SUPREME COURT OF THE STATE OF NEW YORK
THIRD DEPARTMENT

CHIEF JUDGE'S HEARING:

COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

COURT OF APPEALS
20 Eagle Street
Albany, New York 12207
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COMMISSION MEMBERS:

PETER JAMES JOHNSON, JR., ESQ., Presiding

PROFESSOR W. BRADLEY WENDEL

MONICA A. DUFFY, ESQ.

DEVIKA KEWALRAMANI, ESQ.

ROBERT P. GUIDO, ESQ.

MARK C. ZAUDERER, ESQ.

SEAN MORTON, ESQ.

E.J. THORSEN, ESQ.

Colleen B. Neal
Official Court Reporter

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

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

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

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

By way of brief background, in February 2015 Chief Judge

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

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

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

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

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

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

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

speaking to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I have one fairly simple but important example of a rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. JOHNSON: Thank you.

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

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

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

MR. O'SULLIVAN: You're welcome.

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

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

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

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

MR. O'SULLIVAN: Thank you very much.

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

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

and I will bring that back to my organization.

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

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

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

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

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

system is desirable. This should be addressed.

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

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

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

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

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

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

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

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

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

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

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

Conduct for lawyers?

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

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

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

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

MS. DUFFY: Correct.

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

MS. DUFFY: Thank you.

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

MS. KRONSTADT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I thank you very much for allowing me to present

testimony here today.

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

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

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

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

MR. DOWNS: I'm sorry, what?

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

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

MR. JOHNSON: You have a question?

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

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

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

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

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

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

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

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

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

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

MR. JOHNSON: Ms. Duffy?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DOWNS: Thank you.

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

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

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

Our Association represents over 1100 attorneys, each of

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

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

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

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

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

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

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

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

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

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

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

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

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

statewide disciplinary system.

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

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

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

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

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

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

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

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

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

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

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

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

MS. SILVER: Thank you.

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

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

I filed a disciplinary complaint against an attorney who I

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

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

MR. JOHNSON: Rule?

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

And the Disciplinary Committee process is not transparent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CUNNINGHAM: Can I answer that question?

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

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

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

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

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

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

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

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

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

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

colleague, Mr. Zauderer.

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

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

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

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

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

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

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

MR. JOHNSON: Are those documents for us?

MR. CUNNINGHAM: Yes.

MR. JOHNSON: May I have those?

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

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

MR. CUNNINGHAM: Thank you, everybody.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

anyone else.

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

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

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

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

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

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

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

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

MR. ZAUDERER: Thank you.

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

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

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

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

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

MR. ZAUDERER: Appreciate your time.

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

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

MS. WILKOV: You mean the scheme to defraud?

MR. ZAUDERER: Right.

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

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

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

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

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

MR. ZAUDERER: Thank you.

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

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

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

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

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

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

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

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

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

MR. MIRANDA: Good afternoon, how are you?

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, and thirdly, more extensive discovery should be

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

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

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

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

in different parts of the state in terms of lawyers?

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

The second question about uniformity —

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

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

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

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

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

MR. MIRANDA: Very good.

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

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

MR. MIRANDA: Good afternoon.

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

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

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

MR. ZAUDERER: Yes.

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

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

MR. MIRANDA: Thank you.

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

MR. MIRANDA: For changing that?

MS. KEWALRAMANI: Yes.

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

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

MR. MIRANDA: Thank you.

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

MR. MIRANDA: Thank you.

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

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

C E R T I F I C A T E

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

DATED: July 29, 2015