get the same money in a rural county? We're
23 stuck with and I mean stuck with literally, the
24 talent or lack of talent in our surrounding rural
25 counties. There are no qualifications. There is

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2 no oversight. There is no control other than
3 perhaps the judges themselves. I mean, clearly,
4 we have two county court judges. They're both
5 excellent. I think that's what makes the system
6 work, but you don't want to have to rely on a
7 judge to ensure quality defense. But, in fact,
8 they have undertaken that role, if they find a
9 certain assigned counsel are not adequate, they
10 don't want to have to retry a case. Most judges,
11 at least those that I've talked to, want to keep
12 the train going. They're interested in standards

13 and goals and no reversals.

14 PROF. HELLERSTEIN: How would you repair
15 that rural model?

16 MR. EFFMAN: The rural model -- well, first
17 of all, we have several answers. Number one,
18 standards. All right? We have several
19 organizations working on standards. I'm sure you
20 have the defender's standards that the chief
21 defenders have worked on for years to put
22 together. Klaus and Laurie, who works with the
23 state bar special task force on putting together
24 standards that would be produced and finalized
25 and submitted to the New York State Bar

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2 Association House of Delegates April 1st or 2nd,
3 whenever their meeting is. I think that's an
4 excellent document. Where will the attorneys
5 come from? The attorneys will come from a couple
6 of suggestions. One, the capital defender's
7 office looks like it's going out of business.
8 You have a system already set up in New York
9 State with a state-wide organization, with
10 offices throughout the area to cover all of these
11 counties, with expert teams to provide backup in
12 non-capital cases, presuming we don't have the
13 death penalty in New York. That should be

14 utilized immediately. It might take years to
15 change the system. We have something in place
16 right now to back them up.

17 Professor, let me give you an example. My
18 office has handled three capital cases from '95
19 to the end of 2004. In each of those cases, we
20 were first chair and in each of those cases,
21 either the capital defender's office or one of
22 the attorneys qualified in the capital defense
23 were assigned with us. It was the way to handle
24 a case. No question in my mind. I mean, from
25 our position, unlimited resources, mitigation

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2 experts, the ability to truly concentrate -- I
3 realize this is the most serious of crimes. If
4 you want to have a model, take a local lawyer who
5 has been qualified, team that lawyer with an
6 expert with resources, if necessary, in a
7 particular case and you have a model to provide
8 effective, efficient, competent defense under
9 almost any circumstances imaginable. In each of
10 those capital cases, our local DA, who would be
11 understaffed as well, was assisted by the
12 Attorney General's office. It was a level
13 playing field. That's what we need. That's just
14 an example. I think the present bill that is

15 before both houses, I think the Senate sponser is
16 Dale Volker and assembly is Lentol. That, for
17 the public defense commission, is an excellent
18 way to create oversight, to mandate the standards
19 be followed and to ensure that monies flow to the
20 counties so that they have the ability to provide
21 the resources and talent necessary.

22 The other thing is regionalization. You've
23 just heard that Monroe County has a Conflict
24 Public Defender's office. When the rates change
25 and each of the -- in especially the smaller

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2 counties, we're looking for ways to supplement
3 their budgets and avoid paying the 75 dollars.
4 Conflict defenders popped up all over the place.
5 My suggestion to our public defenders in Western
6 New York, a regional Conflict Public Defender's
7 office could handle four or five counties without
8 each of those counties having to duplicate that
9 staff and those attorneys. It's an effective way
10 of dealing with it. You deal with home turf and
11 home rule. It's impossible unless it comes down
12 from above because the counties aren't going to
13 give up their local rule over their defense
14 system.

15 MR. GOLDMAN: Let me ask you something.

16 You're a suburb Public Defender as are the other
17 people who have spoken to us, I'm talking about
18 the people who aren't here. And I've read
19 transcripts from various counties, from
20 Metropolitan areas, too, where the public defense
21 representation is woefully embarrassing. Would a
22 state-wide system -- how do we control, even in
23 the state-wide system, the fact that there are
24 not very good Public Defender's in some places?
25 Or am I just wrong in my assumption?

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2 MR. EFFMAN: You're not wrong in your
3 assumption. I think -- I know public defenders
4 who I would not deem to provide adequate service,
5 even if they paid attention to what they were
6 doing. And I think the only way to do that is
7 oversight and money. I mean, if the counties
8 were relying on the state for reimbursement and
9 the state had to ensure the quality of the
10 services and had some oversight, I think that's
11 the only way to ensure quality services in places
12 that don't have it now. I think you also have to
13 have the ability to bring in the assistance such
14 as something like the capital defender's office
15 or an equivalent to back up those counties. I
16 don't know how to make sure that everybody

17 appointed as a Public Defender is competent and
18 able to handle the task. There's simply no way
19 to do that that I'm aware of other than to review
20 what's happening in that county and have control
21 over reimbursement to that county if they don't
22 meet the standards. Just one thing, it must have
23 been mentioned before, part of the problem in the
24 rurals, I believe, is the justice court system.
25 I know it's not part of your mission statement.

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2 I don't think it is. The reality is the closed
3 door, back of someone's house, in the barn, in
4 the highway department, no record, leads to the
5 types of problems that I think continue to exist
6 in the rural areas. If we had a Nassau Suffolk
7 district court kind of situation -- and I know of
8 some very good justice court people. We have 37
9 magistrates and judges in our county. Right now,
10 one is a lawyer. And it's a very difficult task
11 to train JPs, which we do. We've had the same
12 Public Defenders doing this for the same ten,
13 fifteen years. They come to rely on us as they
14 would the district attorney. The reality is if
15 you keep justice in the dark, it stays in the
16 dark and justice isn't served. You need courts
17 of record. I know it's a cost factor. I know

18 it's home turf factor. But that opens, sheds
19 light on what's happening in these rural areas
20 that we are not aware of. I know there's been
21 studies. I think a professor from Fordham has
22 entered the fray on this. I know it's been an
23 ongoing situation. I know there's lots of
24 politics involved, but I think district courts or
25 something like that would solve a lot of problems

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2 in the rural areas. If you have any questions, I
3 know I'm probably over my time limit.
4 PROF. HELLERSTEIN: We would love to hear
5 more. I think we need to stay on schedule.
6 Thank you so much.
7 MR. EFFMAN: Thank you.
8 PROF. HELLERSTEIN: We're going to take a
9 half-hour break. Twenty-five minute break.
10 Reconvene at 1:30.
11 (Whereupon there was a brief recess taken.)
12 PROF. HELLERSTEIN: Ladies and gentlemen, we
13 are ready to reconvene. Mr. Youngman?
14 MR. YOUNGMAN: Yes.
15 PROF. HELLERSTEIN: Welcome, Mr. Youngman.
16 MR. YOUNGMAN: Thank you. Good afternoon.
17 My name is Richard Youngman. I'm the Conflict
18 Defender for Monroe County. My entire 30-year

19 career in the law has been dedicated to serve the
20 client community that is the subject of your
21 hearing, as an Assistant Public Defender, an
22 assigned counsel panel member, assigned counsel
23 administrator and now as conflict defender. In
24 the mid-1960s, the state's response to Gideon v.
25 Wainwright was to mandate that the separate

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2 counties become responsible for providing
3 indigent defense. Since then, with few
4 exceptions, the state has abdicated any
5 responsibility in this area.

6 During the last 30 years, I have seen or
7 heard of various county responses to this
8 mandate. They range from hostility to
9 indifference and neglect to supportive. In
10 Monroe County, there has been and continues as a
11 strong commitment to providing quality indigent
12 defense services. We benefit from a supportive
13 county government, an active Monroe County Bar
14 Association, experienced and dedicated Public
15 Defenders and Conflict Defenders and skilled and
16 dedicated private practitioners actively
17 participating in the Assigned Counsel Program and
18 a fair and independent judiciary understanding of
19 the necessity of full compensation and adequate

20 support services for assigned attorneys. Another
21 important component of this partnership is the
22 excellent support provided by the backup -- the
23 Public Defense Backup Center of the New York
24 State Defenders Association. The Backup Center
25 provides legal support, training and practice

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2 manuals and research and consultation services to
3 assigned counsel and institutional providers. It
4 fosters well-trained defense attorneys that
5 reduce delay, unnecessary incarceration and
6 claims of ineffective representation that can
7 result in costly reversals and retrials. I
8 strongly urge that this important organization be
9 fully funded now and in the future. I wish this
10 strong partnership existed throughout the state,
11 but it does not. I believe that in order to best
12 serve our client community, that the public
13 defense system remain a local function and
14 choice. But in order to achieve uniformity and
15 quality throughout the various public defense
16 systems in New York, I believe it is imperative
17 to create an independent state-wide commission
18 with the power and authority to impose on the
19 various programs quality standards such as those
20 adopted by the Chief Defenders of the New York

21 State Defenders Association and to act as the
22 disbursement agency for state funds from the
23 Indigent Legal Services Fund. Legislation to
24 create this commission has been introduced and I
25 urge its passage. If you are not familiar with

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2 the standards adopted by the New York State
3 Defenders Association, I would urge you to read
4 them. They are available on the web site and are
5 entitled Standards for Providing Constitutionally
6 and Statutorily Mandated Legal Representation in
7 New York State.

8 PROF. HELLERSTEIN: Do you think that model
9 would do the trick? Is it sufficient?

10 MR. YOUNGMAN: I believe so.

11 PROF. HELLERSTEIN: Could you elaborate on
12 that.

13 MR. YOUNGMAN: I think clients are best
14 served when their attorneys are local attorneys.
15 And I, therefore, am not in favor of a huge
16 state-wide Public Defender's system that might
17 cause clients to have to travel great distances
18 to see their attorneys and would be more in tune
19 with the local practices.

20 PROF. HELLERSTEIN: Could you support a
21 state system that is locally situated and

22 monitored?

23 MR. YOUNGMAN: Having worked in government
24 for years, I would find that while the ideal
25 situation may be to have a Public Defender office

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2 that is a state office in each county in the
3 State of New York, I think once the state got
4 ahold of it, they wouldn't do that, that they
5 would look at the numbers and figure that the
6 most effective way to spend their money would be
7 to have a centralized office. If you took the
8 Seventh Judicial District, there would be a
9 centralized office in Rochester so that with
10 somebody in a misdemeanor case in a town court in
11 Steuben County would have to travel to Rochester
12 to meet with their attorney because I don't
13 believe and never have believed in counseling
14 your client or meeting with your client in the
15 hallway or the courthouse. I just don't trust
16 the state government to set it up on a regional
17 basis.

18 MS. SHANKS: Laurie Shanks. Were you here
19 when the gentleman spoke who said that in Monroe
20 County that is where he met with his assigned
21 attorney and that he was in the criminal justice
22 system several times and he never met with his

23 attorney anywhere other than in court? I just
24 wondered if you had a response to that or if you
25 had even heard it.

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2 MR. YOUNGMAN: I did not hear that.

3 MS. SHANKS: I'll withdraw that question.

4 MR. YOUNGMAN: I can tell you in the
5 Conflict Defenders Office, although things do
6 happen in court, as we all know, where you do
7 have to go into the hallway and discuss certain
8 things, that I urge on my attorneys in our office
9 to meet with clients in our office to discuss
10 their case. Most certainly if there's going to
11 be any kind of trial or hearing.

12 JUDGE STACK: May I ask you, sir -- Judge
13 Stack -- you, as the Conflict Defender, do you
14 have attorneys who work with you in that office
15 or is your role to determine that there is a
16 conflict and to find an attorney to represent a
17 defendant?

18 MR. YOUNGMAN: No. After the court
19 determines that there's a conflict and relieves
20 the Public Defender's office, the case is
21 referred to our office. We are not a full
22 conflict defender office in that we only handle
23 certain types of cases. Misdemeanors in City

24 Court in Rochester, Family Court cases and all
25 appellate cases. Felonies and local criminal

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2 court matters are still handled by assigned
3 counsel.
4 JUDGE STACK: Okay. You have attorneys in
5 your office?
6 MR. YOUNGMAN: Correct.
7 JUDGE STACK: How many attorneys do you have
8 in your office?
9 MR. YOUNGMAN: We have eight.
10 JUDGE STACK: And a conflict case goes to
11 you, there's no question, but that would go to
12 your office in those areas?
13 MR. YOUNGMAN: Correct.
14 JUDGE STACK: There's not another choice
15 that this could go to somebody else?
16 MR. YOUNGMAN: Correct.
17 JUDGE STACK: Assigned counsel is limited in
18 your community to felonies and the other cases?
19 MR. YOUNGMAN: And cases where we also have
20 a conflict.
21 JUDGE STACK: Okay.
22 PROF. HELLERSTEIN: Are these full-time
23 attorneys?
24 MR. YOUNGMAN: Yes, they're full-time

25 attorneys. There are four for Family Court,

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2 three for City Court and one appellate attorney.

3 Plus we staff three clerks. We don't have an

4 investigator. We are allowed to take from funds

5 for 18-B investigators if we have to hire an

6 investigator, we contract those investigators.

7 JUDGE RUSSELL: Do you have one central
8 office?

9 MR. YOUNGMAN: Yes, we do.

10 JUDGE RUSSELL: Where is that located?

11 MR. YOUNGMAN: It's in the county public
12 safety building on the sixth floor.

13 JUDGE RUSSELL: Here in Rochester?

14 MR. YOUNGMAN: Correct.

15 PROF. HELLERSTEIN: You had some other
16 information.

17 MR. YOUNGMAN: Yes. Quality in
18 representation is dependent on adequate resources
19 and throughout much of the state and here in
20 Monroe County, adequate financial resources are
21 not always provided by the counties. With an
22 independent, state-wide commission's increased
23 oversight and ability to impose standards comes a
24 time commitment responsibility on the part of the
25 state to relieve the counties of the burden of

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2 the unfunded mandate of providing indigent legal
3 services. In the mid-1960's, when Article 18-B
4 of the County Law was adopted, the state
5 estimated that the total cost of indigent defense
6 outside of New York City was four million dollars
7 and that the then current aid to localities
8 provided by the state to the counties was more
9 than sufficient to cover this additional cost for
10 the counties. Today, Monroe County, alone,
11 spends near eight million dollars on indigent
12 defense and the aid to localities provided by the
13 state has in no way kept pace. We all understand
14 the financial constraints under which all levels
15 of government labor. However, this is also an
16 era of thinking outside the box and I think that
17 several sources that have not been considered
18 before do exist for raising additional revenue
19 for the indigent legal services fund. I would
20 consider increasing or creating where they don't
21 exist licensing fees for groups, some of whose
22 members benefit directly from delivery of
23 indigent legal services. These might include
24 some groups as private investigators, medical
25 professionals, psychologists, certified court

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2 reporters and other such groups. Not all
3 attorneys receive income from indigent defense
4 services, but all attorneys contribute to them
5 with a portion of their registration fee. I
6 believe that other groups should contribute
7 something also.

8 In summary, I think there are four steps
9 that could be immediately taken to improve the
10 state of indigent defense in New York State,
11 creation of the state-wide independent Public
12 Defense Commission; increase state funding to the
13 localities; establishment of a mechanism to
14 insure that the hourly rates and statutory
15 maximums of Article 18-B are reviewed and
16 adjusted on an annual basis rather than every 20
17 years and full funding for the Public Defense
18 Backup Center.

19 The defense of indigent clients has been too
20 long neglected by the State of New York and it is
21 now time to remedy the deplorable state of
22 indigent criminal defense. New York State used
23 to lead the nation in this area, but we have
24 fallen far behind. Please do something now.
25 Thank you.

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2 PROF. HELLERSTEIN: Thank you.

3 MR. YOUNGMAN: Any questions? Okay.

4 PROF. HELLERSTEIN: Thank you very much.

5 MR. YOUNGMAN: Thank you.

6 PROF. HELLERSTEIN: Mr. Lonski.

7 MR. LONSKI: Good afternoon.

8 PROF. HELLERSTEIN: Welcome, Mr. Lonski.

9 MR. LONSKI: Professor.

10 PROF. HELLERSTEIN: What problems do you

11 have?

12 MR. LONSKI: Well, I would like to thank the

13 commission for allowing me to speak for a few

14 moments here. My name is Robert Lonski. I've

15 been the administrator of the assigned counsel

16 program in Erie County for almost 12 years. Erie

17 County -- in Erie County, the assigned counsel

18 program is the primary defender, which, as you

19 know, is different from most other counties.

20 We've built a strong innovative and lean program

21 and it's been recognized on a state-wide basis as

22 well as on a local basis. I know that you've

23 heard here and you've heard elsewhere about what

24 the problems are with the provision of public

25 defense, so I'm not going to go into a recitation

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of what the problems are. What I'm going to focus on in the time that I have is three broad areas, what I think we need, what I think we don't need and what is possible.

What I think that we need in the State of New York in public defense is strong, enforceable state-wide standards. I think these standards need to be clear, quality related, measurable and objective. They need to be not politically driven and I believe that there needs to be secure, significant state funding tied to compliance with those standards. I suggest that this type of initiative could be best accomplished by an independent permanent state commission constituted at least in significant part by defenders or representatives from the defender community. I think it's particularly important that evaluation with respect to compliance with any standards that might be drawn up be done or be participated in in a significant way by leaders in a defense community, not necessarily by persons or entities outside the defense community, which might have other areas of expertise rather than the provision of defense

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services. Standards I believe need to include but not be limited to the requirement of screening of attorneys who provide public defense in any given locale, significant minimum qualifications speaking to experience, training and skills, oversight of attorney performance and effective client complaint review process. A critical component needs to be training and training not on a one-shot basis, but on an ongoing basis. Supports and resources to the providers of defense services for the indigent and meaningful, weighted caseload guidelines or limits.

What I think that we do not need is to fix parts of the system that were not broken and which, in fact, function well. I think we do not need a one-size-fits-all model that could result in homogenized mediocrity. We do not need a politically-driven bureaucracy. And we do not need to up-size what problems we do have. For example, a state-wide system that's chronically underfunded as, for example, the New York State Defenders Association is. This -- what I'm speaking about in terms of what I think we need

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2 and what we don't need is pretty much what's been
3 done in Indiana. Where, in the early '90s, a
4 state-wide commission was created for the first
5 time, setting standards, tying those standards,
6 compliance to those standards to significant
7 state funding which, at this point, is, I
8 believe, 40 percent of the cost of defense. Yet,
9 allowing each county the autonomy to keep its own
10 defender program just like most counties in New
11 York have its own district attorneys office.
12 I've discussed with David Cook, who is the public
13 defender of Marion County within which is located
14 the largest public defender organization in the
15 State of Indiana. Mr. Cook feels strongly that
16 the commission and the standards that it has
17 created, again, tied to state funding, has
18 improved the quality of defense in Indiana
19 immeasurably. He's very enthusiastic about the
20 improvement and the difference that that has made
21 in his state and in his locale. There are, I
22 believe, some very strong effective public
23 defender model programs in New York State.
24 Monroe County has one of them. Brooklyn has
25 another. Wyoming County, a small county, has a

3 There are also some very good effective assigned
4 counsel programs in the state like Erie, which
5 leads me to what's probably, even possible, even
6 with the type of a system that we have now, if
7 it's fixed. And I would like to just spend a few
8 minutes telling you what's been done in Erie
9 County as an example of what could be done with
10 this type of program. We have roughly three
11 hundred and fifty attorneys on our panel. We
12 benefit from over four hundred volunteer hours
13 each year. And those volunteer hours are donated
14 by high quality attorneys and in some cases,
15 judges, in CLE development and presentment,
16 shadowing of more experienced attorneys by less
17 experienced, mentoring, second chairing board
18 committees. Our program does some of the things
19 that I'm going to mention in a second. Our
20 program is a certified CLE provider in New York
21 State. We do at least six or seven quality
22 programs a year and have created a library of
23 dozens, scores of training videotapes. We
24 provide over 700 and 50 attorney hours of
25 training each year. And it's all, by the way,

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2 focused very tightly on defense issues. These
3 trainings are not open to anybody except

4 attorneys who are on the assigned counsel panel.
5 It allows us to focus it tightly on strategies
6 and issues that are helpful to defense. Some of
7 the most experienced, highly-respected criminal
8 defense attorneys in Erie County represent our
9 clients year after year. And many of these
10 attorneys have expressed to me that they wouldn't
11 be interested in joining a public defense
12 office. So that we're able to tap into talent
13 that would not be otherwise available for public
14 defense by using the model that we have. We do
15 comprehensive screening of attorneys. An
16 eight-page application. Each attorney is
17 individually interviewed by a committee of our
18 board. There are multilevel review by this
19 volunteer board. We have a well-developed
20 training program and I've alluded to some of
21 those things. When attorneys second chair, when
22 they shadow, they're not getting paid for that.
23 The understanding is this is good training. This
24 is what you need. This will take you to a higher
25 level and they're very enthusiastic about taking

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2 advantage of that. We have hands-on, one-on-one
3 training for newer, less experienced attorneys.
4 We have a peer review process. Again, that peer

5 review process is done by a peer review committee
6 of volunteer selected, high quality attorneys in
7 a community. We have ongoing routine client
8 feedback. We do also have an ongoing review and
9 removal process for attorneys that are not
10 cutting the mustard with the program.

11 PROF. HELLERSTEIN: How does that work --
12 two things. Detail of that oversight and then
13 how does that client feedback mechanism work?

14 MR. LONSKI: We routinely -- once a case is
15 complete, we routinely send out a questionnaire
16 to clients on a random basis, taking a sampling
17 every week. We send a sampling of -- we send the
18 questionnaire to a sampling of cases that have
19 been done recently. And, you know, send them a
20 self-addressed stamped envelope and we get both
21 positive and negative feedback in that way. We
22 also have a system set up whereby we track,
23 investigate and resolve any complaints that we
24 receive from any of our clients and from
25 anybody. Once in a while, we'll get a complaint

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2 from a judge. We may get complaints from other
3 attorneys. Generally speaking, when there is a
4 complaint, it's from a client. And again,
5 there's a -- it's sort of a multi-prong approach,

6 depending on what type of complaint it is. I'm
7 the first level of triage in that process and
8 always reach out to the attorney and reach out to
9 the client and try to get to the bottom of what
10 the issue is. Sometimes it's as simple as a
11 misunderstanding about what the client's -- the
12 attorney's role is and the limitations of what
13 they can do. Many times, there's communication
14 issues. And it's fairly easy to resolve those.
15 But when -- on occasions when they're more
16 serious, we do have a formalized complaint review
17 process and I can give you a copy of that. I
18 brought copies of various materials, standards
19 and so on with me. Actually, I just have one
20 copy that I can provide to the commission. But
21 ultimately, there is a process whereby if I feel
22 that an attorney should be either suspended for a
23 significant period of time or removed completely
24 from the program, I'll first discuss it with the
25 attorney. There have been occasions when the

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2 attorney will say, well, I don't want to go
3 through that process, I'll just voluntarily
4 remove myself. But there have also been a couple
5 of occasions where we've had to go through the
6 process which entails convening the peer review

7 committee and essentially that's a body which
8 then would hear both my presentation and the
9 attorney's presentation. The attorney has a
10 right to be represented by counsel if he or she
11 wants to. And that committee then within certain
12 time periods has the -- would issue a
13 recommendation to our full board of directors.
14 The board of directors then would make the
15 ultimate decision on what the result of the
16 matter will be. But the individual would have a
17 second bite at the apple and an opportunity to
18 come before the board itself. By the way, if the
19 complaint, for example, is from a client, the
20 client is also invited to make the
21 presentation -- make a presentation. And we have
22 gone through that process several times. And I
23 will say, that whether it's through that process
24 or through some truncated version of that
25 process, where there was a resolution short of

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2 that, we've probably had over the year probably
3 twenty attorneys at least who have been -- who
4 are no longer with the program who previously had
5 been.
6 MS. SHANKS: Who serves on your board of
7 directors? I don't mean names. I mean how is it

8 comprised?

9 MR. LONSKI: Our board of directors is
10 comprised of -- it's kind of a patchwork of
11 different sources. The primary -- the largest
12 group, more than half, are appointed by the bar
13 association board of directors. There are some
14 ex-officio members, including, for example, the
15 president of the bar association or his or her
16 designee, the chair of the Criminal Law Committee
17 of the Bar Association, the chair of the Family
18 Court Bar Association. And then there are a
19 couple of -- I think just one judge on as an
20 ex-officio. The supervising judge of criminal
21 parts for the district. Does that answer your
22 question?

23 PROF. HELLERSTEIN: Yes.

24 MR. CHAN: May I ask a question?

25 MR. LONSKI: Yes.

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2 MR. CHAN: Chris Chan. Those twenty
3 attorneys who were taken off of your panel, was
4 there a complaint filed with the local
5 disciplinary committee?

6 MR. LONSKI: There wasn't by me, but in some
7 cases where I felt that it was the type of thing
8 that would be -- that should be brought to their

9 attention, I would guide the -- or that the
10 client may want to, I would guide the attorney in
11 that -- the client in that direction. There have
12 been a number of situations in which the
13 grievance committee has contacted me in relation
14 to issues involving our attorneys and I've worked
15 closely with the committee in that regard.

16 MS. ZUFLACHT: Who assigns the cases to the
17 individual attorneys?

18 MR. LONSKI: I'm sorry?

19 MS. ZUFLACHT: Who makes the assignment of
20 cases to the individual -- or appoints the
21 attorney be counsel?

22 MR. LONSKI: In most cases, our office makes
23 the assignments.

24 MS. ZUFLACHT: Is that on a rotating basis?

25 MR. LONSKI: It's on a rotating basis. But

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2 there are a number of factors that would go
3 into -- if you look at it on a broad -- in a
4 broad sense, it's rotating. But in any given
5 case, it's not a pure random rotation. And I'll
6 tell you what I mean by that. First of all,
7 attorneys who come on to our panel are, I don't
8 know if certified is the right word, but approved
9 through this process that actually takes several

10 months. There are -- for example, in the
11 eight-page application that I alluded to, we want
12 to know how many cases of this type have you had,
13 how many have you tried, how many have been jury
14 trials, who have been the judges, who have been
15 opposing counsel, who have been co-counsel for
16 codefendants and what we'll do is we're making
17 phone calls and we're touching base with people
18 and checking, essentially checking references.
19 And we have found that as long as we're not going
20 to reveal our sources that people are very candid
21 with us. And we get more information through the
22 face-to-face interviews and ultimately, then, the
23 board certifies or approves attorneys to receive
24 cases through our program at a certain level.
25 Might be a misdemeanor level. It might be the

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2 lower felony panel. It might be a major felony
3 panel, homicides. And then in Family Court,
4 various levels. There might be approval and it's
5 quite common, that it's approval on a contingent
6 basis. Once you have done X, Y and Z, then you
7 will be released to get assignments at the
8 misdemeanor level.
9 MS. ZUFLACHT: For purposes of arraignment,
10 are you in the courtroom, is the judge assigning

11 from a list you provide to them?

12 MR. LONSKI: Generally not. What generally
13 happens is that in any one of the justice courts,
14 for example -- and there are forty or so in the
15 County of Erie -- an individual will be arraigned
16 and if there's any indication whatsoever that
17 there is a need for -- a person can't retain, one
18 of two things happens. If the person walks out
19 of the courtroom, they're given a piece of paper
20 that says call the assigned counsel program.
21 They'll do a financial screen and get an attorney
22 for that person. If the person is remanded to
23 jail, the court notifies us immediately either by
24 phone call or by fax, depending on what the
25 particular court preference is and there is no

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2 financial screening done at this point. We
3 immediately assign an attorney and instruct that
4 attorney to go to the holding center and
5 interview the client.

6 JUDGE RUSSELL: If I could just ask,
7 Mr. Lonski, if you could, would you explain in
8 what areas that your office covers
9 distinguishable from the Public Defender's
10 office, because there's so many different models
11 state wide and how Erie County may differ.

12 MR. LONSKI: Exactly. The Public Defender
13 in Erie County for non-conflict cases represents
14 all misdemeanor clients in Buffalo City Court.
15 In addition, they represent at the initial stages
16 felony clients who are not a conflict. Any
17 conflict cases, any codefendants, the assigned
18 counsel program represents all of those in city
19 court as well. We try to coordinate as well as
20 we can with the Public Defender cases where the
21 felonies may have to be transferred to
22 representation by an assigned attorney when that
23 case is, say, held for the grand jury.

24 JUDGE RUSSELL: I guess maybe to be more
25 direct, outside of the City of Buffalo, is all

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2 assigned -- does assigned counsel, 18-B, handle
3 all indigent defense representation?

4 MR. LONSKI: All indigent defense is
5 provided outside of the city -- all indigent
6 defense outside the city is provided by the
7 assigned counsel program in Erie County.

8 JUDGE RUSSELL: What about felonies?

9 MR. LONSKI: All felony representation at
10 the superior court level for indigents is
11 provided by the assigned counsel program and all
12 felony defense in all courts except the City of

13 Buffalo is provided by the assigned counsel
14 program, as is all parole revocation
15 representation and all Family Court
16 representation, which there's a right to assigned
17 counsel.

18 MR. GOLDMAN: Mr. Lonski, if I may, we've
19 had some testimony about what it costs the public
20 defender's office per case. And at least my
21 guess is that assigned counsel plan, according to
22 the current plan, would cost more. Is that
23 true? Are those comparisons accurate?

24 MR. LONSKI: Well, I don't know what the
25 comparisons are that you're referring to or what

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2 they are.

3 MR. GOLDMAN: We've heard three hundred
4 dollars a case twice today.

5 MR. LONSKI: I can't say what -- I don't
6 have that information with me, but our analyses
7 are generally done on a more fine-tuned basis
8 than that. What we look as is the average cost
9 of misdemeanor, average cost of this level
10 felony. I can't, off the top of my head, tell
11 you what those numbers are. But I do know that
12 twice in the last ten or so years, Erie County
13 has taken a very hard look at the possibility of

14 retooling its model of defense representation,
15 the latest being last year, when the assigned
16 counsel rates went up. And at least some of you
17 may know, the financial straits that Erie County
18 is struggling with these days. And on both
19 occasions, the county came to the conclusion that
20 this was the preferable way to provide the
21 services, that it would cost more to do a public
22 defense program the way a public defense -- the
23 right way, you know. And that's -- and don't
24 misunderstand me. I'm not making any -- that has
25 no relationship to the public defender program

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2 that's operating in the City of Buffalo. I think
3 they do a good job. To create a countywide
4 public defender, that's what they looked at in
5 great detail and came to the conclusion that the
6 representation was good and that it would cost --
7 well, quite frankly, I'm not sure how -- people
8 that make those ultimate decisions, I'm not sure
9 how heavily they weigh the quality of
10 representation. The fact that on two separate
11 occasions under two separate administrations, one
12 being Democrat and one being Republican with
13 different players on both occasions came to a
14 separate conclusion. I think that they believe

15 that it's economically most cost effective.

16 MR. CROTTY: I've read the Erie County
17 district attorneys office has lost 20 percent of
18 its position because of the financial
19 difficulties that exist in Erie County. Has your
20 program been cut by 20 percent? If it has, how
21 are you going to meet the Constitutional mandates
22 of providing adequate service?

23 MR. LONSKI: I don't believe that the DA has
24 lost 20 percent. They laid off four people this
25 week and I understand that that's the limit of

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2 their layoffs for attorneys, a couple of support
3 staff. And the answer to your other question is,
4 no, we have not been cut.

5 MR. CROTTY: Thank you.

6 JUDGE SMITH: May I, just to make certain I
7 understand, the Public Defender in Erie County
8 only handles misdemeanors?

9 MR. LONSKI: They handle felonies in the
10 city court.

11 JUDGE SMITH: What happens when they leave
12 city court?

13 MR. LONSKI: Currently when they leave city
14 court, as they're leaving city court, they're
15 assigned an assigned attorney, too.

16 JUDGE SMITH: So a defendant is going to be
17 represented by two different attorneys at various
18 times during a prosecution?

19 MR. LONSKI: Currently, that's true. But we
20 have recently had some meaningful conversations,
21 the head of the Public Defender's organization,
22 the Legal Aid Bureau and myself to explore ways
23 that we can work toward eliminating bifurcated
24 representation and have true vertical
25 representation in all cases.

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2 JUDGE SMITH: Last question, the bulk of the
3 indigent defense work on the felony level, then,
4 is done by assigned counsel or all of it is in
5 the county court?

6 MR. LONSKI: That's true.

7 JUDGE SMITH: Okay. Who, if anyone, reviews
8 vouchers submitted by 18-B attorneys?

9 MR. LONSKI: Well, I and my staff do
10 initially. And following that review, they're
11 sent to the judge who supervised the case, who
12 handled the case and ultimately our vouchers
13 require a sign-off by both myself and the judge.
14 I didn't finish answering your question in terms
15 of the rotation. When we get a case in, we're
16 looking at besides a pure rotation, we're looking

17 at what kind of a case is this, who is coming up
18 on the rotation, who's at that level, you know,
19 according to our approval lists. We also, within
20 that, we'll look at immediately who currently may
21 have an attorney assigned to them in any kind of
22 a case. It doesn't matter if this is a criminal
23 case coming in and this is a Family Court case.
24 We want one attorney representing one client.
25 And we'll go back in time within the past, say,

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2 year and see whether a particular attorney has
3 represented this individual in a case that --
4 we're not going to go back three years, but if
5 there has been a relationship between people
6 within that period of time and it's been
7 satisfactory, we will relink that person to the
8 attorney who represented them before. Having
9 gone through those hoops, we will then look to
10 see who is on our panel who can take this kind of
11 a case who is already going to that court on that
12 particular day so we can achieve some efficiency
13 there and not have four attorneys sitting in
14 court for two hours waiting for a case to be
15 called on four different cases. Instead, we're
16 going to have, you know, maybe three -- maybe one
17 or two attorneys and splitting the time on those

18 vouchers.

19 PROF. HELLERSTEIN: Mr. Lonski, I hate to
20 cut you off, we're running low on time. Can I
21 ask you send us a copy of the application for
22 18-B assignment.

23 MR. LONSKI: I have that with me. I can
24 give that to you. I can give you copies of our
25 standards for various levels.

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2 PROF. HELLERSTEIN: That would be very
3 helpful.

4 MR. LONSKI: And some of our policies and
5 procedures. Unless there's any other questions,
6 those are pretty much my comments. I think I've
7 said what I need to say. I know you have a lot
8 of other people to listen to.

9 PROF. HELLERSTEIN: Thank you.

10 MR. LONSKI: Thank you all for the
11 opportunity.

12 PROF. HELLERSTEIN: Ms. Zimmermann.
13 Ms. Zimmermann, welcome.

14 MS. ZIMMERMANN: Thank you. My name is
15 Helen Zimmermann. I'm appearing before the
16 commission this afternoon on behalf of the Legal
17 Aid Bureau of Buffalo, a private, not-for-profit
18 agency that represents indigent defendants in

19 Buffalo City Court and in the Appellate Division,
20 Fourth Department. I am the supervising attorney
21 in Buffalo City Court unit. Therefore, I will be
22 directing most of my presentation this afternoon
23 to matters concerning indigent defense in Buffalo
24 City Court. David Schopp, the Executive Director
25 of the Legal Aid Bureau, will be testifying in

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2 Ithaca as to other issues pertaining to our
3 agency.

4 In Erie County, indigent criminal
5 representation is accomplished through a
6 bifurcated system. The representation of
7 indigent defendants in Erie County is bifurcated
8 in that Erie County contracts with the Legal Aid
9 Bureau to provide representation in Buffalo City
10 Court and in the Appellate Division. At the same
11 time, however, Erie County also contracts with
12 the Assigned Counsel Program to provide attorneys
13 in County and Supreme Court for those indigent
14 defendants who have been indicted and face felony
15 charges in superior court.

16 A brief explanation of the system that has
17 successfully been in place in Buffalo and Erie
18 County for many years might be helpful. Pursuant
19 to this system, Legal Aid Bureau attorneys are

20 the first and often the only attorneys with whom
21 a great many indigent defendants come in contact
22 because Legal Aid Bureau attorneys handle all
23 aspects of representation in Buffalo City Court,
24 the local criminal court with the largest
25 caseload in the county. Legal Aid Bureau staff

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2 attorneys in Buffalo City Court are assigned by
3 the city court judge to represent defendants
4 charged with violations, misdemeanors and
5 felonies when the judge determines that the
6 defendant cannot afford counsel and there's no
7 conflict matters. The Legal Aid Bureau is a
8 major presence in Buffalo City Court inasmuch as
9 Legal Aid Bureau staff attorneys represent more
10 than 75 percent of the defendants in Buffalo City
11 Court.

12 The Legal Aid attorneys in Buffalo City
13 Court, who are often referred to in the local
14 community as public defenders, dispose of the
15 majority of violations and misdemeanor and some
16 felonies by negotiating favorable guilty pleas
17 and sentences for their clients. In instances
18 when the Criminal Procedure Law prohibits the
19 city court judge from setting bail, for example,
20 for defendants charged with class A-1 felonies or

21 two prior felony convictions, the Legal Aid
22 Bureau attorneys appear in County Court or
23 Supreme Court to make bail argument. In
24 representing their clients in Buffalo City Court,
25 the Legal Aid Bureau attorneys regularly conduct

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2 suppression hearings and non-jury and jury
3 trials. When the District Attorney's office
4 holds a felony hearing, the Legal Aid Bureau
5 attorneys in Buffalo City Court represent the
6 defendant at the hearing. When a case is held
7 for the grand jury, the Legal Aid Bureau's
8 representation ends, albeit temporarily. At this
9 point, the Buffalo City Court judge assigns the
10 indigent defendant an attorney from the Assigned
11 Counsel Program to handle the case in the grand
12 jury and beyond. Once the defendant is indicted,
13 attorneys from the Legal Aid Bureau do not have
14 contact with the case again, unless and until the
15 defendant is convicted in superior court and
16 files a notice of appeal and an application with
17 the Appellate Division for assigned appellate
18 counsel.
19 PROF. HELLERSTEIN: Can I ask you,
20 Ms. Zimmermann, without putting any value
21 judgment on it, it sounds a little strange to me

22 to have a system like that because the movement
23 has been so much from vertical representation.
24 The idea that your attorneys pick up a case, goes
25 to grand jury, you're out of the case and then

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2 you come back in on appeal. Apart from vertical
3 representation, in terms of recruitment of
4 attorneys who want to mature as criminal defense
5 attorneys but cannot in your office develop into
6 felony trial lawyers, is that not a serious
7 problem?

8 MS. ZIMMERMANN: Well, apparently not. We
9 have fourteen attorneys in our Public Defender
10 City Court Bureau and most of them have been
11 there for 10 years or more.

12 PROF. HELLERSTEIN: Okay.

13 MS. ZIMMERMANN: Because the county also has
14 an obligation to indigent defendants to supply
15 them with counsel for their statutory and
16 Constitutional right to appeal to the state's
17 intermediate appellate court, it has contracts
18 with the Legal Aid Bureau to provide this
19 important representation in the Appellate
20 Division, Fourth Department. Pursuant to orders
21 of assignment issued by the Appellate Division,
22 Fourth Department -- I'm sorry, Appellate

23 Division, the Legal Aid Bureau Appeals Unit
24 represents on direct appeal to the Appellate
25 Division all indigent defendants convicted in

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2 superior court in Erie County. There are between
3 one hundred and fifty and one hundred and
4 seventy-five assigned appeals each year. It is
5 the responsibility of the staff attorneys to read
6 the transcripts to discern viable legal issues,
7 research those issues, prepare the record on
8 appeal, draft appellant's brief and argue the
9 case before the Fourth Department here in
10 Rochester. Upon receipt of the Appellate
11 Division decision, the Legal Aid Bureau Appeals
12 Unit attorney makes application to the Court of
13 Appeals for leave to appeal. In the increasingly
14 rare event the Court of Appeals accepts the case
15 for review, the Legal Aid Bureau attorney
16 prepares the brief and argues before the state's
17 highest court.

18 JUDGE SMITH: Can I interrupt?

19 MS. ZIMMERMANN: Sure.

20 JUDGE SMITH: I want to make certain I
21 understand the process. Public Defender will
22 represent a defendant charged with a felony in
23 Buffalo City Court, conduct a preliminary

24 hearing. That defendant is held over for action
25 of the grand jury. Your office leaves

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2 representation of the defendant. It's picked up
3 by an 18-B attorney. That defendant goes to
4 trial, gets convicted, receives a state prison
5 sentence and then your office picks up the appeal
6 and they ethically argue ineffective assistance
7 of counsel at the trial level, even though you
8 conducted the preliminary hearing?

9 MS. ZIMMERMANN: They don't all argue
10 ineffective counsel.

11 JUDGE SMITH: This is hypothetical. I have
12 to say, bizarre is the only word that comes to
13 mind.

14 MS. ZIMMERMANN: That's the way --

15 JUDGE SMITH: Has anyone else on the
16 commission heard of a system like this?

17 PROF. HELLERSTEIN: Mr. Lonski just said
18 that he's looking to work with you to arrange
19 some arrangement to reduce this bifurcated
20 representation that seems to imply that as good
21 as his program is, he recognizes it has
22 weaknesses. The benefits from your side of the
23 puzzle, is your office working in that way and
24 how?

25 MS. ZIMMERMANN: Well, I believe our

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2 executive attorney and Mr. Lonski are working on
3 some things. I'm not sure just how far it's
4 gone.

5 MS. SHANKS: Where do you meet your
6 clients? Where do your attorneys meet the
7 clients? Do they go to the jail? Do they --

8 MS. ZIMMERMANN: Well, of course they're at
9 the arraignment. They do do some jail visiting.
10 And those who are not in jail, of course, come to
11 our office for investigation.

12 MS. SHANKS: I'm just curious about if you
13 have any idea what's the average number of times
14 that one of your attorneys would see his or her
15 client. Is it typical that they would meet their
16 client at the arraignment and there would be a
17 plea and the entire attorney-client relationship
18 would be at that court appearance in a few
19 minutes?

20 MS. ZIMMERMANN: At the arraignment?

21 MS. SHANKS: Yes.

22 MS. ZIMMERMANN: Only if it's an awfully
23 good deal for the client, like an ACD or
24 something like that.

25 MR. GOLDMAN: Can I ask you, I'm also a

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2 little puzzled by this bifurcation. On a serious
3 felony case when one of your clients -- when your
4 attorney knows they're not going to handle the
5 case in -- once there is an indictment, do you do
6 any immediate investigation?

7 MS. ZIMMERMANN: Oh, yes. Oh, yes. We have
8 investigators. We have four investigators that
9 go -- they go to the jail every day and also the
10 correctional facility, because they put a lot of
11 people out there because of the overcrowding in
12 the holding center. So we have -- they go to the
13 jail every single day.

14 MR. GOLDMAN: Do they go out to the field?
15 Do you immediately hire experts to go do scene
16 analyses?

17 MS. ZIMMERMANN: No. No. We just talk to
18 the client. That's all.

19 MR. GOLDMAN: So the actual field
20 investigation wouldn't be done until the period
21 after indictment, sometimes after the witnesses
22 have disbursed and the evidence gone?

23 MS. ZIMMERMANN: Until another attorney is
24 appointed, anyway.

25 MR. GOLDMAN: I'm sorry?

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2 MS. ZIMMERMANN: Until another attorney is
3 appointed.

4 JUDGE SMITH: What's involved in that time
5 process? It might not be a fair question.

6 MS. ZIMMERMANN: I have no idea.

7 MR. ELMORE: Correct me if I'm wrong, in
8 your office, if anybody is in custody, an
9 investigator from your office will go over to the
10 holding center, interview them and then the
11 assistant or the Public Defender in the courtroom
12 will have a write-up sheet summarizing the
13 interview?

14 MS. ZIMMERMANN: That's correct. We do have
15 an attorney that goes over every day and sees
16 some clients.

17 MR. ELMORE: Then after the first appearance
18 with the attorney, they get an appointment to see
19 a legal aid attorney in the office?

20 MS. ZIMMERMANN: Right.

21 MS. ZUFLACHT: But if they're in, does the
22 attorney ever go visit them in the jail to talk
23 about options?

24 MS. ZIMMERMANN: I'm sorry, what?

25 MS. ZUFLACHT: If the defendant is in

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2 custody, hasn't made bail, does an attorney from
3 your office go to the jail to discuss options,
4 pleas?

5 MS. ZIMMERMANN: Sometimes. But most times,
6 it's the investigator.

7 MS. ZUFLACHT: So the clients, the
8 defendants don't have contact with the attorney
9 except in the courthouse lockup?

10 MS. ZIMMERMANN: Right. In so many cases,
11 the person is 180.80 and then there's plenty of
12 time to talk to the attorney.

13 MS. ZUFLACHT: Are they able to telephone?

14 MS. ZIMMERMANN: They do.

15 MS. ZUFLACHT: You accept collect calls?
16 Does the jail charge?

17 MS. ZIMMERMANN: We don't accept collect
18 calls. They do sometimes make phone calls.

19 MS. ZUFLACHT: Without cost to them?

20 MS. ZIMMERMANN: I don't know.

21 MS. KHASHU: I just want to give you an
22 opportunity to address any advantages you see in
23 this bifurcated system. We've all pointed out a
24 lot of disadvantages. Do you see any
25 disadvantages in that system?

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2 MS. ZIMMERMANN: In the bifurcated system?

3 MS. KHASHU: Yes.

4 MS. ZIMMERMANN: Not really.

5 MR. GOLDMAN: Let me ask you a question so

6 we get a better picture, from the time a felony

7 case comes in, how long does your office normally

8 have the case? Is it only within a six-day

9 period of indictment, usually?

10 MS. ZIMMERMANN: If it's held for the grand

11 jury or dismissed for the grand jury or if they

12 decide it.

13 MR. GOLDMAN: How soon is that in Buffalo?

14 MS. ZIMMERMANN: Well, that would be the

15 five or six-day period.

16 MR. GOLDMAN: So it isn't quite the image

17 that some of us had?

18 MS. ZIMMERMANN: Right.

19 PROF. HELLERSTEIN: Can I pile on, just

20 because I'm trying to work this out, when your

21 attorneys represent somebody and is arraigned on

22 a felony complaint and the family calls in like

23 on the third day to say my son or my daughter,

24 who is their attorney, since the case is already

25 going to be moving away from your office, how do

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you respond to the question, who's representing

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my son?

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MS. ZIMMERMANN: It hasn't moved away from

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our office yet. If the hearing hasn't been held

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or if the matter hasn't been reduced to -- that

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happens very frequently in Buffalo City Court. I

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don't know about other courts. But many, many

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felonies are reduced to misdemeanors very --

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right away at least. Obviously if they ask who

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the attorney is, I tell them the attorney that's

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assigned to that courtroom. Because that's who

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the attorney is at the moment.

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MR. EPPLER: On an entirely different

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subject, you said you have a contract with the

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city?

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MS. ZIMMERMANN: With the county, sir.

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MR. EPPLER: With the county. Does that

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contract have any flexibility in terms of the

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number of cases or is it a fixed amount

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regardless of the number of cases you have?

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MS. ZIMMERMANN: You mean a fixed amount of

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money?

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MR. EPPLER: Yes.

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MS. ZIMMERMANN: It's a fixed amount of

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2 money. It has nothing to do with case load.

3 MR. EPPLER: And has that presented problems
4 to you? Have the case loads increased,
5 decreased?

6 MS. ZIMMERMANN: Yes, definitely. Yes.

7 MR. EPPLER: So that, therefore, you're
8 handling more cases than -- I don't want to lead
9 the witness.

10 MS. ZIMMERMANN: Interestingly enough, we're
11 handling fewer cases because -- I don't know
12 whether it's because the population in Buffalo
13 has decreased or what. The amount of cases in
14 Buffalo City Court has decreased. I think Judge
15 Russell would agree with me.

16 MR. EPPLER: So it's not affected you?

17 MS. ZIMMERMANN: Right. Although number of
18 cases have decreased, we make more court
19 appearances. That's basically because of
20 specialized courts.

21 MR. EPPLER: I see.

22 MR. ELMORE: Would it be an accurate
23 statement that the public defenders in Buffalo
24 City Court are much more experienced than the
25 prosecutors handling the misdemeanors?

3 MR. ELMORE: And sometimes the judges?

4 MS. ZIMMERMANN: Yes. This hybrid system of
5 two distinct organizations representing all
6 indigent defendants in Erie County has
7 historically functioned well. However, this
8 system provides effective representation for
9 indigent defendants only if the county funds the
10 Legal Aid Bureau on an adequate level. Simply
11 stated, there must be a sufficient number of
12 attorneys in both the city court and appeals unit
13 of the Legal Aid Bureau so that each attorney can
14 give every case the time and attention as
15 required by recognized standards. For example,
16 according to standards promulgated by the
17 National Advisory Commission on Justice Standards
18 and Goals, an appellate attorney handling
19 indigent appeals should have a work load of 25
20 cases per year or less. With respect to cases in
21 Buffalo City Court, it is suggested by the
22 national standards that one indigent defense
23 counsel be responsible for no more than four
24 hundred cases per year. Five or six years ago,
25 each Legal Aid Bureau attorney in city court

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2 might have had as many as 1000 cases per year.

3 Since then, however, the Legal Aid Bureau has

4 been fortunate to have secured more funding from
5 Erie County. This additional funding as well as
6 a decline in arrest rate has resulted in more
7 manageable, albeit still too high average high
8 case loads.

9 PROF. HELLERSTEIN: What about the Appellate
10 case load? What is that now?

11 MS. ZIMMERMANN: That's about two hundred, I
12 think.

13 PROF. HELLERSTEIN: How does that break out
14 in terms of per attorney?

15 MS. ZIMMERMANN: We have eight -- nine
16 appellate attorneys.

17 PROF. HELLERSTEIN: So you're on the
18 standard?

19 MS. ZIMMERMANN: I believe so, yes.

20 MS. KHASHU: Trials or just appeals?

21 MS. ZIMMERMANN: Just appeals. Specifically
22 in 2004, each attorney in the Buffalo City Court
23 unit handled some seven hundred and fifty cases.
24 The obvious conclusion from this recent statistic
25 is that indigent defendants in Buffalo City Court

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2 are now benefitting from their attorneys having
3 more time to devote to their cases. We
4 acknowledge, however, that more attorney time per

5 case is needed.

6 While these are definite improvements, the
7 Legal Aid Bureau, like all indigent defense
8 providers, continues to suffer in ways that are
9 endemic to the system in this state and probably
10 throughout the country. Simply stated, the
11 prosecution, which likes to refer to itself as
12 the people's attorney, has traditionally been so
13 much better funded by the county at the same time
14 as it is also the beneficiary of state and
15 federal grants for innovative prosecution
16 programs. This disparity is seen especially in
17 the new specialized courts that are currently in
18 operation in Buffalo City Court, such as the
19 domestic violence court and the integrated
20 domestic violence court. The assistant district
21 attorneys in these specialized courts often are
22 aided by specially-trained investigators and
23 social workers who are an invaluable resource for
24 the prosecution team. Because of the traditional
25 disparity in funding by the county between

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2 prosecution and defense, the Legal Aid Bureau
3 attorneys representing clients in these
4 specialized parts are unable to afford anything
5 approaching this kind of backup. Indeed, by

6 virtue of this systemic unfairness, indigent
7 defendants prosecuted in these courts seem to
8 bear the burden, when, of course, they are
9 presumed innocent. But in reality, the singling
10 out of these cases by district attorneys and the
11 disproportionate prosecution resources applied to
12 these cases must make indigent defendants, our
13 clients, feel as if they do not have a chance of
14 receiving justice.

15 The inequality of financial resources
16 accorded the prosecution and defense is reflected
17 in other ways. For example, while Legal Aid
18 Bureau salaries are not at parity with those in
19 the Erie County District Attorney's Office, they
20 are competitive for the greater Buffalo area.
21 Where the disparity is felt, however, is in
22 budgets for training. The prosecution seems to
23 have plentiful funds to enable its office to send
24 novice assistant district attorneys for training
25 at DA school and to send experienced prosecutors

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2 to conferences where they learn innovative
3 techniques. For lack of funding for continued
4 criminal defense training, Legal Aid Bureau
5 attorneys in both the city court and appeals
6 units are at a distinct disadvantage.

7 The Legal Aid Bureau submits that the
8 bifurcated system in Erie County which has been
9 providing representation for indigent defendants
10 for which the Legal Aid Bureau is a major
11 component, currently functions well but is highly
12 dependent on adequate funding from local
13 government. Therefore, the Legal Aid Bureau
14 would welcome some sort of state mechanism that
15 would oversee the current system to ensure a
16 level of indigent defense system more on parity
17 with the prosecution and one that can continue to
18 ensure quality defense representation by the
19 Legal Aid Bureau in Buffalo City Court and in the
20 Appellate Division.

21 Accordingly, we support the proposal for an
22 independent public defense commission that would
23 offer vital services to local defense providers
24 such as the Legal Aid Bureau. As described by
25 Jonathan Gradess more than a year ago, such a

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2 state-funded commission would promulgate
3 standards, conduct oversight and require
4 accountability. Perhaps equally important, based
5 on our experience in Erie County with funding
6 fluctuations, an independent commission could, in
7 the words of Mr. Gradess, act as a conduit for

8 state funding of defense services. The
9 disparities mentioned above between prosecution
10 and defense in Erie County in terms of training
11 and investigative services could be negated,
12 thereby ensuring a much more level playing
13 field.

14 Although the current system in New York
15 State has been much criticized for its patchwork
16 nature, we submit that as one of the two
17 providers of indigent defense services in Erie
18 County, the Legal Aid Bureau is performing
19 responsibly and competently for its clients in
20 Buffalo City Court and in the Appellate
21 Division. Even though Buffalo is the second
22 largest city in the state, its decreasing
23 population and declining arrest rate render it
24 very different from the downstate counties with
25 much larger population bases. For this reason

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2 alone, we would suggest that any plan for the
3 wholesale scrapping of whatever programs may not
4 be working downstate is simply not called for in
5 Erie County. Rather, we suggest that with the
6 support of and guidance from an independent
7 public defense commission, the Legal Aid Bureau
8 could receive the assistance it needs, such as

9 help in securing funding to ensure smaller case
10 loads, training and more investigative services,
11 while leaving intact as a strong foundation, the
12 current, well-functioning system in Erie County.

13 PROF. HELLERSTEIN: Thank you. Thank you
14 very much.

15 (Whereupon a brief recess was taken.)

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MR. WILLIAMS: Thank you. Good afternoon. My

3 name is Mark Williams. I'm the public defender of
4 Cattaraugus County. For those of you who don't know
5 where Cattaraugus County is, it is a rural county
6 located immediately south of Erie County, along the
7 Pennsylvania border.

8 Cattaraugus County is one of the largest in area
9 counties in New York State. I am also probably one
10 of the newest public defender offices in the state.
11 I think maybe one has been created since my office
12 was created on January 1st of 2003. I want to just
13 describe my office, because some of this is important
14 issues concerning problems that we have.

15 There are five full-time attorneys in my office,
16 including myself. Four of us are permanent. One is
17 a temporary emergency appointment of a vacancy that
18 the county legislature has not yet decided whether
19 they will allow me to permanently appoint a lawyer
20 that is in that position, because of funding
21 problems.

22 PROFESSOR HELLERSTEIN: Which city?

23 MR. WILLIAMS: City of Olean and City of
24 Salamanca are two cities. Either one isn't very
25 large. St. Bonaventure is in Cattaraugus County

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That's our claim to fame; well, it used to be before the basketball scandal.

PROFESSOR HELLERSTEIN: Still is.

MR. WILLIAMS: Worse season since they invented basketball. This past year we have important -- in 2004, we appeared in 36 different towns and villages handling cases. Those courts meet on 16 different nights a month, Monday through Thursday of each of the four weeks. When there's a fifth Monday or fifth Tuesday or whatever fifth day, it is a bonus day, and my lawyers are not out traveling the roads of Cattaraugus County.

We have two cities that have court one day a week. County Court, two county judges, one is exclusively handling Family Court, and one is exclusively handling County Court, unless there's a conflict, and then occasionally we will see the other judge. Family Court is meeting anywhere from four to five days a week; county Court one day a week, except for occasional hearings during the week and trial term. We have parole revocation cases that we also handle.

When my office was created, I was in kind of a unique position. You are going to hear from another

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attorney from Cattaraugus County who may disagree with that unique position, but I have, in the past, served as a town justice for seven years. I then resigned and ran for county legislature and served almost seven years as the majority leader of the Cattaraugus County legislature. So I think I'm in a unique perspective to see how the system works and the transition that we have had in Cattaraugus County.

One of the first things that we worked on was a plan for the representation. New York State law says that every county should have a plan. I was quite surprised to see that the Cattaraugus County plan had last been updated when it was developed, to meet the requirements of New York State, I believe in 1965, and so we have an updated plan. I'm not sure if it's been provided to the Commission, but I have, I think, about fifteen copies here that I will leave behind.

The plan establishes my office as the gatekeeper for accessing services in the assigned counsel system. At times it's been a popular thing; at times it has been a very unpopular way to handle the program.

But one thing that we had a very -- lack of

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information in Cattaraugus County, I was able to go through and count vouchers to see that in the years preceding my office's creation, that we had around two thousand cases per year that were being vouchered by the assigned counsel system.

Those cases would fluctuate between 1200 criminal and 800 Family Court. And then you might see it even out about a thousand in each, and then maybe go the other way, even 1200 in Family Court and 800 in criminal courts. Out of those criminal cases, 200 to 250 were felony cases that were vouchered as felonies, being handled in County Court.

We decided in Cattaraugus County that we would make the public defender's office the gatekeeper so that we could, number one, have some kind of statistical data on what kind of cases were coming in to the county. For years, we used a voucher system that required the attorneys to submit a lot of information, probably taking them an extra half an hour to complete their vouchers, but nobody ever analyzed the data that was submitted from it. There are copies that are sitting in NYSDA's offices of two years of vouchers, for them to try to, when they have time and find somebody who is willing to take on this

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project, try to analyze the distribution of cases in Cattaraugus County under the assigned counsel system versus how we are now.

The system as it has evolved in Cattaraugus County with this plan is like an old style Chinese restaurant menu, A, B and C. We use all three types of options that we have in New York State. My office is primary. They set it in the plan for indigent defense and representation in Family Court.

If we have a conflict in Family Court cases, we then go to the local Legal Aid Society, Southern Tier Legal Services, which is now part of the Legal Assistance of Western New York, Incorporated. They have a contract with the county for a set dollar amount to handle a range of cases. This year the range is from four hundred to five hundred cases in family Court at a cost of \$270,000.

If there's a conflict there, the cases go back to Family Court and are assigned by the Family Court Judge to an attorney. Okay.

On the criminal side, our back-up, if we have conflicts, goes to the assigned counsel system. Now, the plan calls for I think what the state law says should happen, a rotational plan that's administered

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through an agreement between the Bar association and the county government.

That doesn't happen in my county. It is the ideal, but what happens is kind of a mishmash. My office is probably, at this point -- and the clerical staff, not myself, not my attorneys -- are assigning attorneys in both city court cases -- city courts and probably 75 percent of the local courts when there are conflicts. County Court continues to assign when they see that there's a conflict.

JUDGE RUSSELL: Mr. Williams, just quickly, your office also administrates the 18-B vouchering and processing?

MR. WILLIAMS: In practice, but not -- we have an administrator for the assigned counsel program who has that responsibility, and he reviews the vouchers. We do not review any vouchers.

JUDGE RUSSELL: When you use the term "gatekeeper," can you explain what you mean.

MR. WILLIAMS: Gatekeeper from the state of determining eligibility, at least initially. We take a look and see if the person financially qualifies. We have a full-time investigator that spends some time doing that administrative work, two legal

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secretaries that also take a look at the financial aspects. We don't have a hard and fast rule. I think that's very important that, you know, we take a look at the ability -- well, in fact, our plan, as it says, it's for representation of the indigent and persons financially unable to afford counsel. So it is not just using the standards that are established for the --

JUDGE SMITH: Did I hear you correctly, your office, if you will, if there is a conflict, your office has a conflict, you actually make the assignment?

MR. WILLIAMS: It is coming from a rotational list that the legal secretaries in the office use, yes.

JUDGE SMITH: But your office picks the attorney that's going to replace you?

MR. WILLIAMS: Yes.

MS. ZUFLACHT: The secretaries too?

THE WITNESS: Yes. It sounds like a surprise, and it sounds like conflicts, but it's happening in a lot of counties across -- in fact, it is happening in a lot of places where the public defenders are actually also serving as the administrator of

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assigned counsel. Conflict potentially, yes.

MR. ELMORE: I have a question. Like Olean City Court, I think it's the practice of the public defender not to accept violation cases.

THE WITNESS: No, not at all.

MR. ELMORE: I'm aware of some cases personally, like in Olean City Court where a seventeen-year-old African-American defendants had pled guilty to ABC violations, sentenced to 20 and 40 hours of community service, required to go through drug and alcohol counseling, without the representation of an attorney.

THE WITNESS: And that's the decision of the judge not sending those cases to my office. I have, at times -- and I exercise --

MR. ELMORE: I mean not even -- without their parents knowing.

MR. WILLIAMS: It happens. It happens. I have seen it happen. We try to intervene when we can. I have always maintained my office has the absolute right, and I have the absolute right to decide to represent somebody in any given case within my jurisdictional limits. And have I antagonized some judges? Absolutely.

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I have -- St. Bonaventure is in the local town, and there's a village court. The village judge is of the opinion if a twenty-year-old college student gets into trouble, their parents can pay. And I have explained to them, these parents or her parents have no real legal right to know they are in trouble, that they have a charge against them. And his approach is, "Well, they are going to find out because I'm not going to give them an attorney."

MR. ELMORE: Mark, I got a seventeen-year-old kid down in Olean visiting his grandmother, went to city court, didn't want me to find out, pled guilty to a misdemeanor in front of a judge -- to a violation in front of a judge without counsel. I find that unconscionable. Is there anything your office can do about that?

MR. WILLIAMS: We will look into that. We have had many people come to us and tell us, well, in misdemeanor cases, the Judge is going to see if they can't work it out at a pretrial conference before he gives them an attorney. Some of you are judges. Some of you may -- we get put in that position, and we try to get around it.

MR. CHAN: My name is Chris Chan. In homicide

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cases, did in fact you put a defendant on the stand during a Huntley hearing, and when the prosecution tried to cross-examine the client, that you asserted the Fifth Amendment?

MR. WILLIAMS: Not at all. No, no, not at all. But I will tell you ultimately in that case, my client was acquitted at trial after a three week trial, found not guilty of murder in the second degree. But I did put him on the stand at the Huntley hearing, absolutely. But I did not try to assert his Fifth Amendment rights during that Huntley hearing.

Well, other points I wanted to make, I wanted to tell you this, because I was summoned on Tuesday to appear before the finance committee of the Cattaraugus County legislature to discuss possible budget cuts affecting my office. I am -- I don't want to say that I'm understaffed, but my attorneys are working, and myself included -- I consider myself a working public defender. I carry a full case load and manage the office. We are working 60 to 70 hours a week.

Yesterday is a prime example. I worked the whole day in the office, working on motions and other

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issues, and I left the office and drove to the furthest town court I can from my office in Olean, 60 miles away in the town of Perrysburg, had court, left there at 9:45, and got home at about eleven o'clock last night. I had another attorney -- it's nice having cell phones, because that's how I manage my attorneys, keep up with what my attorneys are doing, hands free, of course, as we are driving across Cattaraugus County, discussing cases.

He was in the Town of Yorkshire Court after working a full day in Family Court. That's my attorney who is only in a temporary job right now.

But I think, you know, the problems with the current system, lack of standards, absolutely, that's the number one problem that we face. Standards dealing with case load, with experience, with training are needed, and I think having a statewide independent commission to enforce those standards is very important.

You know, I listened to Bob Lonski. I have known Bob since I got involved as the public defender, and I think what he does as far as making sure that his attorneys -- he used the words "certified," certification. We all know that's not a

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good term to use, but somehow we need to find a way to make sure that the attorneys that are handling cases, whether they are in my office as the public defender or in the Legal Aid office or in the assigned counsel system, that they have adequate training and some means or test to make sure that they can handle the cases that they are assigned to.

Next big problem I see is lack of funding, no consistent funding source. I have to, in order to get CLEs for my attorneys or myself, I have to submit a travel request to my county administrator, who then reviews it, who then sends it on to the vice-chairman of the county legislature, and ultimately to the chairman of the county legislature to decide whether or not that training is approved.

Invariably, it comes back saying not approved and that they need more information, or they need to understand why it is essential for my attorneys to be trained on how to handle Family Court cases or criminal court cases. And the fact that they have to have their minimum hours of CLEs sometimes is not even considered.

We have -- last year, on numbers, twenty-seven hundred plus cases were referred to the public

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defender's office. There were a few cases that may have gotten to the assigned counsel system without coming through my office. Out of those, 692 cases were not taken by my office but were either referred to the Legal Aid Society, to the assigned counsel system, back to the court, or otherwise they were not eligible. That included people we had -- I think we had three that died during their cases and others.

But we opened two thousand new cases to actually be worked in my office. We closed sixteen hundred plus cases last year in my office. I have some nice bar charts and graphs that might be interesting, but 1684 cases that we closed. Where the cases came from: 623 from the two city courts, 810 from the town and village courts, 248 from County Court, 1031 from Family Court, a substantial case load.

In counties such as Cattaraugus County, which are economically depressed, we see probably percentage-wise substantially more numbers. My estimate is that 90 percent of all criminal cases in Cattaraugus County are being referred through my office when the person claims they are indigent. That one that John Elmore is talking about don't make it, and probably they should be there for sure. I

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have judges that are worried about their taxes who don't want to refer cases, because it is a burden on the system.

But going back to the lack of funding, we have these kind of cases, you know, I -- my office opened 75 percent of the criminal cases and Family Court cases. We closed around 75 percent of the cases. Now, we have a little disparity in our numbers, because last year, the assigned counsel attorneys submitted 350 vouchers on cases that hadn't been worked on since before 2004, sometime in 2003 or earlier, and they showed up, to --

PROFESSOR HELLERSTEIN: I hate to interrupt you, because I know you have a lot of stuff, but we are running pretty late. You have got a whole bunch of color printouts for us?

MS. WILLIAMS: Yes, yes, I can wrap up in about two minutes. Just lack of -- the other thing is lack of training, the training opportunities. I myself, I went to NYSDA'S Basic Defender Institute. Although I had twenty some years' experience as an attorney, it had been ten years since I handled criminal work. I would like to have the opportunity to send additional attorneys from my office. I don't have the money.

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You know, we have successes though. I want to point that out. We have, in the last eighteen months, we have had six felony trials, not guilty on a murder second, not guilty on an assault first, not guilty in DWI felonies, not guilty in assault second, but an assault third, and we have had a couple that we have lost too, but that's not a bad track record. But you know, we are working, 80, 90, during trials, 120 hours a week. Sure we need more help.

My three wishes, adoption of standards, such as what NYSDA has done through the chief defenders of New York State and the nice supportive directors, funding that's tied to the standards, including full funding of the New York State Defender's Association. You know, you're in the middle of a trial as a defense attorney, especially in a small office, with everybody having less experience than me, I have nobody to turn to but the Backup Institute, the Backup Center. The Backup Center provides us quick, accurate information, case law that helps. They need to be fully funded, and they are trained. Plus they also provide the case management that allows us to do these kinds of graphs that I'm going to show you.

You know, funding that -- what I'm really

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looking for is funding that says to my county, either provide services that are adequate and consistent with allowing a good defense, and not just an adequate defense but a good defense and with those standards, or have the state take over providing those services, and then bill the county back for it.

Now, that funding, though, has got to take into account local conditions. In New York State, we provide school aid based upon the relative needs of the school district. We need to do the same in defense funding. Westchester County doesn't have the poverty levels that Cattaraugus County has or that Allegany County has, and we need to have that.

We also need to look, as everybody else has mentioned that I have heard, parity with the D.A. Parity -- I was skewered on Tuesday or Wednesday night because my office has a three hundred thousand dollar more net levy on the tax roles than the district attorney's office. That's one percent of our local property tax. They couldn't get over that. "Why are you costing so much more money?" When I talked to them about the fact that Family Court is 50 percent of that, and the fact that the district attorney's office receives grants and other income

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that we don't have. I want to thank you for your
time and efforts.

PROFESSOR HELLERSTEIN: Same to you.

MR. WILLIAMS: My clients are hoping you come up
with a system that is fair and effective for them.
Thank you.

PROFESSOR HELLERSTEIN: Thank you. Mr. Carr.

MR. CARR: My name is Jay Carr. I'm an attorney
in private practice in Olean. He alluded to the fact
he might be followed by an attorney from Cattaraugus
County that might not agree with everything he said,
and I think he was referring to me. I am in
practice -- I have been in private practice in
Cattaraugus County for about nine years. From the
time I started practicing, a substantial part of my
practice has always been involving criminal and
Family Court. I started basically handling
misdemeanor cases in the local courts and have
moved -- over the years moved into doing more and
more felonies.

Since the public defender's office was
instituted a couple of years ago, what we have
basically noted -- and I guess I can't really speak
for all of us in the assigned counsel, but I'm

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hearing a lot of the same comments from people is that we actually handle fewer cases, but actually the income that we get from them is similar. I think it's a function of a couple of things. First of all, that we are having fewer cases, we can actually spend more time on each case. And secondly, when you're going to a court -- the city courts in particular and also Family Court, it really doesn't matter if you're going over there with two files or six files; you're going to go and spend approximately the same amount of time to get the cases resolved.

I didn't really have -- I don't have the numbers that Mr. Williams has. I mean I really can't argue with him on those numbers. I'm not privy to a lot of the budget figures. I know that our income -- the amount of income we have from assigned counsel last year was about the same as what it had been the last year before the public defender's office was in full force, but that --

MS. SHANKS: When you say "we," who are you referring?

MR. CARR: My firm. Up until the beginning of this year, I was in practice with one partner. We added two partners at the beginning of this year. So

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this year, obviously, hopeful --

PROFESSOR HELLERSTEIN: Your point of disagreement with Mr. Williams?

MR. CARR: I was not a big fan of the creation of the public defender's office. I don't think it's anything that's going to improve the delivery of services to indigent people in court. We had had nothing but assigned counsel since the 1960s. My experience was that the system worked very well. There were a number of very experienced attorneys, both in criminal defense and Family Court, who were involved in taking assigned cases. Even at the older, lower rates, that make it difficult to even cover your overhead, we didn't really have trouble getting good experienced attorneys to take the cases, and we still -- the same attorneys are still taking them.

MS. SHANKS: Who did the screening? For instance, when you started practicing and you wanted to start, could you --

MR. CARR: Originally it was just the judges themselves. The judges were the ones who made the determination of eligibility, theoretically. I think it was very uneven. There were some courts there

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would be a very withering cross-examination about assets. "Well, gee how did you get here today?" "I drove."

MS. SHANKS: No, no, I'm sorry, how would the judge decide that you, for instance, James Carr --

MR. CARR: I had to just contact the judge and get on the list and tell him I wanted to get on the list. There wasn't much screening.

MS. SHANKS: So you could have gotten assigned to a homicide case a year out of high school?

MR. CARR: Theoretically, yes, the judge could have assigned it to me, yes, but no, it wasn't going to happen. There was some discretion involved, and I think the judges know who the experienced criminal defense attorneys are. And like I said, the first couple of years, I might have gotten, you know, just a few felonies a year, really, and they were some of the simpler cases.

MS. SHANKS: Was there any requirement that you do training or --

MR. CARR: There was really no formal requirement.

MS. SHANKS: You thought that's a good plan?

MR. CARR: I didn't think -- I'm not saying

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necessarily that's a good plan. I'm saying it was working in Cattaraugus County, where there's a relatively small bar and judges know who the lawyers are, I don't think there was any difficulty, like I said, with the quality of representation.

PROFESSOR HELLERSTEIN: How did you assess that? How did you know how good it was?

MR. CARR: I was in court a lot, and I saw the results coming out. I saw the cases that were going to trial, the efforts the attorneys were making on their clients' parts.

MS. SHANKS: Just theoretically, if you walked into court and someone was doing a really bad job, assigned counsel, and it was clear that he or she was in over their head, what would have been the process to say, "Oh, there's really a problem here"?

MR. CARR: There really wasn't one.

MR. GOLDMAN: Do you take any CLE in criminal cases, your first few years?

MR. CARR: Yes, and that was before the mandatory CLE.

MR. GOLDMAN: Solely on your own?

MR. CARR: Right, right.

MR. ELMORE: Jay, the question I have is the

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lawyers that Mark hired, aren't they lawyers that were formally panel lawyers accepting cases?

MR. CARR: Only one of them -- well, actually his first assistant was an assistant D.A., but she had been a panel lawyer before that. She had handled a lot of criminal defense work.

MR. ELMORE: What background did the other lawyers have?

MR. CARR: I'm not sure about that. I know they are fairly inexperienced. I know that one of the -- one of the first ones that was hired had been like a caseworker with the Department of Social Services. She had a law degree, but she never actually practiced. The other ones I don't really know. I know they are fairly recently out of law school.

MR. EPPLER: Have you any comment on the caps on the amount of compensation you can get in a particular case?

MR. CARR: I never really had a problem with those. They were, under the old system particularly, they were very low, but if you --

MR. EPPLER: If you were going to trial on a particular case.

MR. CARR: You were going to exceed the cap, no

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question about that.

MR. EPPLER: Did you see that as a problem?

MR. CARR: It was never a problem of getting a judge to approve a voucher over the cap in that situation. You just had to submit an affidavit. I don't think I ever had one of those. I mean I submitted those, like I say, pretty much any felony trials, especially at the old rates, you were going to exceed the cap. And you know, if I submitted a voucher to Judge Himelein, who does basically all the criminal cases in County Court, he would approve that. I have never had one not get approved.

PROFESSOR HELLERSTEIN: Do you have any problem with a judge assigning you cases and approving vouchers?

MR. CARR: No.

PROFESSOR HELLERSTEIN: In terms of pressures on how you represent somebody?

MR. CARR: I never felt any pressure, no.

PROFESSOR HELLERSTEIN: No concern about a judge perhaps disapproving of a particular strenuous position you were taking?

MR. CARR: I have never felt that way.

PROFESSOR HELLERSTEIN: Have any of your

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colleagues in the Bar felt that way?

MR. CARR: I never heard anybody make that kind of comment.

JUDGE STACK: Ever heard a comment about favoritism, about a judge appoint a lawyer to more cases -- one lawyer than another?

MR. CARR: I don't think so, because during -- during the time that the judges were actually making the assignments, the rates were, I mean, 25 and 40 dollars an hour, and they weren't really cases anybody was going to fight over. I mean we were doing them, but I don't think that -- nobody was getting rich on assigned counsel cases. Really, especially as far as the local courts went, the local courts in our county are scattered kind of far and wide, and there's only certain lawyers going to go to certain courts, and they have a limited pool to choose from.

JUDGE STACK: You have heard -- I'm sure you have been sitting here asking others how they think the shape of the system should be since that's our mandate. Do you have any thoughts on that?

MR. CARR: I believe it is very important that the funding come from the states and not from the

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counties. You know, I -- I guess I should clarify that I think that Mr. Williams has done a good job with the public defender's office in the county. He -- they have given him some money to work with, and he's done a good job, and like he told you, he's gotten some very good results in County Court.

But I think that -- it was done to begin with to cut costs, and the pressure is on him now to cut costs. And as long as the funding is being done by the county, there's just -- there's going to be this push to cut costs.

He mentioned the problems that he's having with the legislature. Back a couple of years ago when the legislature was considering creating the public defender's office, their first comments were that, gee, you know, we should be able to run the public defender's office for the same amount as we run the D.A.'s office for. And those of us who were doing assigned counsel work went to the legislature and said no, that's absolutely not true. The public defender's office is always going to spend more money than the D.A.'s office because the D.A.'s office doesn't go to Family Court.

And Family Court is a five day a week, all day

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long enterprise. It is just not -- there are responsibilities the public defender's office has that the D.A.'s office doesn't, but I think it is very important that the funding come from the state. And I guess my ideal model would be something similar to the law guardian program, where the assignments are actually made at the local level. The local attorneys are the ones who are actually doing the work, but the funding is coming from the state. The law guardian program, at least in my experience, works very well. I don't see any reason why, you know, the same wouldn't be true of the public defense system.

PROFESSOR HELLERSTEIN: Thank you.
MS. GORMAN: I think I'm next, Shirley Gorman.
PROFESSOR HELLERSTEIN: Ms. Gorman, welcome.

MS. GORMAN: By way of introduction, I have worked seven years, although two different periods of time, for the Monroe County Public Defender's Office as a trial lawyer and appellate lawyer. I have worked for about three-and-a-half years for the Genesee County Public Defender's Office, first as a trial lawyer and as an appellate lawyer. Back in the early eighties, I spent two years in the Orleans

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County Public Defender's Office, and about fourteen months ago, I went back to Albion to Orleans County to do a solo practice. I'm taking assigned counsel cases out of Orleans County, and I'm doing assigned appeals out of the Fourth Department. And Sandy Church, who is our public defender, spoke this morning.

We have every conceivable problem and every issue that has come up. One that came up recently is the eligibility issue. I know that the Monroe County Public Defender's Office determines eligibility. The Genesee County Public Defender's Office determines eligibility. In Orleans County, you can be assigned because there's a conflict, and no one will have determined eligibility. And it puts you in the awkward position of what is your role here, in terms of deciding whether you go to the judge and say, "This seventeen-year-old's parent should be hiring an attorney and shouldn't have assigned counsel."

So I think that's one thing that desperately needs to be addressed. I know attorneys have moral conflicts about whether they should be telling a judge that an assigned case is no longer eligible. And it might make sense to have, as an administrative

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part of the court doing the examination, to determine whether a person is eligible in the first instance. I know that that would free up people in every public defender's office, because the public defenders are spending days making those assessments.

MR. GOLDMAN: Do you have any estimate of what percentage of your cases that you handle, that you think people should not be eligible for an assigned counsel?

MS. GORMAN: In the first case I got when I came back in January of last year, I thought that was clearly true, and I would say probably ten percent. I mean it is not significant, but I haven't been doing a significant amount of assigned counsel work in Orleans County either.

MR. GOLDMAN: When you say not eligible, you think they barely go over the line or are people -- I was once assigned a client who literally went to pick me up and take me out to dinner in his Rolls-Royce after we won.

MS. GORMAN: No, I don't think it is that bad. I think if it were in a county like Monroe County where they had to go in and demonstrate their eligibility, they would not have had assigned

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counsel. And that's a burden on the county government in Orleans County to pay the assigned counsel attorneys, and it's also a situation where it's not fair in terms of you can have the same client with assigned counsel in one county, and he's got charges in another county, and he has to go hire a lawyer. Or you end up doing it pro bono, because you're --

JUDGE SMITH: Why would you think it would be a problem for you as an attorney to go to the court, County Court, for example, and --

MS. GORMAN: Well --

JUDGE SMITH: Hold it, and indicate to the judge, "Judge, this defendant I was assigned to represent is eighteen years old. His parents own their own home. Both of his parents work. He doesn't qualify." I'm not familiar with what -- I'm having a difficult time, because in our county, we don't have that problem. I'm -- we are made aware of that right up front. And if the parents refuse to retain counsel, that's not a problem. Now you're assigned under 722-d, and notify the parents they are going to have a judgment filed against them.

MS. GORMAN: Right, and that happens in Monroe

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County, as well. When I first got in this position, I called the public defender's secretary and said, "What would you do if you had been assigned to this case?" And she said, "If the judge assigned us to it, we would not determine eligibility." So I didn't feel that I should be in a position where, because a client had assigned counsel, he was treated differently than somebody who was in the public defender's office.

JUDGE SMITH: Thank you.

MS. GORMAN: But in a village court, for example, you will hear the public defender's office making eligibility determinations with the conversation in the room. Some judges will send -- I was assigned to a felony case out of one town court. The judge sent that person to the public defender's office to be interviewed and gave him my name and said, "If you are eligible, here's the assigned counsel that's going to represent you."

We don't have an assigned counsel plan. We have the public defender's office. Until about eight years ago, we also had an assigned counsel plan with a volunteer attorney administrator. When it got too expensive for that attorney to keep doing that, the

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program fell apart, and now, just like in Cattaraugus, as they used to do apparently, the judges assign. And there is a serious problem with judges assigning.

And I can tell you the Buffalo problem you see is obvious in Orleans County, because the judges will assign attorneys to felonies, and the County Court judge will replace them because he does not believe that the attorney assigned is competent to handle the felonies.

JUDGE SMITH: Why is that a problem?

MS. GORMAN: Because you have at a critical stage of the proceeding now, because there are certain cases that can only be pled out to certain things before indictment, you have an attorney who doesn't know felony law, who is not doing the plea bargaining that could be done before indictment to save a client. You have clients who have assigned counsel in local court showing up for arraignment on the indictment alone, because the attorney that was assigned knows the County Court judge won't assign them, and the defendant just gets notice to show up and shows up alone.

And you're -- you're starting over with new

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attorneys, and it can be weeks after, months after the charges arose. And we do, in Orleans County, have open file discovery. We are in a situation where if you're assigned to a felony complaint, you can -- I sat last night and read two search warrants on a felony case out in town court with the D.A. himself. And you can make evaluations about the case immediately. You can decide whether a case should be pled by SCI. You can decide whether there are legal issues that you and the D.A. need to talk about right off the bat to determine how to handle the case.

But if you have an attorney who doesn't know how to handle a felony, doesn't know the plea restrictions, doesn't know the sentencings, doesn't know how to try a case, you're not in a position where that can happen.

MS. SHANKS: How do they get onto the panel? Is it one of these things that any judge can appoint anybody they want?

MS. GORMAN: Right, right. A lawyer walks in and says, "Judge, I will take assigned counsel cases." And of course as happens, and probably has happened for years and years and years, the new lawyer -- a judge feels here's somebody new in

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practice, just got out of law school, I will throw him some cases. And we have one attorney judge in the county, and those -- some of those judges are arraigining, for example, four people misdemeanor search warrant marijuana case, arraigining four people, sending all four to jail with three thousand dollars bail, no determination as to which one the public defender will represent.

So when court sits again on D.A. night two weeks later, all four people show up. The lawyers in the courtroom get assigned to those four people. And that's -- that's a problem of no oversight and no standards.

It appears we are also not complying with the county law, because the county law says if there's a conflict with either the public defender or assigned counsel plan -- once you get to the point where you have run out of options, the Court is supposed to appoint an attorney in the county. There are very few of us in the county who do criminal work, very few of us who do felony work. The County Court judge, for the most part, is appointing attorneys from Rochester.

JUDGE SMITH: They have to have, under the state

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law, they have to have an office in the county.

MS. GORMAN: And they don't. There are about three lawyers who live in the county who practice outside the county, who get assignments. There are three -- four of us now who take criminal assignments who actually have offices in the county. And this is a problem you would have in the regional office, and I know that my county would not have an office, because it would be in Batavia. It would be in Rochester. It would be in Buffalo.

You have clients who have lawyers assigned from those places. They do not travel in to see their clients. There is no room for an attorney to meet with a client in the village court or the town courts. And there are toll costs. So you do have a situation where -- and I'm torn. There has to be a system of oversight. And that's for all lawyers practicing criminal law. So that if you're getting an assigned counsel case, somebody knows you don't know what you're doing, and somebody can say, "You shouldn't be handling this."

But at the same time, if you take away the local component in a rural county, where people don't have the money, don't have automobiles, you do take away

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some of the abilities to meet with them easily. And how often does a lawyer go to a jail that's 45 minutes away when a client is in a jail? And we don't have the ability anymore -- years ago we did, but now every call coming out of the jail has to be a collect call.

So it's -- there are multiple levels of problems. And I think that's true in every rural jurisdiction, when you have a strong public defender's office like in Genesee County, and you have an assigned counsel plan in Genesee County with an administrator, you have a totally different situation than you do with us, where it's judges assigning attorneys on a random basis.

JUDGE SMITH: You mean local court judges?

MS. GORMAN: The local court judges and the County Court judge.

JUDGE SMITH: The local court judges would do the assignment, and when it gets to County Court, the County Court Judge would replace them if they are not competent.

MS. GORMAN: Right. Unless there are other questions --

PROFESSOR HELLERSTEIN: Thank you.

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Mr. Sciarrino.

THE WITNESS: Good afternoon.

PROFESSOR HELLERSTEIN: Welcome, Mr. Sciarrino.

MR. SCIARRINO: I come to the panel with a very similar situation as the last person who gave testimony. I'm a private attorney who takes assigned counsel cases in Livingston and Wyoming County. It is my understanding Mr. Effman talked earlier about the program in Wyoming County, but I'd like to concentrate and share my experiences with the assigned counsel and public defender's office in Livingston County.

In Livingston County, the public defender's office also is the assigned counsel administrator which does create an inherent conflict sometimes, when they are conflicted out of the case of them choosing the attorney who is going to be assigned. But the number one problem that I have experienced over the last ten years of practice in this county is the unwillingness of the courts and the public defender's office to provide the resources to adequately defend someone through the system, in particular, expert witnesses and investigators.

Our public defender's office does not have an

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investigator at their disposal. So of course we are hampered by our ability to investigate or interview potential witnesses. I'd like to give the panel an example of a case that actually just ended two days ago in Livingston County. I was assigned to represent a gentleman who was accused of an assault first in the Groveland Correctional Facility. He is a two-time prior felon, so he was facing 25 years to life if he was convicted. There was a co-defendant, and both myself and the other attorney who was also through the assigned counsel, had made application to the court for an investigator.

Our clients informed us that there were four or five potential witnesses to the events that occurred at the facility, and they wanted those people interviewed. And those people had been scattered throughout the DOCS system in New York. We had made argument to the Court that for ourselves as the attorneys to interview these people created a conflict in case they were to change their testimony at a later date, and plus we bolstered that argument with that the investigator charges 50 dollars an hour for his time to go interview and has 25 to 30 years of experience in interviewing witnesses. That

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application was denied. It was then made a second time a few months later. It was denied, and finally approved by the judge after a third application was made, after we had been involved in the case for a total of seven months.

What finally prompted the judge to change his mind in this case was the fact that he declared in conference, prior to one of our appearances, after denying the second motion, that he had never approved an application for an investigator in an assigned case in his nine-and-a-half years sitting on the bench.

When I gingerly asked the judge if he would like to put that on the record when we went out into open court, the conversation ended abruptly, but we did finally get our investigator, which led to us being able to develop a case and come up with a plea bargain that was favorable to our client.

That's just one example that's happened over the last ten years, but it happens on a daily basis. And the pressures that we have referred to by the other gentleman from Cattaraugus County, is that the public defender's office, which in our county is one full-time person, two clerical staff, and then three

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part-time defenders, they are under constant pressure to control their budget. And because the money comes from the county and the public defender is appointed by the county, she feels tremendous pressure to keep that budget in restraints, to keep her job. And that's why it is so important that the funding come from the state, to take this out of the realm of the county being able to apply the pressure.

And you know, for instance, our public defender's office could use probably a full-time investigator, and it would probably be very much more economical to do that, but the county would never even consider such a thing.

And then we run into similar situations with expert witnesses. Expert witnesses are, in my tenure -- have probably been approved by judges, to my knowledge, maybe ten times out of maybe a thousand cases that I have had privy of seeing and observing in the County Court system. And when you are successful, what the judges normally say is that "You're entitled to an expert, but not the best expert." You know the district attorney's office may bring in the top gun in Western New York, but we are not going to be able to bring someone in from down

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state because of the cost of flying them in and putting them in a hotel and conferring with us prior to the case.

Again, the money needs to be -- money needs to be established to be able to provide these additional services. I mean the increase in fees for the 18-B program has created a better lot of attorneys who are taking criminal cases.

For example, I myself was able to take many criminal cases within the first few years, privately and through assigned counsel, because I had the opportunity and the advantage of having a partner who was my father who had practiced for 43 years in criminal law. He himself now is taking assigned cases, which he hadn't done in 30 years because the rates have come to where it is at least a break-even point for keeping the lights on in your office. And that's been a tremendous advantage.

But now you're going to see all of these counties go to conflict offices because the counties when they do their budgets next year are going to see it is more expensive to have assigned counsel attorneys, when they properly develop a case.

And someone had mentioned about the limits and

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having judges approve over the limit with affidavits for the work you have done. And I found that many judges are willing to go ahead and approve those, but the limits right now, if it is a trial case, are ridiculously low. The case that we settled two days ago, we were preparing for trial to start on Tuesday, we anticipated with our preparation and the three-day trial for the two attorneys, it would have cost the county an additional eight thousand dollars to have that trial. It may have been one of the motivations for the Court to go ahead and allow us to enter the favorable disposition that we wanted. Because the judges are concerned about the county's budgets also. Those are just the things that I wanted to share with you.

PROFESSOR HELLERSTEIN: We appreciate it. Thank you.

MR. SCIARRINO: Thank you.

MR. KASPEREK: Good afternoon. My name is Larry Kasperek. I appreciate the invitation. You look like a jury I had just recently. You want to get up and stretch a little bit?

I come here as a private attorney with 14 years of experience in the Monroe County Public Defender's

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Office. I threw caution to the wind and left the public defender's office and went into private practice. I share space with a guy by the name of Don Thompson, and together we practice guerilla warfare. I also invited Jim Monroe, who is an investigator that I rely upon heavily in the criminal -- in my criminal practice and Karla Burke who is an interpreter that we use, that we use for Spanish speaking services, to follow me up. I think that they will bring interesting insight into what the circumstances are.

I think really when you're talking about indigent defense services, you're really talking about the criminal justice system. My experience as a private practitioner is that basically retained clients are a very small percentage of the criminal justice system. By and large, it is all indigent counsel. And quite frankly, my position to you is that there should be a state defender's office which is regionally based in -- throughout the state; that you should recommend that the local justice courts be eliminated and district courts be established. So with that in mind, here we go.

In 14 years at the public defender's office, I

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rose through -- matriculated through the office. It starts out jurisdictionally in the town courts, moves to City Court and then goes to County Court and Supreme. So I, after 14 years, became one of their more experienced VFO attorneys.

Currently -- first of all, let me tell you, the Monroe County Public Defender's Office, when I left five years ago, the felony attorneys had a case -- individual case load of somewhere between 125 and 150 cases that were constant yearly cases that rolled over. They included violations of probation, parole matters, and VFOs.

The city court people were bringing in, per term -- and by term I mean the arraignment part -- between 700 and 1200 cases per attorney. They do two terms with the judges. The town courts carry anywhere, you know, somewhere close to those numbers, and they generally cover six courts per attorney.

In private practice, when I left, I'm now assigned -- I'm now on the assigned counsel list here in Monroe County. I basically only take homicide cases and B level felonies, because I think it is my responsibility as one of the more experienced attorneys to accept those cases. I haven't had a

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problem with vouchers regarding that, because most of the cases I take are homicides. However, the vouchers are reviewed by the court, and the most difficulty that I have of arguing those cases are vouchers for support services, investigators.

Spanish investigators are almost non-existent in the system, translators, and the disparity between the payment of translators and investigators is something I think that requires your attention, because I can't use -- I can't -- I don't speak Spanish, so I have to rely upon my Spanish translator to investigate the case with us.

JUDGE SMITH: Can I interrupt?

MR. KASPEREK: Yes.

JUDGE SMITH: Are you suggesting you're having difficulty from the courts having that approved? On an assigned case?

MR. KASPEREK: I can tell you when I submit vouchers -- I'm capially certified, as well as taking felony cases at the assigned counsel, and I can tell you that I have submitted vouchers to judges in the county court here who have indicated to me that they are appalled at the vouchers that I'm submitting on behalf of my investigators, because of

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the amount of money involved.

But I can tell you that when I pick up a case, my investigator and I walk in the case together. But currently in the assigned counsel pool, at least the system in Monroe County, in my opinion, we are suffering under the delusion of two circumstances: One, fast track the cases because OCA wants the cases done in a certain period of time; and the district attorney in our county has decided that instead of doing preliminary hearings, he's going to fast track the cases to the grand jury.

Under the assigned counsel system and the court system, based upon what the D.A. has decided to do, the system has done back flips to accommodate his process. Traditionally, an assigned attorney would not get the case -- would not get notice of the case for two or three days. That has changed based upon the efforts of Rick Youngman's office. But it's not -- it wasn't uncommon and it is not uncommon for an assigned attorney to show up on a felony case after that person has been arraigned, somebody from the public defender's office stands in for the arraignment. There's a conflict determined. The D.A. serves on the court and the defendant at that

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time notice of grand jury presentment, a prescheduled time for that attorney -- for that defendant to testify, and if he doesn't waive his right to the preliminary hearing, for an unspecified period of time, the case will be indicted.

Now, I have got to tell you that I have had cases when that system was implemented that that whole process took place before I even showed up in court, before I even got called by the assigned counsel program to accept the case.

I'm also assigned in cases to the CJA panel in federal court, and the federal court, in my opinion, has some advantages that you should take into consideration. The federal public defender's office is a model, I think, that you can apply on a statewide basis for regional representation, because the federal public defender's office has resources, not only just in their local office, but they rely upon their whole array of other offices to provide support and training, as well as backup for research.

JUDGE MARKS: Larry -- just for the record, Judge Marks. Larry, are you -- I wanted to go back to your point about the vouchers for investigative services, translator services and the like. You said

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they indicated they were appalled. What was the outcome of the presentation? Were they denied?

MR. KASPEREK: No, Judge, I can tell you --

THE COURT: So they were granted.

MR. KASPEREK: I'm a dinosaur here in the county, as you know, and I can effectively communicate to my -- the judge reviewing the voucher that those vouchers are credible, that I stand behind them and that they should be paid. But the first reaction that I have received is "Oh, my God, what are you doing? What are you doing here?"

And the point being it is my responsibility to provide the assistance and to stand behind what that calls for, but the judges' reaction as gatekeeper for the money aspect of it, is the -- has frequently been the first response.

The capital defender's office here in New York State, in my opinion, is a wonderful example of how the system can operate. They were organized. They were cooperative among their regional sections. They cooperated intensely with assigned counsel for assigned cases, and as a consequence of that, I think they were extremely successful, and now obviously going to be put out of business. But I think it is a

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model for what you can consider to adopt.

The -- there are some -- there are some things I think that, you know, that were touched on earlier. I heard Mr. Kelly refer to, you know, where the rubber meets the road. I have been called a lot of things, but never a tire. I consider myself in the infantry, you know, and actually appearing in front of the General's staff regarding this for a buck private is, you know, quite a thrill. But I want you to understand that in my opinion, you must address the skill levels in every aspect of criminal defense. There is no organization, if you will, at this point, for qualifying investigative services, language services or other support services.

There is a system in place in Monroe County for graduated advancement of assigned counsel. But outside of Monroe County, the grass is not very green. And you know, outside of Monroe County, in cases that I have practiced in -- and I have taken -- I have taken cases -- or, rather, I have represented individuals from Madison County. That's east of Syracuse, down to Cattaraugus and Chautauqua County and down to the Pennsylvania border. The public defender's office or Legal Aid's offices are small.

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They are understaffed. Some of those people are part time. And the assigned counsel gets -- get assigned by the judges. And the only way, in some of those courts, that you get assignments is by those judges. And if you raise holy hell, you don't get assigned.

Now, you can build a practice on assigned counsel, but you have to roll a lot of cases to make it worthwhile.

I think that you need to investigate a distinction between the judges making appointments or the court being involved in the assignment process.

I don't know --

JUDGE SMITH: How are you suggesting things should be done?

MR. KASPEREK: I'm sorry?

JUDGE SMITH: Are you suggesting the Court shouldn't be involved in the assigned counsel program?

MR. KASPEREK: I think judges should have the right to review counsel to determine in their own minds whether counsel are qualified. I have heard judges say, "I have never seen you before in my life. I don't know what your practice standards are or where you come from. Tell me who you are, and why

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you're qualified to represent this individual," and conducted an examination at that point for somebody who is assigned regarding the case.

I can tell you that's only happened four times in my experience in the 20 years I have been practicing. But what I am telling you is that there should be a mechanism to evaluate the counsel as has been recommended already and to assign -- to assign the individual. Ultimately the judge controls their courtroom, obviously.

JUDGE SMITH: Not only controls the courtroom, you would agree the courts -- the judges have a responsibility at every stage of the criminal proceedings to make -- to ensure that a defendant receives effective representation.

MR. KASPEREK: Absolutely.

JUDGE SMITH: Which is exactly why this judge in his court, on an infrequent basis, discharges an attorney in open court.

MR. KASPEREK: Judge, I commend you.

JUDGE SMITH: Do you say there's something wrong with that?

MR. KASPEREK: No, not at all. I commend you for doing it.

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JUDGE SMITH: I misunderstood.

MR. KASPEREK: I am saying there are people obviously being assigned to cases or were being allowed to accept assigned counsel cases that clearly don't have the -- any felony experience or clearly don't have any homicide experience.

The other problem I think that arises is that because of the variance in criminal defense services that are provided, the prosecution has a wide impact about how to prosecute the case and whether to comply with any discovery mechanisms whatsoever. So as a consequence of that, it is really a hodgepodge, depending on where you are. In this county, allegedly, we have an open discovery process. That, you know, frankly just doesn't exist. It depends upon the individual attorney.

Outside of this county, you may get no discovery, whatsoever, until the mandates of the criminal -- of the CPL apply. But if there's some way to organize the criminal defense bar, which is the only way the prosecution is going to respond, the only way the courts are going to act, then you can minimize the length of time it takes to resolve the case.

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It's shortsighted, in my opinion, to narrow the possibility of a defense attorney to adequately obtain the information to assess the case to counsel his client, because what happens is what's happened in this county, you start with over -- you have overloaded courts. You have an overloaded process, and they are trying to react to it. So to react to it, they have demanded that cases be resolved within a certain period of time because they need to minimize the case load. If it was front loaded, those cases wouldn't be there in the first place. So as a consequence of that, you need to attend to the issue of statewide, equal protection and equal defense protection regarding the circumstances.

In some of the outlying counties, not so much here, the judges have the individual from cradle to grave. They are the Surrogate Court judge. They are the Family Court judge. They are the County and the Supreme Court judge. I can't tell you that anybody can parcel out where an individual is in that system, whether they are a defendant or a defense attorney. Okay? If I'm a solo practitioner in Yates County, that judge controls my ability to earn a living. That judge defines whether I'm successful or not.

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And as a consequence of that, there's this inbred
wink and nod system that exists about how to resolve
the circumstances or what you're going to do.

PROFESSOR HELLERSTEIN: So how would you
proceed in Yates County?

MR. KASPEREK: I come with questions, not
answers.

PROFESSOR HELLERSTEIN: I thought you had the
answers.

MR. KASPEREK: You are the general's staff as I
have just referred to. Is it a good idea to have one
judge sit with three different hats on? Now, I
forgot to mention, that they are also the drug court,
the domestic violence court, the boutique court of
the day. You know, they are wearing four or five
hats. Is this a reasonable way, an enlightened way
to proceed with the criminal justice system?

The other thing that I would recommend is that
the access to expert services, which has been
mentioned earlier or in this -- in my experience like
for instance the public safety lab here, which
basically does all the forensic work for the multiple
county area -- I think it is like six different
counties that they provide services for. I

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understand that this public safety lab is supposed to be a separate entity, but if there was a mechanism, if there was thought presented to equal access for the defense to that independent body, I think it would also lead to the shortening of the length of cases for their final resolution of the case.

You could save money on alternative expert services for the defense by having independent, really independent systems created for chemical forensic analysis that literally do have equal access for the defense and the prosecution. This would minimize the overlap of necessary services. It would save you money, resolve the cases, and again, instead of the rear end decision making about how to eliminate the cases, you start at the front.

You know, a couple of the things that I think I wanted to draw to your attention, just because I'm on the front lines, the evaluation of clients or of pretrial detainees or access of attorneys to their detained clients, I think is also something you need to address. Depending -- because of my varied practice now, I go to a variety of different counties and facilities to represent -- to meet with clients, both federal facilities, as well as state and county

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facilities.

I can't tell you that I have a confidential setting to meet with my clients that is uniform in any stretch of the imagination. I have met with clients who are in jails in guard locker rooms. I have met with clients in facilities that are shared by other people, open conference rooms. I have met with people in tiny little units without physical contact, unable to have physical contact. I have met with individuals in allegedly small rooms that allow us confidential communication, but have open ceiling settings where I can easily hear the conversation next door to me, just as plainly as the guy sitting across the table from me.

So I think that when you consider indigent defense services, you really have to consider the entire criminal justice system, because that's what's really controlling the system.

I have invited Jim and Karla to be listed on this, because I think they give you a unique insight to their particular concerns, and unless you have any other questions, I think frankly, you will enjoy listening to them.

PROFESSOR HELLERSTEIN: They are both here?

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MR. KASPEREK: They are here.

PROFESSOR HELLERSTEIN: Do they want to testify
tandem or separately?

MR. KASPEREK: I'm happy to stick around, if you
want to ask questions.

MS. BURKE: Good afternoon.

PROFESSOR HELLERSTEIN: Good afternoon.

MS. BURKE: My name is Karla Burke, and I work
privately for a number of members of the criminal
defense bar. I would like to start today by quoting
the criminal justice pamphlet commissioned by Judge
Judith Kaye. "The criminal justice system is
complex, and for those who stand accused, often
frightening. The fear and confusion are compounded
for defendants with limited command of English, of
whom there are large numbers in New York State.
Fairness demands that everyone who enters the system
understand the nature of the proceedings." The
importance of providing defendants with -- with no or
limited knowledge of English with proper
interpretation and translation into their native
language is so that each would completely understand,
and therefore participate effectively in their
defense. Interpreters have the weighty

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responsibility of interpreting everything that is said without adding, deleting, altering or summarizing the context.

I would like to add that by no means I'm perfect. I understand that we are all humans, and we all make mistakes. But I have witnessed court interpreters whose interpretation is inaccurate. By doing so, defendants may misunderstand what is taking place or the evidence that is presented to the judge, or the jury may be distorted or significantly changed.

I believe there are several reasons for these inaccuracies: First, the limited number of interpreters available. I like to mention here that often there's only one interpreter for several co-defendants during a court hearing, for example, at the preliminary hearing. Interpreters working with more than one defendant violate their confidentiality.

Second, judges have limited patience for the time that it takes to accurately interpret. And most importantly, there's no transcript of the actual interpretation during these proceedings, which is extremely important to preserve the records.

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I personally have spoken to the court here in Monroe County about becoming certified to interpret in court. However, I have been told that if they take me through that long process, that I'm not to accept any interpreting work other than the one that's facilitated through that office. The reason they give me for this is to avoid conflicts and to ensure my availability to the court. They can't guarantee either how many hours I would receive through the court.

If this is a concern to the court, they should investigate the possibility of full-time interpreters for all main languages, but at the same time, they should offer some kind of certification for someone like me that works on my own, that work on my own to be able to work in court and provide the interpreting services.

For example, there have been cases where I have developed a good relationship between the attorney and the defendant, and when it comes time for trial, I am not able to interpret what this defendant is going to testify.

PROFESSOR HELLERSTEIN: Have you ever been in a situation where you were sitting with a defendant as

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part of his defense team, and there was an interpreter, a court interpreter, and there was -- and you were able to pick off meaningful inaccuracies in what the court interpreter was saying?

MS. BURKE: Yes, I have.

PROFESSOR HELLERSTEIN: How is that resolved? I assume it was raised.

MS. BURKE: Yes, it was raised by the counsel I was working for.

PROFESSOR HELLERSTEIN: What happens then?

MS. BURKE: I could tell he was making the effort to correct it, but like I said, there's different reasons why he was being inaccurate. The judge was not being patient enough to give him the time to interpret everything that was being said. Interpreters are required to speak a very --

MR. EPPLER: Fast.

MS. BURKE: -- fast rate and to retain memory, lengthy questions and responses, and this takes extensive practice. So I think after talking -- after this was done, the hearing, I talked to the interpreter, and he said that he could feel this extra pressure of me being there to make sure that he was interpreting accurately. So I think that

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cross-examination would be important.

MR. KASPEREK: One of the things we discovered in using Karla is that she was wise enough to pick up the nuances between the different Spanish cultures in the communication, and she spends a lot of time reading Spanish legal dictionaries and English legal dictionaries to make sure she is coalescing the words correctly to the individuals, which is something that we have discovered hasn't -- doesn't seem to be followed generally.

The other thing that we would point out is in multi-defendant cases, particularly in Spanish cases, drug conspiracy cases for example, we have one court interpreter for all the defendants. But Karla is shadowing my cases, you know, communicating with my client and me to make sure that we are understanding what's going on, but we are the only ones doing that. Nobody else, the other defendants don't have independent translators.

JUDGE SMITH: Why not?

MR. ELMORE: That's a good question.

JUDGE SMITH: Did they ask for it? Because they are entitled to it by law.

MR. KASPEREK: I don't know. I'm just raising

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the point.

JUDGE SMITH: My point is it may or may not be a problem. They are entitled to that -- a defendant is entitled to his own interpreter.

MR. KASPEREK: I agree.

JUDGE SMITH: They have to ask for them.

MR. KASPEREK: Either they don't know it, or they are unaware of it, or they don't think it's necessary.

MR. CHAN: In Federal Court, do they have their own Spanish interpreters, and do those interpreters also interpret in local court?

MR. KASPEREK: In federal court, the interpreters are certified and provided when we get to court. But likewise, it's not -- it is frequently my practice, in fact, it is my practice to have Karla present regarding the circumstances, because in my opinion, the court -- particularly in Federal Court, the single translator provided by the court becomes the translator communicating in every aspect of the prosecution. And this happens in the State Court, as well, and becomes aware of plea negotiations, proposed testimony by the other co-defendants. There is no ability to have a confidential communication,

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because the translator -- and there might be three or four of them here -- becomes the ombudsman for all the defendants and all the activity in that case.

MR. CHAN: And are those translators also used by the U. S. Attorney's Office to translate, for example, wiretaps?

MR. KASPEREK: Absolutely. So this person, this translator is crossing over not just among defendants, but from prosecution to defense.

JUDGE SMITH: The thing that I'm puzzled with, it would strike me, then, that if you're, say, in a three defendant trial, and all three defendants are not fluent in English, and you have Karla as your personal interpreter for you and your client, the Court has to provide one by law for the Court.

MR. KASPEREK: I agree.

JUDGE SMITH: They have to. Otherwise you can't have a trial. Don't you think you should be getting on your feet or inviting -- making an application to the court saying, "Judge, I don't want the court's interpreter acting as an interpreter between the other two defendants and their attorneys." And the -- if it is brought to the attention of the Court, the Court would have to appoint an interpreter

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for each?

MR. KASPEREK: I absolutely agree with you --

JUDGE SMITH: Are you suggesting it hasn't been done?

MR. KASPEREK: I'm suggesting it has not been done.

MS. ZUFLACHT: When you bring Karla, even if it is a one defendant case, you have a court interpreter and Karla sitting there. She is not interpreting for the defendant, she is telling you --

MR. KASPEREK: She is monitoring the translation of the court interpreter.

MS. ZUFLACHT: To you.

MR. KASPEREK: To ensure it is accurate, and then should I wish to communicate with my client during that court proceeding, I -- we do it through Karla.

MS. ZUFLACHT: But she is not interpreting for the client. The court interpreter is.

MR. KASPEREK: If there's a variance in what is said in English --

MS. ZUFLACHT: She corrects it.

MR. KASPEREK: She corrects it, and we bring it to everybody's attention.

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MR. CHAN: Likewise, if you have a witness on the stand who is speaking Spanish, and the Spanish interpreter is translating into English for everyone out there to listen to, she also makes corrections, she alerts you if there is a mistake, right?

MR. KASPEREK: Correct.

MR. CHAN: And that could be key in the defense case?

MR. KASPEREK: Absolutely. Mr. Monroe is our 007.

MR. EPPLER: You said something about -- that the pay is different?

MR. KASPEREK: Karla, could you address the --

MS. BURKE: I usually get paid thirty dollars an hour.

MR. EPPLER: Usually, this is by application to the court?

MR. KASPEREK: Yes.

MR. EPPLER: This is under the voucher system?

MS. BURKE: Correct. If it is a federal case, it has changed to being either half a day -- actually it is \$43 or \$86 for a full day, which makes it \$10 an hour.

PROFESSOR HELLERSTEIN: So you work in the

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federal system?

MS. BURKE: Sometimes I work with some federal cases.

PROFESSOR HELLERSTEIN: You can work privately. I understand you to say if you were to be certified for the state courts, you couldn't have a private practice, so to speak?

MS. BURKE: Correct.

PROFESSOR HELLERSTEIN: But a federal interpreter can?

MR. KASPEREK: She works for our office on federal cases we are assigned to as a translator and -- you know, different capacities as an investigator, but she is basically working for assigned counsel, not as a function of the court.

MS. KHASHU: I'm sorry, you could take cases that you haven't been paid for by the defense attorney, right? You can be an interpreter in other cases where you're not working for someone like the gentleman over there?

MS. BURKE: Correct.

MS. KHASHU: It's just the same case. I want to clarify that you can be a vouchered interpreter from OCA, just not on the same case that you are working

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for the defense counsel?

MS. BURKE: Correct.

JUDGE SMITH: What did you mean the courts were suggesting to you that you should -- if you applied to be a court interpreter, you should do only that and not do defense work?

MS. BURKE: Right, to ensure my availability to the court and to avoid any conflicts.

MS. KHASHU: Just on the same case.

MR. KASPEREK: I think you misunderstand it.

JUDGE SMITH: It is not on the same case; you're saying period.

MS. BURKE: Right.

JUDGE SMITH: If you want to be a court interpreter, they won't want you doing defense work.

MS. ZUFLACHT: They won't guarantee your hours?

PROFESSOR HELLERSTEIN: How do you make a living?

MR. KASPEREK: You should investigate this. The individuals who are court interpreters do not do defense work.

PROFESSOR HELLERSTEIN: Do they do outside work?

MR. CHAN: Do they work for the prosecution?

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MR. KASPEREK: I don't know if they work for the prosecution, but they -- they discourage court certified interpreters from doing work outside of any assigned work from the court.

MR. EPPLER: When you represent a non-English speaking defendant, do you have to apply under the voucher system to have that defendant have an interpreter separately and apart?

MR. KASPEREK: Yes.

MR. EPPLER: You do?

MR. KASPEREK: Yes, just like I would apply for investigative services, I apply for translation services, mental health services, whatever.

MR. EPPLER: Is the pay under the voucher system the same for the court interpreter that the court has, as well as the --

MR. KASPEREK: I can't address that, but what we can tell you is that the fees assigned for translation services are different than the fees assigned for investigative services. And it is impossible, in my opinion, to represent Spanish speaking individuals where you must go into the Spanish speaking community, speak to other Spanish speaking individuals without a Spanish investigator.

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Do you understand?

PROFESSOR HELLERSTEIN: What's the difference in fee?

MR. KASPEREK: What is the difference in the assigned -- in the fee for translation as opposed to investigative services? Jim, what do you get paid?

MR. MONROE: My experience with Monroe County, there is no set fee for investigator. I can charge \$50 on a file; I can charge \$75 on a file. Whatever the judge determines is that cap, the conflict defender's office here will accept.

JUDGE SMITH: Well, there is a statutory cap on investigative services, and if it's going to be exceeded, theoretically, application is being made at the appropriate time to the trial court for permission to exceed the cap. I'm assuming they do that here, yes?

MR. KASPEREK: Correct.

MR. MONROE: The total cap -- total dollar basis for that case is a thousand dollars is what the cap is.

JUDGE SMITH: You're talking about the hourly rate.

MR. MONROE: Correct, interpreters are paid on

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an hourly rate, and there's a specific hourly cap of \$30 per hour on that cap.

MR. KASPEREK: So I can tell you -- I don't mean to jump on Jim's words, but I only basically take homicide cases on assignment. You know, we don't live by a thousand dollar cap for investigation services on a homicide. We go through that in two weeks.

MR. EPPLER: Are you saying that -- I'm sorry, it's the wrong way to start the question. The investigator who has to be able to speak Spanish, is that a separate category and a separate pay?

MR. KASPEREK: There's two issues you need to be aware of here. Investigators have a specific definition, as far as the assigned counsel requirements are, because investigators have a specific requirement in New York State, and to be an investigator, you have to, you know, dot the I's and cross the T's.

JUDGE SMITH: You have to be licensed.

MR. KASPEREK: Exactly. So the pool of available individuals is minuscule, and you run into this overlap. And so what happens, I monopolize these two individuals, and I have attorneys calling

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me constantly saying, you know, who can I use? Where can I get them? Because there's no other resource. As an experienced, you know, gray-haired attorney, Don and I develop a pool of individuals that we rely on, and everybody else calls us looking for it. We need to have some kind of centralized available support staff to be able to rely upon, because new people into the area or new practitioners to cases don't know where to go get these people.

MR. CHAN: Wouldn't that create a conflict, say for example, this young lady here was on this centralized pool, and you used her for one of the defendants in a multi-defendant conspiracy case, and then another attorney says, "Gee, let me go through this centralized office and try to find a translator," and they get her name.

MR. KASPEREK: You go right back to the same problem. The pool needs to be developed. The resource needs to be developed, and it hasn't been. It is kind of a hodgepodge of system at this point.

MR. KELLY: My only mention, just to throw it in, is that I think that you would probably do this here; that you have a private contract between yourself and her regarding that particular client so

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that she comes within your privilege.

MR. KASPEREK: Absolutely.

MR. KELLY: One of the things you're going to have to do is create the central pool, not only do you have to create that private contract to protect the privilege, you also have to put something into it that's going to cover for the potential conflict situation, not only in this case, but because this person may have information over into another case.

PROFESSOR HELLERSTEIN: Mr. Monroe.

MR. MONROE: Good afternoon, my name is James Monroe. I have been an investigator for the defense bar since 1987. I have been appointed on 14 capital cases, of which I was the lead investigator on 11. I have worked more than 30 homicide investigations and numerous other, serious felony cases. I am privileged to work with a group of attorneys. I work for no more than eight attorneys. It is a small group, but with their practice -- they are all solo practitioners, that fills up all my time.

One thing that becomes an issue on some cases with some of the judges locally here is the cap that we were speaking about earlier, about the interpreters, the same with investigators. Under the

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county law, the county cap for investigator as an expert is a thousand dollars. Somebody with my experience is generally charging \$75 an hour, although taking the capital case, that rate is dictated through the statute at \$50 per hour on a capital case. So most investigators will take an assigned case at \$50.

With that thousand dollar cap, the math is easy; it is 20 hours. You cannot effectively do any sort of homicide investigation with only 20 hours at your disposal. Fortunately, the attorneys I work for always go to bat and go to bat for their client. If we need more time, we need more hours, we have been successful in a vast majority of the time of getting the voucher paid.

However, what I think would be something that should be looked into that may be a more appropriate way to handle serious felony cases and homicide cases is sort of mimic the way the death penalty statute was enacted. The investigator is statutorily attached to the case, just like the two attorneys, along with a mitigation specialist. If it was by statute and the rate is capped by statute, then it makes it more easy to justify to a judge that we need

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this person for this amount of time, and the legislature in their great wisdom thought it was important enough too, that they put it there. That would make the process a lot easier, and therefore I think improve dramatically the ability for the indigent defendant. To my --

MR. GOLDMAN: Excuse me, are you saying every single criminal case, you automatically get an investigator?

MR. MONROE: I don't think that's necessary. I'm saying all the serious -- whoever wants to determine which case is serious, that's out of my realm.

JUDGE SMITH: How about if a case goes to trial, do you think that's serious?

MR. MONROE: Most definitely. I think think many -- like here in Monroe County where the district attorney doesn't share discovery, the attorney is forced to do investigation early on at the early stages. You're not getting any information from the police through the district attorney. You can't properly tell your client what things look like if you don't know what they look like. So immediately early on, I think it's really important.

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We all see those television commercials they have out -- television shows they have now 48 Hours Homicide, whatever, they show the first 48 hours on a homicide is crucial to solving it. Just as the evidence gets stale for the prosecution, it gets stale for the defense. And so that's why early on it is important, and a thousand dollar cap at 20 hours just doesn't suffice for what you need.

A lot of my colleagues don't take assigned cases for that sheer hassle of going through that whole nightmare of, "Are we going to get approved for it?" You don't want to stop when you have a lead and you're working a case and things are going one way. You are not going to stop and hope the money doesn't run out. You are going to keep going.

In my experience -- and Mr. Kasperek stole some of my thunder about the crime lab -- is that in my experience, that is where I think the biggest benefit to a defendant can occur, right now. That's just Monroe's looking at it. I will share with you a case we just had.

We just had a shooting and called the crime lab for the ballistics expert to get his understanding and rationale behind his -- there were 14 fragments

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of bullets. There were six or eight bullets. There were eight impact areas, and we were trying to marry up what fragment went with what bullet, what impact area what bullet hit.

The crime lab ballistics guy wouldn't share his information with us. He told us he was not permitted to speak to us about his findings on this. So it caused the attorney to hire his own ballistics expert. That ballistics experts then had to go through the evidence, and just looking at the evidence, he did here, the property clerk took it out, brought it into a room. He looked at it under the supervision of a district attorney investigator.

But then he came to a point where he couldn't match up the parts. He had to do it with a microscope. He asked to use the one at the crime lab. He was denied access to the crime lab. And this is a ballistics expert who is currently practicing with the New York City crime lab, so he's a colleague. But they claim that their rules were outsiders can't come into the lab.

So the attorney then had to find a comparison microscope that was available. Fortunately, here in Rochester, in our community, we had Xerox Corporation

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who had such equipment for us. We then had to hire that microscope. It was seven hundred dollars for the day for us to send our expert there, under the supervision of an investigator, following us there, with the evidence, bringing the evidence out, watch him open every packet, everybody is reinitialing all the packets, putting everything away, where a simple phone call to that ballistics expert, fragment A goes with bullet 6, it could have been resolved with a phone call. It happens with other evidence also.

MR. SPERANZA: John Speranza. Did you make that phone call? I mean did you attempt to get a judge to do that?

MR. MONROE: I'm not sure.

MR. SPERANZA: Did Larry or whoever was in charge of the case?

MR. MONROE: It was for Mr. Thompson. I made the phone call initially; I was denied.

JUDGE SMITH: Phone call to a Judge?

MR. MONROE: No, no, no, no.

MR. SPERANZA: Did you ever seek a judicial intervention to sign an order -- whether it was ex parte or not, permitting you the utilization of that particular microscope?

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MR. MONROE: Mr. Thompson did, and he made application, and Judge Connell was the judge on it. Made application to the judge, and he ran up with a resistance with the crime lab also that it was easier for him to approve the seven hundred dollar expense than to keep fighting with the crime lab.

JUDGE SMITH: The judge was fighting with the crime lab?

MR. MONROE: Correct.

JUDGE SMITH: That should be no contest.

MR. SPERANZA: If that had happened in Broome County --

MR. MONROE: Aside from ballistic evidence, there's all kinds of forensic evidence handled through the crime lab. I remember early on when I first began, attorneys could go to the crime lab and borrow a book from the library. They don't do that anymore. They could pick up the phone and call Bob Stanton who used to be the ballistics expert, and he would tell you a war story along with whatever else you wanted to hear that day. You always got something out of Mr. Stanton and always the answer to your question.

It is not like that today. I'm not putting it

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on any one person. I'm not saying anybody over there, whatever, I'm saying their open door policy is gone, and that has created an enormous expense for the defense. But also it creates an enormous delay, because until we had that information from the ballistic expert, we couldn't then marry that up with what strike marks were which in this particular crime scene. Therefore, we couldn't position either one of the two weapons that were discharged at this crime scene and who was where. It's just an enormous delay, and that creates more leg work and more investigation involved.

PROFESSOR HELLERSTEIN: Thank you all.

MR. KASPEREK: Thanks very much.

PROFESSOR HELLERSTEIN: Welcome, Ms. Banks.

MS. BANKS: Good afternoon. My name is Lenore Banks, and I'm off-board judicial specialist for the League of Women Voters of New York State. I have been League liaison to the New York State Defender's Association, NYSDA, for the past five years, and a member of NYSDA's client advisory board since 2003. I thank Judge Kaye and the Commission for the opportunity to present the League's views on reform of the present New York State public defense system.

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Since 1999 there has been an acknowledgement of crisis with regard to assigned counsel fees. Judge Kaye took on the issue that year, convening a task force resulting in the report of January, 2000, entitled, "Assigned Counsel Compensation in New York, a Growing Crisis." The report recommended, among other things, that certain mandatory surcharge moneys be designated to pay for a fee increase. NYSDA and the league feared that providing state funding for only one type of public defense program, in that instance, assigned counsel, would destabilize the provision of defense services statewide. Cash-strapped counties, it was predicted, would abandon public defender offices and legal aid societies to seek a state revenue stream proposed only for assigned counsel.

While the fee increase that was ultimately passed by the legislature did provide for eventual payment of some state funds to counties for public defense of any type, counties faced a fee increase effective at the beginning of 2004 while state funding would not follow for more than a year. That delay, along with uncertainty about the amount of state funds that will be ultimately forthcoming as a

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result of that legislation and about how those state funds will be distributed, has caused chaos in counties focusing primarily on cost.

Groups such as the league, concerned about quality, have sought to keep up with the effects of the Legislation and continue to advocate for improvement in the quality of public defense.

Our message this afternoon is the league strongly supports formation of an independent, statewide public defense commission, along the lines envisaged by the Whiteman Committee for an Independent Public Defense Commission, and embodied in the Luster/Volker legislation of 2002, reintroduced as Lentol/Volker in 2003, and it is hoped to be reintroduced again in 2005. A Pretlow bill has already been introduced this year in the assembly.

In addition to making assigned counsel fees consistent for all types of representation, the proposal addresses the current lack of standards, insufficient resources, especially for recruitment, training, supervision and support services; the need for statewide accountability, which is now non-existent; and the need for professional public

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counsel, independent of political and other improper strictures.

The league's qualifications to testify in this matter include our near half century involvement in studying and advocating for improvements in the judicial system of New York State. We are primarily a lay or non-lawyer organization, and as such, we have sought to represent the public interest, that is the consumers in the justice system.

In 1956, we began by studying the court structure in New York State followed by judicial selection and discipline in 1966, pretrial procedures in the criminal courts, focusing on counsel for the indigent, grand jury, bail and alternatives to bail. That was in 1975. In 1987, we studied measures to improve a fair and efficient jury system, alternatives to incarceration in 1993, and opposition to the death penalty announced in January of 2005.

In addition to lobbying for legislative changes, we have also done considerable work in the area of public education on the state judiciary. In 1990, we began a major exercise in citizen democracy, focusing on the criminal justice system called, "Balancing Justice in New York State," which resulted in over 50

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local projects around the state.

In recent years, the league has been particularly involved in public defense issues. We have worked with NYSDA to co-sponsor public hearings on the adequacy of the public defense programs across the state and participated in Gideon Day, the annual observance of the right to counsel case, Gideon versus Wainwright, educating legislators and the public about the need for and problems with our public defense system.

In 2003 the league joined NYSDA, the New York State Community Action Agency Association and the Committee for an Independent Public Defense commission in co-sponsoring a Gideon Day client-defender speak-out in Albany. Testimony at that speak-out again illustrated the need for public defense reform.

More recently, the league has been involved with NYSDA and other groups in hearings held in specific client communities. As the state league's liaison to NYSDA and a member of NYSDA's client advisory board, I have participated in these hearings. An initial analysis and findings from one community has been released by NYSDA entitled, "A Preliminary Report

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Concerning the Inadequacy of Defense Services Available to Farm Workers," analyzing testimony taken at a hearing in Albion and other information about public defense in the farm worker community in western New York State. The report was issued as part of the NYSDA campaign, "Defending the Right to be Heard. Every County. Every Client." Additional reports are anticipated.

I have included with this testimony the NYSDA Client Advisory Board's most recent draft of a Client's Bill of Rights, developed over the past year at our public hearings, focus groups, and prisoner service. I will include it with my testimony, without reading it.

Counties in chaos. As I noted at the beginning, what we have found was a system in chaos: Sixty-two counties with more than 62 different delivery mechanisms, no uniform standards of training and performance, and no accountability, along with inadequate funding which has resulted in the crisis we now face.

As a result of the 2003 fee increase legislation, which at best will eventually provide half of the funds needed just to pay for the increase

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in assigned counsel fees, and will not put money into county coffers until 2005 at the earliest, counties across the state are hastily reevaluating how they provide public defense services. NYSDA reports that nearly half of New York counties have considered some change concerning their public defense system as a result of the rate hike.

Many efforts are directed only at saving money, not improving quality. From requests by assigned counsel programs to survive at all costs to the addition of scaled-back conflict defender offices, localities have tried to deal with the continuing statewide problem of the underresourced, unfunded mandate of public defense.

This is not just a fiscal issue. Clients, client communities and communities at large are increasingly demanding improvement in public defense.

A lawsuit in New York City appears to have helped galvanize the fee increase; the possibility of new litigation has been voiced more than once in counties across the state.

In 2002, the state league made establishment of an independent public defense commission a priority on our legislative agenda. Such a commission would

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protect constitutionally and statutorily required legal services from control by those with conflicting interests and provide a single accountable entity to whom any and all concerned groups could turn to if quality representation is not provided. It would act as a conduit for transmitting state funds to localities that meet standards established by the commission.

We urge creation of the politically insulated statewide Public Defense Commission that guarantees high quality legal representation for all New Yorkers regardless of their ability to pay. Such a commission would ensure fiscal accountability to the state. Its members would be appointed by the governor, legislative leaders and the courts from a pool selected by a nominating committee made up of representatives from a variety of Bar groups, civic and legal organizations. This would insulate the provision of defense services from public and political pressures that threaten the ability of public defense lawyers to provide professional representation to their clients.

We thank you for this opportunity to address this issue, and we urge your support for this

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legislation.

PROFESSOR HELLERSTEIN: We are adjourned.

(Proceedings adjourned at 4:16 p.m.)

* * * *

2 I, Meredith A. Bonn, RPR, do hereby certify that I am an
3 Official Court Reporter of the Seventh Judicial District, at
4 Rochester, County of Monroe, State of New York, duly appointed;

5 That on the 11th day of March, 2005, I reported in machine
6 shorthand the proceeding held before the Indigent Defense
7 Commission; and that the transcript, herewith numbered pages 1
8 through 83, inclusive, is a true, accurate, correct and
9 complete record of those machine shorthand notes.

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MEREDITH A. BONN, RPR

9 I, Regina Zielke, RPR, do hereby certify that I am an
10 Official Court Reporter of the Seventh Judicial District, at
11 Rochester, County of Monroe, State of New York, duly appointed;

12 That on the 11th day of March, 2005, I reported in machine
13 shorthand the proceeding held before the Indigent Defense
14 Commission; and that the transcript, herewith numbered pages 84
15 through 185 inclusive, is a true, accurate, correct and
16 complete record of those machine shorthand notes.

14

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REGINA A. ZIELKE, RPR

16 I, Judy A. Ging, RDR, do hereby certify that I am an
17 Official Court Reporter of the Seventh Judicial District, at
18 Rochester, County of Monroe, State of New York, duly
19 appointed;.

20 That on the 11th day of March, 2005, I reported in machine
21 shorthand the proceeding held before the Indigent Defense
22 Commission; and that the transcript, herewith numbered pages
23 186 through 272, inclusive, is a true, accurate, correct and
24 complete record of those machine shorthand notes.

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JUDY A. GING, RDR

25 Dated at: Rochester, New York,
this ____ day of _____, ____.