

SUPREME COURT OF THE STATE OF NEW YORK
FOURTH DEPARTMENT

CHIEF JUDGE'S HEARING:

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2 COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

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92 Franklin Street Buffalo, New
York August 4, 2015

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COMMISSION MEMBERS:

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HONORABLE BARRY A. COZIER

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HONORABLE STEPHEN K. LINDLEY

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MARK C. ZAUDERER, ESQ.

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PROFESSOR W. BRADLEY WENDEL

13

VINCENT E. DOYLE, III, ESQ.

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15 JUSTICE COZIER: Good afternoon and welcome to the second of three
16 public hearings scheduled by the Commission on the Statewide Attorney Discipline.
17 My name is Barry A. Cozier and I am the chair of the Commission. I am currently
18 senior counselor at LeClair Ryan in New York City and have been practicing for
19 approximately 40 years in one capacity or another. From 1986 through 2006, I served
20 as a member of the New York State Judiciary as a Family Court judge, a justice of the
21 Supreme Court, and an associate justice of the Appellate Division, Second Department.
22 On behalf of Chief Judge Jonathan Lippman and myself and all of the members of the
23 commission, I want to thank each of you for taking the time to come before us today
24 and share your thoughts and insights about the important issues the Commission is
25 tasked with addressing.

DANIELLE M. GREGORY DAIGLER, RPR, CRR

1 In February 2015, Chief Judge Lippman established a Commission on
2 Statewide Attorney Discipline to conduct a comprehensive review of the state's attorney
3 disciplinary system to determine what is working well and what can work better. After
4 conducting this top-to-bottom review, the Commission is charged with offering
5 recommendations to the chief judge, the Court of Appeals and the administrative board
6 of the courts about how to best enhance efficiency, effectiveness, and public confidence
7 in New York's attorney discipline process.

8 Among the primary issues under consideration by the Commission are:
9 One, whether New York's departmental-based system leads to regional disparities in
10 the implementation of discipline; two, if conversion to a statewide system is
11 desirable; three, the point at which disciplinary charges or findings should be publicly
12 revealed; and, four, how to achieve dispositions more quickly in an effort to provide
13 much needed closure to both clients, complainants and attorneys.

14 By holding these public hearings, and also accepting written testimony,
15 we hope to hear from a diverse cross-section of interested individuals, organizations
16 and entities about their views on these and related issues they feel are relevant to the
17 Commission's task. We believe that by inviting and considering different viewpoints,
18 the Commission will gain a more complete understanding of the issues at hand and in
19 turn be in a better position to formulate the best possible recommendations for the
20 state of New York.

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

You will each have up to ten minutes to present your testimony and
1 then you may be asked questions from the panel. We kindly ask that you please
2 strictly stick to your time limit so to ensure that all of our speakers have enough time
3 to testify. If you begin to run over your time, we will certainly let you know and we
4 will give you some indications as your time is winding down. If you wish to submit
5 additional written testimony to the Commission, you are most welcome to do so
6 following the hearing.

7 I am pleased to have this afternoon a distinguished panel joining me.
8 Each of these professionals has special experience in the disciplinary field and
9 currently serves as a member of the Commission on Statewide Attorney Discipline.
10 First to my left, the Honorable Stephen Lindley, associate justice of the Appellate
11 Division, Fourth Department, which sits in Rochester. Justice Lindley is co-chair of
12 the Subcommittee on Enhancing Efficiency.

13 On my far right, Vincent E. Doyle, III, a partner at Connors & Vilardo
14 here in Buffalo and former president of the New York State Bar Association. Mr.
15 Doyle is a member of the Subcommittee on Uniformity and Access.

16 To my immediate right, Mark Zauderer, a partner at Flemming Zulack
17 Williamson & Zauderer LLP in New York City and a distinguished trial lawyer. Mark
18 is on the Subcommittee on Uniformity and Fairness.

19 To my left in the center, Professor W. Bradley Wendel, Cornell
20 University Law School. Professor Wendel is with the Subcommittee on
21 Transparency and Access.

22 And to my far left, Robert Guido, Esquire, the executive director for
23 attorney matters at the Appellate Division, Second Judicial Department. And Mr.
24 Guido is a co-chair of the Subcommittee on Uniformity and Fairness.

25 Also, in addition to these members, we also have with us this

afternoon Sean Morton, who is seated to my right in the jury box. He is a member of the Commission and also the deputy clerk of the Appellate Division in the Third Judicial Department, and he is a member of the Committee on Uniformity and Fairness. I'm deeply grateful to the members of the Commission for their hard work these past several months, and I thank all who has been able to join us today.

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I would also like to thank the Counsel to the Commission, Matthew Kiernan, who is also seated in the jury box; and John Caher, the senior advisor to the Commission and the point person for both of them helping to bring order and organization to both the process and the hearings.

1 I would ask that the witnesses keep their voices up as we do have a
2 court reporter present. And I would like to remind the witnesses that a transcript of
3 their testimony will be posted to the Commission's web page and possibly included as
4 an appendix to our final report. In other words, whatever you say here today at this
5 public hearing will be available to the public.

6 Our first witness this afternoon is Kevin Spitler, the president of the
7 Erie County Bar Association. Mr. Spitler?

8 MR. SPITLER: Thank you very much. Members of the Commission,
9 we appreciate the opportunity to appear before you today with our comments. I, as the
10 judge said, am the president of the Erie County Bar Association, the voluntary bar
11 association here in Western New York, with approximately 3,700 members.

12 In preparation for my testimony today, I've had an opportunity to read
13 Professor Gillers' law review article. I've also read his article that appeared in one of
14 the local papers. I've had an opportunity to discuss my testimony with former chairs
15 of the grievance committee here in the Eighth Judicial District. I have had an
16 opportunity to talk to their staff attorneys. I have spoken with a number of people
17 who have commented to me that are members of my association.

18 The first item I'd like to address is the issue of confidentiality. We
19 strongly advocate for the current system of confidentiality, and that status being that
20 there be no public disclosure of any grievance that's been filed until such time as there's
21 been a finding of a preponderance of the evidence. Respectfully, we think that a review
22 of those — I have had an opportunity to review the Model Rules for Lawyer
23 Disciplinary Enforcement filed by the ABA, and I do note that in some of those rules
24 they suggest that clear and convincing evidence may be a better standard for there to be
25 public disclosure.

1 Why confidentiality as it currently exists? As the members of the panel
2 are aware, Rule 12 of the uniform, of the Model Rules, states that while it's unlikely
3 that malicious complaints would be made, and if those malicious complaints were made
4 against an attorney, it's really not that damaging if they're found not to be substantiated,
5 and with that I respectfully disagree. One of the things that bothers me under Rule 12 of
6 the Model Rules is that there's an issue of, of immunity. So if a client chooses to make a
7 malicious complaint against an attorney which then becomes a part of the record, and
8 the attorney is then found -- is found to be malicious,
9 found to have no basis. If there's not been confidentiality, of course the bell
10 has been rung, and we are very concerned about that.

11 You know, most of the members of our bar association are sole
12 practitioners and members of two and three, four person attorneys, and any negative
13 comment is — can be — is immediately and in the long term very hurtful. People
14 have suggested that that happens anyways with the Internet. Anyone can go on the
15 Internet, post something concerning my name and indicating what a poor job I did in
16 defense of them. Well, that's right, they can. But if the, but if we remove
17 confidentiality to a place that as soon as a complaint is made that complaint now
18 becomes listed on a government-sponsored server of some type, in other words,
19 somebody going to the grievance committee locally and saying, 'Has Kevin Spitler,
20 ever had a complaint filed against him?' And if we show him that I did, the bell I
21 believe has been rung. Whether or not the person then bothers to go further along and
22 see that the complaint was found to be unfounded, respectfully the strength of that
23 governmental listing has much greater weight in my opinion than it does if it's just
24 posted on the Internet. So confidentiality is foremost in our minds.

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1 As to efficiency, we do not oppose any increase
2 in efficiency, a shortening of the time period. We note that Rule 15 of the Model
3 Rules has suggested that there be, for instance, a 20-day time limitation for
4 voluntary discovery between the panel and 60 days for some at least initial
5 disposition of the complaint, whether it's going to be dismissed or taken further. We
6 certainly on behalf of our members would be glad to resolve these things quickly,
7 and I can tell you that we have a very efficient group of investigators and attorneys
8 on staff here who handle these matters in what we think is the most expeditious
9 manner, but certainly we would not be opposed to any additional limitations.

10 We believe that the use of judicial hearing officers, as we do here in
11 the Fourth Department, is an appropriate use of that resource. We think it helps the
12 Appellate Division better have the issues properly set out for them and so we would
13 encourage that that be continued.

14 Uniformed penalties for violation. I know from reading Professor
15 Gillers' argument and his citing of the egregious conduct that he cites in those cases
16 between 2008 and 2014, that he makes -- he shows differences between the
17 departments, and we would not be opposed to some sort of a uniformed list. My
18 concern is as a practitioner in the federal system, doing a lot of
19 criminal defense in the federal system, the sentencing guidelines, as we all know, have
20 proved to be problematic because they're of -- initially they're mandatory in nature. If
21 there were to be some sort of uniformity of penalties, we would want those to be
22 advisory only similar to what the what the guidelines are now. Uniformity of
23 procedures across the departments, we would not be opposed to that. However, going
24 back to my first point, I would certainly hope that whatever that uniformity of process
25 was, realize the importance of the confidentiality. We didn't get into the bell's been

rung, now somebody's got to go un-ring it four months, three months, whatever down
the road, but -- but the issue of uniformity would be fine.

Mr. Spitler 8

1 Currently, any attorney who has to face a complaint if it gets to our
2 grievance committee has the opportunity to appear on their own behalf with counsel or
3 without. We would certainly believe that any attorney who's got a charge brought
4 against him, grievance brought against him, should have the opportunity to appear
5 before the panel who is hearing that complaint and we would be in favor of that.

6 We are opposed to a statewide grievance committee. I know the uniform
7 -- the Model Rules suggests there be this, and I know Professor Gillers has talked about
8 the California situation. Model Rules talk about a unit area and agency that would not
9 only prosecute but also adjudicate. We feel that that would be — and although it
10 indicates that those two units would have some sort of a wall between them,
11 respectfully we think that that would be very difficult for the adjudication people when
12 a case comes before them, knowing that their, their work mates, they are people that
13 work for the same department or office or agency as they do have found it appropriate
14 to bring this case before them, there would be some bias against the attorney.

15 As the Chair said in its opening comments, we understand that the
16 purpose of attorney grievance is to protect the public. On behalf of my members, we
17 also understand that we need to make sure that any attorney grieved is afforded every
18 right that they have, since it's their livelihood, and we, therefore, would, on the issue of
19 a statewide, we believe that not only does the statewide have the issue of the crossover
20 of the prosecutorial and adjudication units, but also we question how such an agency
21 would be funded. If it was to be funded by some sort of a charge or a fee against all the
22 attorneys, I think as all the members of the panel can be -- are aware, many solo and
23 small attorney practitioners are faced with very tough economic times
24 sometimes, and to have one more additional cost, whatever that would be, \$200,
25 \$300 every year to help fund this agency, I respectfully suggest would put an undue

1 burden on the members of the bar, particularly because I think when we look at the
2 number of grievances that are brought against whom they are brought, it represents a
3 very small percentage of all attorneys licensed in, in the state.

4 JUSTICE COZIER: Excuse me, Mr. Spitler, your time is just about up.

5 MR. SPITLER: Thank you.

6 JUSTICE COZIER: So maybe you can wrap it up?

7 MR. SPITLER: Yes, sir. Thank you. I've reached my last point, Mr.
8 Chairman, which is the current system. We favor the current system. We believe that
9 it functions properly. We feel that it protects the citizens who seek the services of
10 attorneys. We have — I said we have a central intake office. We have well, very
11 bright and very articulate attorneys, skilled lawyers and wonderful investigators. And
12 if there are any questions, I'd be glad to address them.

13 JUSTICE COZIER: Yes. Professor Wendel?

14 MR. WENDEL: On confidentiality, you object to a rule that would
15 permit disclosure of a grievance as soon as it's filed, but, of course, the Model Rules
16 and a version of the Model Rules which are in effect in about 40
17 states only permit disclosure after there's been a confidential investigation and a
18 finding of probable cause. So does your organization have a position on the
19 confidentiality rule that's actually in the Model Rules?

20 MR. SPITLER: Yes. I believe that the -- our position is that, rather
21 than probable cause, I would respectfully suggest that it either be a preponderance of
22 the evidence and/or I think, quite honestly, the best standard would be clear and
23 convincing evidence.

24 MR. WENDEL: But that would be before there's a final determination?

25 MR. SPITLER: That's correct. And if that's found, then certainly

1 publication would not be opposed.

2 JUSTICE COZIER: Yes. Mr. Zauderer?

3 MR. ZAUDERER: Well, thank you for your testimony. You certainly
4 raise an important issue about confidentiality. Those who — there's some who make
5 the analogy to the criminal justice system. they say, well, in essence, when there is a
6 criminal charge it's a matter of public record. Why do you think that's an
7 inappropriate model for the way one should look at attorney or any professional
8 discipline? Maybe you can give us your thoughts on that.

9 MR. SPITLER: Yes. I find the difference being once a criminal
10 complaint is filed against someone, that
11 criminal complaint may obviously impact the accused, but does it cost him his job?
12 Does it cost him clients? Does it cost him people who say, Oh, my attorney was found
13 to, to not have done something he was supposed to do or there's an allegation that he
14 doesn't, and that's where I find the difference. And, I guess, particularly if there's no
15 penalty for filing a malicious grievance, as the Model Rules may suggest, at least in the
16 criminal system when you sign your criminal complaint there's that little paragraph that
17 says, false statements are subject to at least a misdemeanor charge.

18 MR. ZAUDERER: Just one more follow-up on that, if I may, Mr.
19 Chairman?

20 JUSTICE COZIER: Sure.

21 MR. ZAUDERER: Arguments also been made that greater public
22 disclosure is necessary because the disciplinary process takes a lot of time, and if
23 someone is a malefactor, damage may be done unless the public knows about it. Might
24 it not be better to address that by greater efficiency in the process rather than changing
25 the confidentiality?

1 MR. SPITLER: I think that the ability — I know that — that there's the
2 process or the ability for an immediate suspension based upon the seriousness of the
3 allegation against the attorney. If the allegation
4 against the attorney doesn't rise to that level, I think that the, the the penalty
5 suffered or the harm suffered by the attorney, it outweighs the protection of the
6 public.

7 MR. ZAUDERER: Okay.

8 MR. DOYLE: Mr. Chairman?

9 JUSTICE COZIER: Yes.

10 MR. DOYLE: Mr. Spitler, thank you for your testimony. I wanted to
11 ask you a little bit. We have people from across the state on the Commission, many
12 from New York City and many from different areas. being up here in Western New
13 York, and you're the president of the Erie County Bar which includes not only
14 Buffalo but smaller communities, and I assume you're familiar with even smaller
15 communities out in some of the other counties of Western New York. Is there a lot of
16 attention that comes from a grievance action when it is taken? Is there media,
17 newspaper, other media attention that comes along with that?

18 MR. SPITLER: It does, particularly when it hits the newspaper. The
19 local newspaper, the regional newspapers will report on that. It's. it's, I don't know, I
20 guess it's maybe the great fall or whatever you want to say, but people held in high
21 regard or high positions when they have trouble like everything

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1 else. So, yes, it does, it has a negative impact. It's not like it's a -- in my opinion it's a
2 matter of some major newsworthy which is reported by the media, both the print
3 and, and the electronic media.

4 MR. DOYLE: Thank you.

5 JUSTICE COZIER: Thank you very much.

6 MR. SPITLER: Mr. Chairman, thank you very much. Members of the
7 committee, thank you for your time.

8 JUSTICE COZIER: The next witness is Stephanie Saunders, the president
9 of the Minority Bar Association of Western New York.

10 MS. SAUNDERS: Good afternoon, Chair, and the members of the
11 distinguished panel. My name is Stephanie Saunders. I'm president of the Minority Bar
12 Association of Western New York. I'm honored to have this opportunity to comment on
13 the state of attorney disciplinary matters.

14 I just want to give you a brief background about what the minority bar
15 association is. We're an organization comprised of over a hundred attorneys, judges and
16 law students. The mission of our organization is to improve the administration of
17 justice, the protection of civil and political rights for all citizens while providing a
18 vehicle for professional and social interaction of all minority attorneys.

19 Also, I want to give the disclaimer that any
20 statements that I'm making today are my personal reflections and not representative of
21 the executive board or entire membership of the organization.

22 In looking at the questions posed for discussion during these proceedings,
23 I'm submitting commentary on two issues: Whether New York's departmental-based
24 system of attorney discipline leads to regional disparities in the implementation of
25 discipline, and, secondly, at what point disciplinary charges or findings should be

1 revealed to the public.

2 On the first topic, I think that there are vast differences in the type of
3 disciplinary matters adjudicated in different departments. Moreover, there's just not
4 regional disparities, but differences in the manner of the adjudication of matters within
5 departments.

6 Looking at reported grievances in the Fourth Department, I was doing
7 some research for this discussion and I note there was one matter where an attorney
8 received censure for failure to timely file to pay income taxes. Another case where an
9 attorney received a suspension for two years for a similar offense. I'm not privy to all
10 the information that the learned justice reviewed in making these decisions; however,
11 from the observation from the public, one would wonder, how could these disparities
12 exist?

13 Also, I cannot offer any commentary on any racial profiling because it's
14 my understanding there's no racial profiling information available. But in the minority
15 community there is a perception that there are more attorneys of color being subject to
16 disciplinary actions than non-minority attorneys.

17 Looking at the question of what the, at what point the public should be
18 privy to disciplinary charges or findings, I think it's best to leave disclosure till the
19 matter of final ruling. Early disclosure can lead to, can be very problematic, especially
20 to the younger attorneys who have not fully developed a reputation in our community.
21 Disclosure too early in the process can become a scarlet letter to the public and damage
22 a practitioner's reputation indefinitely. And I thank you for this opportunity to provide
23 this testimony and look forward to your questions.

24 JUSTICE COZIER: Thank you. Mr. Lindley?

25 JUSTICE LINDLEY: You mentioned two cases from the Fourth

Department?

Ms. Saunders 14

MS. SAUNDERS: Yes, sir.

1 JUSTICE LINDLEY: Yes. And do you know the names of those lawyers
2 involved in those cases? This is not confidential, we've already published their
3 names. I'm just curious 'cause I think I know what case you're talking about.

4 MS. SAUNDERS: I can give that information to you, Judge,
5 definitely.

6 JUSTICE LINDLEY: 'Cause I think I know what cases you're referring
7 to and there's a lawyer from Buffalo who pleaded guilty to a tax fraud case, a felony
8 in federal court?

9 MS. SAUNDERS: Yes. That's what I'm —

10 JUSTICE LINDLEY: And she filed three false tax returns in a row to
11 the federal government, underreported income, pled to a felony fraud charge in
12 federal court. We suspended her — I was on that case. We suspended her for two
13 years. The lawyers were censured, and there are a number of them. These lawyers
14 failed to file tax returns. Failure to file. They didn't engage in any fraud, they just
15 hadn't gotten around to it yet. They pled to misdemeanor offenses. They had
16 unblemished records. So if that's the case you're talking about, which I think it is, then
17 I respectfully submit that there was a reasonable, a rational reason to treat those
18 lawyers differently. Again, one was a felony, fraud; one was failure to file. I'm not
19 saying that we are consistent uniformly. There's probably cases that one might be able
20 to dig up where lawyers might have been treated a little bit differently, but I caution
21 you and
22 others that in our writings we don't put everything in there. There's, there are reasons
23 that we do what we do, and our decisions — perhaps they should be more detailed,
24 maybe they should be longer, but we're aware of our prior cases, and we look at
25 them, and generally we try to, to treat more leniently those who deserve it and we

1 treat more harshly those who deserve it. But I think in that instance that those
2 disparities were justified.

3 MS. SAUNDERS: Your Honor, I'm not privy to everything, of
4 course, that the panel looks at, but from the public it can give that perception that
5 there is a great disparity.

6 JUSTICE COZIER: Yes. Mr. Doyle?

7 MR. DOYLE: Miss Saunders, thank you for your testimony. Thank
8 you for coming today.

9 MS. SAUNDERS: Thank you.

10 MR. DOYLE: Your comment that there may be an impression among
11 the minority legal community that they may be more frequently looked at by the
12 grievance process.

13 MS. SAUNDERS: Yes.

14 MR. DOYLE: Is that local? Is that statewide? Is that, where do you
15 get that impression from?

16 MS. SAUNDERS: I can only speak to locality. I just recently rejoined
17 a national bar association and
18 become very active in region two, so I will begin to have those discussions with
19 leadership down in New York City and throughout the region which also encompasses
20 Connecticut and -- I don't know. I know Connecticut. I don't want to guess what other
21 states are included in the region. But I can say in this community in which I reside,
22 there is not necessarily that the perception's true, but there is the perception that
23 minority attorneys are looked at just a little bit more frequently. And when they are
24 looked at, the sentencing or the decision is more harsh.

25 MR. DOYLE: I know I, and I suspect the rest of the Commission, would

1 be very interested in anything you learned from your discussions with
2 the national bar, whether this is a common perception that's out there. True or false, it's
3 still concerning if the perception is there. But whether that is, you know, national,
4 statewide or something local, we'd be very interested in anything else you learn about
5 that.

6 MS. SAUNDERS: And I will have an opportunity to submit more
7 information?

8 MR. DOYLE: Right. We'll be continuing our work for a while, I think,
9 right? Thank you.

10 JUSTICE LINDLEY: I too share Mr. Doyle's concern that there's a
11 perception of racial bias in the
12 Fourth Department. When I saw your proposed testimony that was submitted in
13 writing, I was concerned and I, I looked into it.

14 MS. SAUNDERS: Okay.

15 JUSTICE LINDLEY: And I went through the list of attorneys who
16 have been sanctioned by the Appellate Division over the last ten years. If I'm not
17 mistaken, there have been no African-American lawyers who have been disbarred
18 during the period of time in the Fourth Department. There has been one African-
19 American, there was one African-American lawyer who was suspended. He failed to
20 respond to the complaint, he failed to show up in court, he, he was suspended. As far
21 as I'm aware, those are the only two lawyers that have been suspended or disbarred.
22 There have been a few who have been censured, but I would be, I know our court
23 would be, interested if you had any more detailed allegations, we would certainly, we
24 take those allegations very seriously and we will look into it.

25 MS. SAUNDERS: Okay. Your Honor, when I did make the inquiry, I

1 was advised that there were no statistics that were kept. So, therefore, I
2 had to premise my statement on.

3 JUSTICE LINDLEY: I understand.

4 MS. SAUNDERS: I have no data to back up what
5 I'm saying, but that perception is there.

6 JUSTICE COZIER: Miss Saunders, in your initial remarks you made
7 reference to disparities, both procedural and substantive disparities, that seem to arise in
8 the disciplinary process. Do you have a position on whether or not those disparities can
9 be addressed by greater uniformity?

10 MS. SAUNDERS: I think that's a difficult decision, your Honor, because
11 just because the difference of the practice Downstate and Upstate. I feel I'm a member
12 of a very collegial bar in Western New York. I don't know if it would be beneficial if
13 there is uniformity across the state for members here in Western New York. That's a
14 very difficult, you know, question for me to answer to you today, Judge, and I would
15 just like to give some more thought and to give you some more in writing.

16 JUSTICE COZIER: Thank you.

17 MS. SAUNDERS: Thank you, sir.

18 JUSTICE COZIER: Any other members?

19 MR. DOYLE: Judge, just one other comment. Ms. Saunders, one thing
20 I'd suggest, sometimes if the minority legal profession has concern, sometimes those
21 concerns are based out of fear of the unknown maybe how the grievance process works.
22 You know, it's the type of thing that

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1 education might be able to help with. I know Mr. Huether is here, the chief attorney
2 of the Grievance Committee of the Fourth Department. I know we've had several of
3 their attorneys come and speak at different bar groups, explain the process, answer
4 questions, and sometimes that -- you know, that sort of educational effort helps bridge
5 a situation where there is fear of the unknown. I'm sure Mr. Huether and his staff and
6 other people involved in the Grievance Committees would be willing to, to work with
7 your, your group on that type of effort.

8 MS. SAUNDERS: We've actually had the opportunity
9 to have Mr. Huether present CLEs.

10 MR. DOYLE: Oh, great.

11 MS. SAUNDERS: And it was very informative and we would really
12 like that to be an annual thing so our membership can be better informed and
13 prepared.

14 MR. DOYLE: That's terrific.

15 MS. SAUNDERS: Thank you so much.

16 JUSTICE COZIER: Thank you so much. Our next witness is Bill
17 Bastuk, the founder and co-chair of the organization It Could Happen to You.

18 MR. BASTUK: Thank you. Honorable members of this
19 Commission, let me start off by saying that prior to founding It Could Happen to
20 You, I had about 35 years in public policy which ranged from serving in the --

21 MR. ZAUDERER: Maybe you can slow down and speak up a little bit.

22 MR. BASTUK: I've had 35 years of public policy or reform that
23 included serving in the Monroe County Legislature, service as an Irondequoit
24 councilman, and working for the state Legislature in the late '80s and early 1990s.

25 My life changed dramatically in May of 2008 when I received a call for

1 help from the Monroe County Sheriff's Department and I naturally
2 agreed to help them. They were looking into something. And about half an hour later,
3 they told me that a 16-year-old girl had accused me of raping her in a shed at the
4 Rochester Yacht Club. I met with an attorney the very next day, John Speranza, and
5 John called me into his office and said, I have the lawyer you want. I didn't know what
6 that meant. And what John told me was: This is what's going to happen to you. You are
7 going to be arrested, you are going to be indicted and I'm going to have to fight like hell
8 to keep you out of prison for the next 25 years. And this could take up to a year to get to
9 trial because we're going to go through a series of mini trials involving requests for
10 information that I'm going to need to help exonerate you. And I said, John, how do you
11 know, how do you know all this, this just happened yesterday. And he said, Bill, he
12 said, 'cause that's the way the system operates. You are presumed guilty until
13 innocent and the prosecutor's goal nowadays is not the truth but to do everything
14 possible to put you away.

15 What John told me turned out to be exactly true. Matter of fact, it took
16 me a year to get to trial. The reason it took me a year to get to trial is because the
17 assistant DA, Kristy Karle, working under Michael Green, was withholding
18 exculpatory material, very critical material that she didn't deem necessary but that my
19 attorney deemed necessary. Bear in mind that the sole driving force that resulted in
20 my arrest was a diary entry that this girl's father found in which she accused me of
21 raping her the previous September 2007.

22 After I was arrested, I actually turned myself in —I, John began to
23 issue motions of demand. Actually, that occurred shortly after my indictment in
24 August. My trial was set for November, my first trial date, but it was postponed four
25 times. The reason it was postponed four times was because John was issuing motions

1 for two critical pieces of material: He wanted all of the girl's diaries
2 and he wanted any existing medical records. She refused. The ADA kept refusing.
3 Fortunately we had a good judge, Judge Valentino, and we were getting the granted
4 delays.

5 Finally, six months after my indictment in May — excuse me, in
6 February of 2009, Washington's birthday — John called me into his office, and
7 scattered all over his desk were numerous diary entries, one of which she predicted
8 the date and time I was going to rape her. The second in which she said, I wish I
9 could make this all go away but my parents want me to go to court. And a stack of
10 psychiatric medical records in which she was a self-mutilator. These medical records
11 went prior to the alleged, prior to the alleged rape incident. The, the ADA had been
12 telling us that her only medical records after the alleged incident.

13 I went to court on May 1st and prior to that there were a series of
14 pretrial motions not related to discovery. But John wanted -- the trial was supposed to
15 begin on a Friday, John wanted the trial to begin on Monday, and one of the
16 arguments he used was, I still haven't gotten all the diaries. The judge asked the ADA
17 where the diaries were and she said she gave them back to the girl, that she had
18 already gone through them. Judge Valentino was not happy about that and he said by
19 the end of the day today I will have all the diaries on my desk.

20 That Thursday, less than 24 hours before I was due, the jury selection
21 was due to begin, John called me and asked me if I knew a Mr. Yandou and I said no.
22 He
23 said, Here we are 24 hours before we go to court and I get an excerpt -- another excerpt
24 from the diary in which this girl has Mr. Yandou climbing into her window, the bedroom
25 window, and raping her. We tracked down Mr. Yandou. It was her high school social

1 studies teacher who was studying to become a Brother at an All Catholic girls high
2 school.

3 After my acquittal, I began to look at the criminal justice system and
4 learned two things: The public really doesn't understand how it's operating and how
5 it's intended to operate, and prosecutorial wrongful prosecutions, prosecutorial
6 misconduct is rampant.

7 Regarding the existing system, I'm sure you've heard this in some of the
8 previous hearings, a public health study of the current disciplinary process between
9 2001 and 2009 found that just one percent of roughly 91,000 complaints received by
10 First and Second Department Committees resulted in public sanctions. And just five
11 percent of all complaints resulted in so much as private letters of caution. Bear in mind,
12 for that reason I did not waste my time filing a complaint. Because the system, I had
13 learned about going through my trial, is defunct and basically a joke.

14 A New York Times 2008 article of 80 cases of
15 prosecutorial misconduct in Queens between 1989 and 2000, 80 convictions
16 overturned by appeals courts for prosecutorial misconduct, senior officials took no
17 disciplinary action.

18 The University of Michigan Law School study which tracks
19 wrongful convictions notes that New York State is second in the nation in
20 wrongful convictions, only behind the state of Texas, costing state taxpayers
21 hundreds of millions of dollars in payouts, not including the cost of counties
22 going to trial to reach those settlements.

23 In Marvin Gaye's words, what's going on? We have an epidemic. We
24 don't even have a system of tracking wrongful prosecutions such as false accusations
25 in indictments. Generally, those who are indicted and then acquitted want to put it

1 behind them. We have a freedom tour that includes some of those
2 brave souls as well as the wrongfully convicted. And when we speak to quantum
3 clubs and Rotary Clubs and tell our stories, they are outraged. They are outraged at
4 the lack of accountability. They are outraged that I can't get back the \$150,000 that it
5 cost me to defend myself, my wife's retirement fund. And the acts of the ADA, Kristy
6 Karle, went on practicing her merry way and nothing happened to her, even though I
7 filed a lawsuit that was thrown out by the Western District Court because all the, all
8 of the immunity of prosecutorial misconduct. The standard language is used in
9 practically every wrongful indictment.

10 JUSTICE COZIER: Excuse me, Mr. Bastuk, you have approximately
11 1 minute of your time so you may want to just summarize it.

12 MR. BASTUK: Okay. All right. I will, I will. It Could Happen to You
13 recommends the establishment of the commission on prosecutorial conduct, S 24/
14 A1131, which has broad bipartisan support state legislature, as a matter of fact, it
15 made it to the seventh floor in the supplemental calendar. I can tell you I -- that that --
16 in every committee that it went through, it was broad bipartisan support. The votes
17 were not even close. We also have memos of support from 12 different organizations
18 including New York State United Teachers, New York State Catholic Conference,
19 New York State Trial Lawyers. I will provide you with that list of support.

20 We need a system that will operate in a proactive mode rather than a
21 reactive mode, just as the Commission on Judicial Conduct has for over 35 years, a
22 wholistic approach which is not purely discipline focused but works to establish
23 uniformed best practices for all DAs in the state and the re-establishment of the
24 adversarial vertical system of justice rather than the cooperative horizontal system
25 of justice which has resulted in presumption of guilt rather than innocence. Every

1 other profession is subject to best practices and accountability except the most
2 powerful players in the justice system, the prosecutors.

3 If you have a car that's not working and it's causing you trouble
4 over and over again, you don't go and keep pouring money into that rusty old
5 engine, and you probably would not go out and buy the same model again. We
6 have a model that we're proposing based on a working model. Any questions?

7 JUSTICE COZIER: Thank you. Members? Yes, Mr. Zauderer?

8 MR. ZAUDERER: Certainly as you described a horrible story of
9 what occurred to you, did you, I wasn't clear, did you file a complaint with the
10 relevant disciplinary authority with respect to the prosecutor's action?

11 MR. BASTUK: No, no, I didn't because I was told that I was better
12 off filing a lawsuit, that it would probably just be discharged as a harmless error,
13 which basically the Innocence Project's study of prosecutorial misconduct found.
14 They surveyed 200 cases and 80 percent of those cases were dismissed as harmless
15 errors. So I
16 would have had a \$150,000-dollar harmless error.

17 MR. ZAUDERER: So the question would arise, you certainly need to
18 think about, even if there were such a separate commission, why the same
19 circumstances would, wouldn't preclude review or, or people wouldn't file maybe?

20 MR. BASTUK: Well, if such a commission was made known to the
21 public, okay, they would file. By the way, this ADA had a reputation of doing this.
22 Defense attorneys -- and I even asked my defense attorney, Why, why don't you file a
23 complaint with the local bar or with the, with the, the division? And he said, It's not
24 going to do me any good and I'm only going to end up burning bridges.

25 A independent commission on prosecutorial conduct will conduct a

1 confidential investigation with neither parties being disclosed. And I've
2 heard the, the question of confidentiality come up, and I know for a fact, I know that
3 you heard from Steven Downs a couple weeks ago, who's the counsel for the
4 Commission on Judicial Conduct. He'll draft this legislation at the request of Senator
5 DeFrancisco, that that Commission is operated with the highest degree of
6 confidentiality, even though at times there was tremendous pressure from the public to
7 disclose names of those being investigated, of
8 those judges being investigated, this Commission would operate with that same
9 high degree of integrity and confidentiality.

10 JUSTICE COZIER: Okay.

11 MR. BASTUK: Oh, Judge Lindley.

12 JUSTICE LINDLEY: Mr. Bastuk, good morning. Thank you for your
13 testimony. I have known you for quite many years and I remember when you got
14 arrested, and I, I have no doubt about everything you said this morning is true, not
15 just because I know you. I haven't seen you in 23 years, but I've spent some time
16 looking into your case and I read about it and I wanted to know what, what happened
17 there, so I do believe that you were wrongly charged.

18 One thing, however, I want to, I just want to clarify: You were told not
19 to file a grievance because more often than not they are deemed to be harmless errors.
20 What I think the lawyer was referring to in that situation was an appeal from a
21 judgment of conviction where a defendant is convicted, files an appeal and said, My
22 conviction should be overturned due to prosecutorial misconduct. And we at times
23 will say that, Yes, there was misconduct, but it was harmless error. We don't have
24 harmless error grievance. We don't say, Well, the lawyer engaged in misconduct but it
25 was harmless. It certainly

1 wasn't harmless to you. So that harmless error analysis that was being
2 referred to by the attorney I think deals with a, with an appeal if you were convicted.
3 Of course you weren't convicted. The jury acquitted you in a very short period of
4 time, but we do have grievances that have been filed against prosecutors. I have four
5 prosecutors I know, looking at our records in anticipation of this hearing, that we
6 sanctioned, but it doesn't necessarily follow that there's no need for one centralized
7 agency to be handling these things. We don't get a lot of grievances. And so it doesn't,
8 it doesn't necessarily militate against what you're asking for, but I just wanted to make
9 it clear that we do get complaints, the Appellate Division, Fourth Department, does
10 get complaints against prosecutors. Some have been referred to the grievance
11 committee to the court, and we have sanctioned four lawyers over the last few years,
12 including the District Attorney from Albany County himself came up and he was, he
13 was sanctioned.

14 So, again, it doesn't mean that your arguments are not persuasive and
15 this should be some other court, but I just want to make it clear that we do — there
16 is a place to go right now.

17 MR. BASTUK: I guess, I guess a question I would have in that
18 regard is that why wouldn't a lawsuit
19 such as mine, okay, alleging prosecutorial misconduct, automatically trigger that
20 also being reviewed by the grievance committee?

21 JUSTICE LINDLEY: Without a complaint, just a sua sponte
22 investigation?

23 MR. BASTUK: Yeah. I mean, I mean, you pretty much know what the
24 result of that is going to be. But, I mean, it was -- it was -- my court document clearly
25 lays out all of the -- I mean -- I mean, you only know half the story so, but I have gotten

Mr. Bastuk 26

the sheriff's side, but that's not what you're addressing here. But I would think that that would help. And I just want to make note of the fact that when the DA's association got wind of the fact that this was sent to the Committee in the closing weeks of session, they descended upon the Capitol like paratroopers, and they met with the Senator DeFrancisco and Senator Bonacic and they claimed that the current system is working just fine. And the senators said -- and they also said that there's been a number of prosecutors and DAs who have been sanctioned and who have been disciplined. And this was about three weeks before the end of the session. And the senator said, Well, bring us a list. And the DA and the representative said, Okay, we'll bring you a list. Well, every day that I ran into one of the counsels to the senate either at Dunkin' Donuts

1 or in the halls I'd say, Did you get a list yet? And he would come up and say, No
2 list, no list, no list.

3 JUSTICE COZIER: All right. Any other questions? Thank
4 you very much.

5 MR. BASTUK: Thank you for your attention.

6 JUSTICE COZIER: I just want to introduce an additional member of
7 the Commission who is present with us this afternoon, Sheldon Smith, who is in the
8 second row.

9 The next witness is KP Brady, a legal consumer from Rochester. Is
10 Mr. Brady here? We will move on then.

11 The next witness is Richard T. Sullivan, a partner at Harris Beach and
12 former chair of the Eighth Judicial District Attorney Disciplinary Committee. Mr.
13 Sullivan?

14 MR. SULLIVAN: Good afternoon and thank you for the invitation. I
15 appreciate being here today. Vince called me on Thursday and I was more than
16 happy to give to the Committee what I believe is a somewhat unique perspective on
17 the attorney discipline process. And that's, frankly, what I referred to it as, the
18 attorney discipline process rather than the grievance process, because a grievance to
19 me is a very particular issue and attorney discipline is much broader.
20 Be that as it may, my perspective comes from the fact that I had the privilege of being
21 a chairman for six years of the Eighth Judicial District Grievance Committee here in
22 Buffalo, and after that for the past almost 20 years representing several lawyers
23 involving charges of professional misconduct, both at the grievance committee and
24 Appellate Division level. So I guess I've seen both sides of the story and I am pleased
25 to report, at least from my perspective, the good news; and the good news is that the

1 grievance process and attorney discipline process works in the Fourth Department.

2 The reason I say that is that we have an extremely dedicated staff of attorneys,
3 investigators and individuals who serve on the Appellate Division who take their role
4 extremely seriously and recognize the serious nature of any situation that could
5 jeopardize someone's professional license and ability to earn a living. Obviously,
6 there are some issues that I see as a defense lawyer in these situations which I will
7 talk about in a second, but overall the system works. And I guess my recommendation
8 to the committee here is if it ain't broke, don't fix it. And it isn't broke here in Buffalo.

9 I have not had the opportunity, being asked a little late in the game to
10 testify here today, to read Professor Gillers' law review article which I understand is
11 to some degree the impetus for this examination of the process. But I can tell you
12 this, that one of the things
13 that people tend to overlook is that much of the discipline process for the serious
14 cases -- and I understand there's a claim that maybe there's a disparity in punishments
15 or of dispositions between the departments. I actually question how significant that is,
16 and having not read the article, I'm not familiar with anything that supports that claim.
17 But as a matter of law, an attorney convicted of a felony in New York, whether you're
18 in New York City or Buffalo, is automatically disbarred. An attorney convicted of a
19 misdemeanor -- and those are obviously both very serious things for any professional
20 -- obviously very, very serious, an attorney committed -- committing a misdemeanor
21 in Buffalo and having been so convicted is automatically suspended and directed to
22 show cause why discipline should not be applied. So that process has its own built-in
23 mechanisms to where the very, very serious cases involving criminal conduct are
24 taken care of almost immediately, in one case immediately and another case almost
25 immediately after the criminal justice system has had the opportunity to take its

1 course. So that's not as serious an issue as everyone -- serious to the people involved,
2 but in terms of the disparity of dispositions, I don't believe it's all that serious an
3 issue.

4 I can say, without sounding smarter than I
5 really am, that when a lawyer comes in to see me and explains the situation that he or
6 she is involved in, if I recognize it as serious misconduct, and I include within that
7 obviously the failure to maintain adequate trust records, which is a wholly separate
8 issue that we in Erie County have tried for years to educate young lawyers about as to
9 what a trust account is and what it's for and how it should be maintained, I can pretty
10 much tell a lawyer who comes in to me facing a serious issue non-misdemeanor, non-
11 felony issue what I believe the disposition of the Appellate Division is going to be
12 within a range. Okay? It is then my job to offer in terms of the hearings that are
13 conducted before judicially-appointed former judges to offer mitigating facts in support
14 of the lawyer's claim as to why it happened, et cetera? But there really isn't any great
15 disparity or inconsistency in at least the Fourth Department's decisions in those areas.

16 The Grievance Committee itself has a great deal of broad discretion. I
17 know when I was the chairperson, that any case involving misuse of funds or
18 misapplication of a trust account, we felt, and I personally feel to this day, belongs
19 before the Appellate Division for a decision. And that has been a consistent rule I think
20 that has been followed in this department and in this district for many, many years.

21 That having been said, I also understand that there is a cry or perhaps a
22 request that the confidentiality of the process be removed. I think that would be a
23 terrible mistake. I think it is unfair to the participants involved, because the statistics
24 are there. I know at least in the Eighth Judicial District there in the Fourth
25 Department, the statistics are published annually in a report by the Committee as to

1 how many complaints come in and how many actually proceed to
2 some form of disciplinary action short of dismissal or a letter of caution, and you will
3 find that the statistics on that issue are rather startling; that the huge majority of
4 complaints that come in -- and this was my experience in six years — the huge
5 majority of complaints that come in are dismissed or can be resolved with an
6 explanation to the client or grievant as to actually what happened. They just want to
7 know what happened. And the very, very small portion get to the letter of admonition
8 situation, and an even smaller portion get to the situation where there was a grievance
9 filed.

10 I believe confidentiality is essential to the fairness of this process, and I say
11 that, Committee Members, against my own interests and I'll tell you why. I probably
12 practice the only area of law in New York State where the good authority I can't find.
13 And what I mean by that is I can cite reported cases of, you know, the court did this in
14 this case, but they all involve discipline because they're the public ones. I don't have
15 the authority or the, the data on cases that are dismissed because they are confidential,
16 okay? So I don't have a lot of authority on my side when I go up and face Judge
17 Lindley and the rest of the Appellate Division. And that's a good thing. I have no
18 problem with that. The Appellate Division can give me guidance on what happened in
19 a particular case, but I have no problem with that because I believe that the
20 confidentiality process trumps that issue.

21 I had a situation here with a fellow lawyer,
22 Joel Daniels. Is Joel testifying? Is he here?

23 MR. DOYLE: Yes, he's right here.

24 MR. SULLIVAN: Where he and I represented some lawyers who were
25 well known in the area. And a newspaper, Joel and I, and perhaps the grievance

1 people -- the Court didn't know, the Court didn't have the case yet --
2 were perhaps the only people who knew what the case was all about, yet for almost a
3 year, lawyers would come up to me, not even knowing I represented these individuals
4 and said, Hey, did you hear what's going to happen to so and so? I said, Geez, no, I
5 didn't hear what's going to happen. And they'd give me this big litany of things that
6 were going
7 to happen to these two lawyers, none of which was true. I was the only person who
8 probably knew what was going to happen at that stage, and, in fact, all the bad things
9 that people said were going to happen really didn't happen anyway. They deserve better
10 probably because of the outcome of the process. There was a major newspaper article
11 about the case, which I think was unfair to the entire process and unfair to them by the
12 time the Court made its ultimate determination. So I think confidentiality is, is critical
13 to the process. The process that is fair, could move a little bit faster, but I think is fair in
14 its overall procedure. And finally –

15 JUSTICE COZIER: Excuse me, Mr. Sullivan, I just want you to wrap
16 up. Your time is just about done.

17 MR. SULLIVAN: Sure. Judge Lindley usually talks about that. I just
18 want to make a final remark about a uniform, a uniform statewide system. I, too, feel
19 that that would be a mistake, for this reason: The felonies and misdemeanors are taken
20 care of as a matter of law. There is no substitute, no substitute for the 18 lawyers and
21 three lay people who sit on a committee who know their community, who know the,
22 maybe know the particular lawyer. That's not a bad thing, okay, to know the lawyer, to
23 know the background, and apply a community -- not only a community standard but the
24 rules
25 of discipline to a particular situation. The fact that there are more disbarments in New

York City doesn't trouble me at all. There are more lawyers in New York City. Maybe more lawyers doing bad things in New York City, I don't know. But I think taking the jurisdiction of this process from the Appellate Division — I had the privilege of teaching at the University at Buffalo Law School for 29 years. I taught the civil practice course there. And I always told my students when we were talking about the Appellate Division, I said, They're the ones that swore you in and they can be the ones to swear you out, and that's the way I think it should be. Local involvement in the process is, I think, critical. And, again, if it ain't broke, don't fix it. Thanks.

JUSTICE COZIER: Thank you. Members? Mr. Zauderer?

MR. ZAUDERER: Thank you. Let me ask you a question I asked a little earlier to someone who made a similar argument about confidentiality: Those who are suggesting relaxing controls or standards in that regard, analogizing to the criminal justice system where criminal charges are filed and public, why is that an inappropriate comparison or analogy?

MR. SULLIVAN: Because at least in the criminal justice system everybody has the presumption of innocence.

1 and everybody knows that in the criminal justice system. Well, he's not
2 guilty until proven guilty. I think in the lawyer -- I'm not so sure lawyers would be
3 afforded that same presumption under those circumstances. And as I said, the clear --
4 one statistic, the statistic that I can rely on, as I referenced, are the statistics that show
5 that the number of complaints as opposed to the number of actual disciplinary
6 proceedings is so small that all of these lawyers who have complaints filed against
7 them that go nowhere, really, the damage is done once it's published. You know, you
8 get the complaint in the newspaper, you don't get the fact that the grievance
9 committee later dismissed it before it even went to the committee itself.

10 MR. DOYLE: Mr. Chair?

11 JUSTICE COZIER: Yes.

12 MR. DOYLE: Thank you, Mr. Sullivan for coming. I appreciate it. The process now
13 makes public those determinations that the Court has ruled on --

14 MR. SULLIVAN: Correct.

15 MR. DOYLE: -- that if there was professional misconduct and, and
16 whatever discipline is imposed. So, obviously I hear you speaking against making the
17 mere filing of a grievance or a complaint by a client or anyone else, you would be
18 opposed to making that public?

19 MR. SULLIVAN: Yes, I would.

20 MR. DOYLE: How about once a decision is made by the grievance
21 committee itself to file what we would call a petition, would you be opposed to having
22 that be made public at that point?

23 MR. SULLIVAN: Yes, I would, because that is -- well, yes, I would.
24 Because, again, that process has to get carried out in terms of answering the petition,
25 having the hearing, having the testimony and making the Court have the, the

1 determination. So I would continue that confidentiality through that
2 process. And, by the way, we publish here — I'm sorry if my time is up, but in our local
3 bar journal, we regularly publish letters of admonition that are issued without the
4 lawyer. I don't think -- I don't have the lawyer's name, right? Yeah. But we publish
5 letters of admonition regularly to give lawyers some idea as to where the committee
6 stands on some things, which I think is a good thing.

7 JUSTICE COZIER: Mr. Guido?

8 MR. GUIDO: Thank you. Mr. Sullivan, you had a rather unique
9 perspective having been on the adjudicated enforcement side, now on the other side. So
10 given that background and your experience, I'm interested in what your view is, at least
11 insofar as the Eighth District or the Fourth Department, as to whether or not your view
12 there is a reluctance on the part of the grievance process to investigate and prosecute
13 prosecutors in criminal cases?

14 MR. SULLIVAN: Prosecutors?

15 MR. GUIDO: Yes.

16 MR. SULLIVAN: I doubt it. I am not familiar with any case where that
17 has been done. I'm sure it has been done. But it also reminds me of something, 'cause I
18 wrote a note to myself about sua sponte investigations by the grievance committee. I
19 believe our Fourth Department rules have been modified primarily as a result of an
20 argument I was always making with them that they didn't have sua sponte authority.
21 Now they do, okay? I mean, they can pick up a newspaper. When this gentleman was
22 talking about the fact that he sues a district attorney in federal court for a civil rights
23 violation, in my opinion, that would open a Grievance Committee investigation in the
24 Eighth Judicial District. But the answer to your question is a prosecutor, I don't, I've
25 never represented one.

1 MR. GUIDO: One other thing I just wanted to have you clarify, on the
2 statewide uniform system.

3 MR. SULLIVAN: Right.

4 MR. GUIDO: But if we were to maintain the system administered
5 through the four Appellate divisions, you wouldn't necessarily be opposed to a uniform
6 statewide set of procedures, would you?

7 MR. SULLIVAN: Oh, no. No, no, no, no, no, no. As a matter of fact, I
8 was kind of a fish out of water down in the Second Department when I went down
9 there. But that's a very valid point. I would have no problem with that.

10 MR. ZAUDERER: I would like to draw on your experience here. I'm
11 trying to find my way in what is the right result here, as I'm sure the other
12 commissioners are. With your extensive experience in this area in representing people,
13 can you just describe briefly for us, 'cause our time is limited, reference has been made
14 to the adverse effects of an allegation against a lawyer and which may be unfounded
15 and proved to be in the thousands of them in relation to the ones that are upheld.

16 MR. SULLIVAN: Yep.

17 MR. ZAUDERER: Can you just kind of give me an executive summary
18 of what the kind of effects are on a lawyer when that happens?

19 MR. SULLIVAN: Well, sure. Some people have described Buffalo not
20 only as a small town but a big room, and it is readily apparent to me that the law
21 business, as competitive as it is in so many areas, that that kind of public knowledge
22 will be used against the lawyer in his professional practice. I have -- sadly I have
23 absolutely

24

25

1 no doubt about that. And I think that that's -- you know, there's a famous -- Roy
2 Donovan was the commissioner, the laborer commissioner, and I tried defamation
3 cases, and he went outside the county courthouse and you know what he said was,
4 Where do I go to get my reputation back? And that has always stuck in my head.
5 And that's, that's the bottom line answer.

6 MR. ZAUDERER: Thank you.

7 JUSTICE COZIER: Thank you, Mr. Sullivan.

8 MR. SULLIVAN: Okay. My pleasure. Thank you.

9 JUSTICE COZIER: Our next witness is Joel Daniels, an attorney in
10 Buffalo who also handles attorney disciplinary matters. Good afternoon.

11 MR. DANIELS: Good afternoon, members of the Committee. Thank
12 you for inviting me here. I always agree with Mr. Sullivan. In fact, I can't say when I
13 had disagreed with him. And we did handle a case together that he referred to. That
14 was a case — again, that was banged around in the press quite a bit before the results
15 came out, and those lawyers took their amount of hits, but time heals some things
16 sometimes. I can say that those two gentleman have done very, very, very -- three
17 verys— have done very, very well for themselves since that matter was concluded. I
18 know the Committee has a great interest in
19 whether or not charges against the lawyer should be made public. Mr. Doyle
20 suggested perhaps that after the Committee finds that it should be petitioned or
21 maybe at some earlier stage in the proceedings. Personally, I can say without any
22 hesitation or reluctance that any publicity on a grievance matter where charges
23 have been levelled claiming that a lawyer is unethical before there's been a final
24 determination would be devastating. It would be not only unfair, but it would be a
25 major,

1 major mistake.

2 As a lawyer, few things are more important than your reputation, and
3 without it, you're in trouble. Your career's in trouble. You're in a great jeopardy.
4 That's why we feel, and I think I speak for lawyers who handle grievance matters, that
5 we think the process should be allowed to take its course. Committee investigates;
6 Committee determines whether to go forward. Here in the Fourth Department, we are
7 blessed with a Committee that we can appear before. I understand the other
8 departments don't have that, and I think that's a very, very, very important rule. If
9 you're talking about uniformity, maybe that's something that we could have across the
10 state. You have a couple of dozen people, lay people and lawyers who listen to these
11 matters and they could determine whether or not it should be petitioned. And if it is
12 petitioned,
13 the case takes its course; you go before a JHO, a JHO hears facts, you could present
14 your case, you could present your litigation, you may win, you may lose, you go to the
15 Appellate Division, you can still argue some of the legal issues, you can argue what the
16 final sanctions should be, and if the Appellate Division decides that that lawyer should
17 be sanctioned, then it's public, whether it's a censure, suspension, disbarment, whatever
18 it is, then it's time to pay the price. But if you choose to publicize, for example, a
19 petition that's filed against the lawyer with allegations that will never be sustained,
20 because that does happen, sometimes they're not sustained. If we were talking about 30,
21 40 or 50 years ago when we just had three TV stations, we didn't have cable, we didn't
22 have Facebook, we didn't have social media, then maybe it's a different story. But today
23 — and I'm not telling the Committee anything that I'm sure they're not aware of, that
24 social media, the way it is today, once that petition or once that charge hits, hits the
25 social media pages, you're in trouble. And the petition would be out there. All you have

1 to do is hit your iPhone and Google that lawyer's name and that's the first thing that's
2 going to come up. So I think for fairness, for even-handedness, for taking into
3 consideration that reputation is so critical to a lawyer, that we should
4 wait, let's talk about due process, wait until the system has taken its course, and at the
5 end if there is a decision against a lawyer, fine.

6 I know the issue was raised before about criminal cases. Well,
7 those are different. Those have always been open. The day a criminal case is
8 filed, that's, that's fair game. That's a public record. You can go over to the
9 courthouse and you can pull any of those records, that's, that's it. And often times
10 a public official, lawyer or otherwise, you can be charged with some offenses and
11 down the road you may be cleared, hopefully. As long as Mr. Doyle's firm is
12 involved, there's a good chance that that will happen, and you can say, Well, the
13 slate is wiped clean, even though you've been Googled and you're hit in the
14 social media and you were vindicated. But, you know, with ethics violations,
15 that's just different. The connotation is different. And the way it is today and the
16 way the competition is today, these, these website lawyers, they're out there,
17 everything is, is public and you want to keep that reputation as solid as you can.
18 So for those reasons we think the best thing to do is to maintain confidentiality.

19 I'd like to address briefly the issue of uniformity. I know that
20 that's -- that's a question
21 that's troubling to a number of people who write on ethics and have serious
22 considerations as far as the ethics cases are concerned. We have four different, we have
23 four departments here. I believe our system here is different from the other three. I
24 haven't practiced in ethics cases in the other three departments, but very basically what
25 I would say as far as we're concerned here -- and, again, I'll quote Mr. Sullivan, if it

1 ain't broke, don't fix it. We have a Committee — and, again, I made reference to it
2 before earlier — that hears cases after the grievance committee. The attorneys believe
3 that there's cause to go forward and we've appeared before this Committee many,
4 many times, sometimes successfully, sometimes not, but this Committee is made up of
5 experienced individuals, lay people, lawyers, they've all been around, they all know the
6 score, and at least you give somebody a chance. Because rather than face the possibility
7 of a petition and having to go before the Appellate Division, at least you got a shot to
8 try and convince the Committee that this is a matter that should be handled with a letter
9 of caution, a letter of admonition, maybe you'll save the client a lot of trouble, and
10 believe me, a lot of aggravation.

11 I mean, let's face it, there are many, many serious cases. Again, I
12 think Richard alluded to them, where there are trust account violations, where
13 there's
14 thefts, there isn't much controversy there. Those are cases that are going to go
15 to the appellate court. There's no question about that. But you have a lot of
16 other cases that are kind of in the middle, potential conflicts, someone
17 represents both sides in a real estate deal, those are matters that in the long run
18 can be handled effectively before this Committee and maybe result, again, in a
19 letter of caution, a letter of admonition. And, again, if the Committee believes
20 that the matter goes forward, then the petition is prepared and you have a
21 hearing if you choose. You can have a hearing before the JHO, all the facts can
22 be disputed, but often times we decide to avoid the hearing and sometimes we'll
23 just go to the Appellate Division just on the issue of mitigation when the facts
24 really aren't in dispute. But at least that's an opportunity that we have for our
25 client and can make that choice.

1 So, again, we feel that the procedures that we have in the Fourth
2 Department are very, very good and very fair. And, again, if the State wanted to have
3 uniformity, I think instead of starting down in Manhattan or starting in the Bronx,
4 with all due respect to Manhattan and the Bronx, we ought to start here, because I
5 think our system is the best and it works and it's the fairest. There was some talk --

6 JUSTICE COZIER: Excuse me, I'm just going to ask you to conclude
7 your remarks.

8 MR. DANIELS: Yes, Judge. I'll be very quick, Judge. Just a couple of
9 other points. In speaking to one of the attorneys for grievance, I was told there was
10 some discussion of possibly having guidelines in effect for grievance cases. Maybe
11 I'm wrong on that, but that's not a good idea. If we had enough time we could talk
12 about guidelines that have been issued over in federal court, and believe me, you
13 don't want to adopt that system here.

14 As far as discovery is concerned, that may be an issue also. Again, our
15 Fourth Department we have what I consider to be a very fair method of handling
16 discovery. It's generally open. These aren't, we don't consider them that adversarial
17 here. It's not like a criminal case. If we have a matter with a grievance, that we can go
18 over there, the lawyers are very, very cooperative, they're very helpful, and often
19 times they open their file and they're going to show you what it's all about.

20 Because let's face it, we're not talking about a crime here, we're not talking about
21 putting somebody in jail. It's your reputation and that's what counts. So we, again,
22 our system, the Fourth Department, we think would be very helpful and everyone
23 should take a look. Thank you.

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1 JUSTICE COZIER: Thank you, Mr. Daniels. I do have a follow-up
2 question. You have made some persuasive arguments, I believe, for why confidentiality
3 should be maintained until and unless, of course, a sanction has been arrived at by the
4 Court. But it strikes me that those arguments are primarily for the protection of counsel,
5 primarily for the protection of the attorney. And my question to you is this: Isn't there a
6 balance to be struck with respect to protection of the public and where is that balance
7 being struck with respect to your position?

8 MR. DANIELS: I know that the medical profession has had similar
9 issues as well. I'm not certain exactly how that has, how that has resolved itself, but I
10 am very, very focused on the public being protected, and I think the public has a right
11 to certainly be protected from lawyers who may have, don't have their interests, the
12 public's interest out there as well as, as well as they should. And I know you're always
13 trying to balance these issues. You got the public on one side, you got the lawyer on the
14 other side, and it's easy to say, Well, maybe the public comes first and we should let
15 them know right away as soon as someone is charged. It just bothers me, Judge, that a
16 lawyer -- again, I'm trying to balance this for the Committee -- that a lawyer should take
17 that
18 hit as soon as there's probable cause, even keeping in mind how important it is that
19 the public be made aware for the simple reason, Judge, the damage to the lawyer, just
20 in case the matter does not resolve itself in any sanction, the damage is irreparable.
21 You're never going to be able to put the suitcase back, the pieces are not going to go
22 back, Judge.

23 So I would say, again — and I understand where you're coming from,
24 this issue of balancing — I think we have to tip it somewhat in favor of the lawyer
25 because of that reputation issue.

1 JUSTICE COZIER: Professor Wendel?

2 MR. WENDEL: I've lived in Upstate New York for 12 years and I love
3 it, but I'm not a native New Yorker like a lot of people here. I grew up in Texas. So
4 maybe you could explain to me how New York is different from the 40-plus states
5 that allow publication of attorney charges, not, not just immediately when it's filed
6 but after a finding of probable cause? The ABA has been tracking this for a long time,
7 and states like New Jersey and Illinois, which seem to be similar to New York in
8 relevant respects, have a system in which the charges are published upon a finding of
9 probable cause, and this guideline hasn't fallen. So what's different about the
10 reputational interests of attorneys in New York as compared to New
11 Jersey or Illinois or some place and, especially in light of Judge Cozier's comments
12 about the public interest, why do lawyers get more protection here than in 40-some
13 odd other states?

14 MR. DANIELS: I'm sure the attorneys' interests in the 40 other states are
15 equal to our interests here or vice versa. I just feel personally that I prefer our system as
16 opposed to the other 40 states. If that's the way it's going, well, then so be it, but it
17 doesn't mean I have to agree with it. But I -- you know, I -- I've worked in the vineyards
18 for a long time. I represented a lot of lawyers with grievance cases, represented some
19 judges from time to time. I've practiced for many, many years. I've been there, done
20 that, seen that, all that stuff. And let me tell you, I don't know about these other 40
21 states, okay? They may be doing the right thing and they may think they are, and I
22 understand where you're coming from, Professor. But I can tell you, once something
23 goes in the paper or in social media or you Google somebody about your being
24 unethical, all that time and all that money and all those efforts you put into your
25 practice to build your name, they are out that proverbial window. So we might be in the

1 minority, but in all due respect again to the Committee, I think we're
2 right, in all due respect to the 40 other states.

3 JUSTICE COZIER: Judge Lindley?

4 JUSTICE LINDLEY: Mr. Daniels, you had indicated you represented
5 a lot of attorneys on grievance matters over the years. I've certainly seen you on many
6 of those. Do you have any experience with attorneys that you represented who, while
7 the process was ongoing and the public was not privy to these charges, are you aware
8 of clients of yours who then continued on and there were additional claims against
9 them? In other words, the argument is, well, we should have disclosure to protect
10 future clients, that everyone should know so nobody else gets ripped off. Has that
11 been a problem in your experience?

12 MR. DANIELS: It's happened, Judge. It's the exception and not the
13 rule.

14 JUSTICE LINDLEY: Because I did read the — there was testimony
15 from the July 28th public hearing of this Commission, and Mr. O'Sullivan from the
16 lawyers fund for client protection, testified. I found it rather interesting that he did a
17 study on this issue of what's the cost of not disclosing it early. And he looked at 3,479
18 awards where the fund awarded clients money that were billed from attorneys to see
19 how many of those occurred while there's an ongoing grievance against that particular
20 attorney. His study showed — this went
21 back from 2009 to July 1st of this year — that .8 percent, less than one percent of the
22 victims have been victimized by an attorney who was ongoing, had a grievance going.
23 In other words, \$47 million has been paid out of this, but only \$131,000 was paid out to
24 victims who would have been saved if they had known. It seems to be a, for balancing
25 public versus lawyer's rights, that the public right, yes, it's important, but it doesn't

1 sound like it happens. According to the expert, it doesn't sound like it happens a lot.

2 MR. DANIELS: It's a small percentage, though, but still some people did
3 get hurt to the tune of \$131,000. By the way, Mr. O'Sullivan, he's a great guy and I've
4 talked to him a number of times. He's very helpful and he does a terrific, terrific job.
5 Again, it may happen. But, Judge, from my experience, I don't think I can think of any
6 one specific case where that, where that scenario has occurred, but it would be a rarity.
7 But, again, reputation, when that goes, you're done.

8 JUSTICE COZIER: Mr. Zauderer?

9 MR. ZAUDERER: Listening to you and your colleagues raise very
10 thoughtful points, and it occurs to me that we may be talking about apples and oranges
11 when we talk about an open process, and when we talk on the one hand about a criminal
12 case and the other a disciplinary proceeding. The concept of openness in a criminal
13 proceeding which goes back to the beginning of the republic and the constitutional
14 provision which ensures the protection of the accused, not for the enjoyment of the
15 public. We don't have secret trials. On the other hand, when we're talking about
16 prosecution that deals with somebody's reputation, there's different considerations, so
17 I'm not sure whether the analogy is apt.

18 But in response to some of the points that have been raised about
19 balancing the public interest here, are we sort of applauding with one hand in having an
20 incomplete process if we allow the public to see a proceeding that's going on even when
21 there's been a charge which is only a charge and the reputation damage is done? Is there
22 justification for doing that and wouldn't it, wouldn't the remedy be to speed up the
23 process? Or if the Committee feels that the allegation is so serious by the nature or the
24 quantum of proof, and they have the power to do this, to suspend the lawyer rather than
25 just simply operate by letting the public know? Wouldn't that be a better process?

1 MR. DANIELS: It may. I think the process we have now is, is fine. I
2 think it, it, it meets the requirements of fairness and balance. You raise the issue of a
3 suspension. If a lawyer is suspended while the
4 proceeding is ongoing, that's public because that's a court order. That's out there. So
5 in other words, if you, if you have someone who the Committee believes is a, a
6 danger to the public, to continue in practice, like someone who can't stop taking
7 money from their trust account and who's putting money in his pocket, the Committee
8 certainly can go before the Appellate Division. I've seen it many times. And that
9 lawyer is suspended, that is public. I know where you're coming from. I understand.

10 Transparency, you can't pick up a paper today without reading about
11 transparency. They want it in government, they want it, you know, in everything.
12 They want open arguments before the United States Supreme Court. The public
13 should know of everything. Maybe I'm old school, but I strive for fairness. I just feel
14 that a lawyer's reputation and his ticket to practice are so critical, and I don't want to
15 sound like a broken record, are so critical that any sanction, no sanction should be
16 made public until the process runs its course.

17 JUSTICE COZIER: We thank you for your testimony.

18 MR. DANIELS: Thank you, Judge.

19 JUSTICE COZIER: The next witness -- and I apologize in advance if I
20 mispronounce his name -- is it

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1 Mr. Posr?

2 MR. POSR: Posr Posr.

3 JUSTICE COZIER: Posr?

4 MR. POSR: Posr. Good afternoon.

5 JUSTICE COZIER: Oh, just before you begin, because you may not
6 have been here when we commenced, your time is limited to ten minutes and when
7 you're close to that point, I will let you know if you're going over. Okay? Thank you.

8 MR. POSR: My name is Posr Posr. I am the Attorney General of the
9 Western Mohegan Tribe and Nation of New York. The boundaries are from the
10 length of the Hudson River 50 miles east and west.

11 The issue that I'm here on today, two, — one is transparency, but the
12 second more critical one is that when a lawyer's actually complained about and is
13 under indictment, the disciplinary committee doesn't proceed with procedures
14 against him. In this case I'm talking about a Barton Nachamie, a Manhattan
15 practitioner who was indicted for stealing from his own company and from two
16 clients close to \$900,000. He, I'm not sure what, I know he, the district attorney told
17 me that he pled out, got 30 days in jail. He stole \$900,000. This attorney was
18 complained against by Chief Ronald E. Roberts in 2002. I don't have the documents.
19 I do have the notes in my computer. We can do this part later. But the Disciplinary
20 Committee, what happened was there was a seller, there was, in bankruptcy. The, we
21 were in bankruptcy court. We couldn't make all the money in the first closing so he
22 gave them a lien to try. We don't pay by October, you take the \$300,000 we gave
23 you, you take it all, here's your lien. Gave him \$650,000 on October 16th, 2001. Yet
24 M. David Graubard who was the attorney for the seller, sold the lien to the
25 investment company president even though he got his \$650,000. Our attorney at the

1 time, Barton Nachamie, fell into another case, actually told the seller,
2 We would like, well, the president of the investment company, not the company, just
3 the president wants insurance security for his investing in his own company. Mr.
4 Graubard transferred the lien on that basis. Tribe never signed to that.

5 When I reported this to the — as a matter of fact, now Mr. Graubard in
6 bankruptcy. In order to get out of bankruptcy, I'm sure you gentlemen know, that a
7 person has to be discharged. You have to make a disclosure statement. And I have
8 that disclosure statement right here that says the balance of \$622,000 at the second
9 closing was held on October 16th. Western paid the sum. Western paid the balance of
10 \$622,000 on
11 October 16th. This is the disclosure statement. And I'll hand this up to you when I'm
12 finished. However, that, before the disclosure statement, Mr. Graubard made a
13 statement in state court, Ulster County, in which he said basically to a Mr. Bernard
14 Hujda, the signor in consideration of the same \$622,000 signs and sells, et cetera, to
15 Mr. Hujda. These, both of these documents are in the possession of the Disciplinary
16 Committee of the First Department.

17 How can a lawyer file one statement in one court saying we paid and
18 then file another statement in another court saying somebody else paid and the
19 Disciplinary Committee find that to be no error? I don't understand that. This is why
20 transparency is needed, because there's no, there's no, not only transparency. When a
21 lawyer gets a discipline complaint, they should — both the complainant and the
22 attorney — should come in side by side with a transcriber so that facts don't get
23 overlooked. I don't see, the Disciplinary Committee in their letter to, to me said
24 absolutely nothing, matter, Mr. Graubard in his response, I don't have it here, I'm sorry,
25 I came all the way from Delaware. Mr. Graubard in his response said, I did absolutely

1 nothing wrong in the bankruptcy case. It is exactly -- what happened in the bankruptcy
2 case was okay, but he never said what he did in the Supreme Court Ulster County,
3 which was file a document from Neil's Mazel saying that Mr. Bernard Hujda paid,
4 when, in fact, BGA Investment Company gave the money to Barton Nachamie to pay
5 on our behalf.

6 Obligations Law, I think it's 5-703 says: Before a property can be
7 conveyed, the owner of the property has to sign or his valid representative. There's no
8 signature in this case, yet the Disciplinary Committee apparently didn't even investigate
9 that, didn't call the trustee. When I called to ask why, they said, We can't tell you that.
10 No transparency whatsoever, and that's why these matters can happen as they do.

11 I'm probably getting close to my time now. I mean, I could get more
12 into the facts of it, but the basic crux is an attorney filed in one court that we paid, filed
13 in another court that someone else paid, and the Disciplinary Committee First
14 Department apparently thinks that's okay. Any questions?

15 JUSTICE COZIER: Members any? Thank you.
16 Thank you for your testimony.

17 MR. POSR: Well, then do I have a minute since there are no questions?

18 JUSTICE COZIER: If you wish to take another minute you can.

19 MR. POSR: I'll take one more minute and I'll
20 hand these documents up. I don't even have the, the the document number on them,
21 but I'm sure this will, the First Department can answer this. Not only should there be a
22 face to face with lawyer, client, transcription, but a litigant — a litigant, a
23 complainant — should be allowed to make his own tape recording or even bring a
24 transcriber. But I would personally like to be able to bring a recording to this face to
25 face, because we all know the transcriber can't talk as fast as I'm writing, or write as

1 fast as I'm talking. Might have got that mixed up. We know that happens.

2 And in conclusion, I would say the reason why we're here is because
3 the lack of transparency has not encouraged or put the fear of jail in lawyers who are
4 willing to steal from their clients and from people who are not their clients. And in
5 this case, Mr. Barton Nachamie who actually put his own company in default, his
6 own tribe, his own client in default, yet the Disciplinary Committee finds that's okay.
7 I'm just going to hand these papers up. If I may approach the bench?

8 JUSTICE COZIER: Yes, just one moment. I think Mr.
9 Zauderer has a question.

10 MR. ZAUDERER: Just for clarification and a complete record
11 here, how did you present to the Disciplinary Committee the circumstances
12 that you
13 described here? Did you write a letter? Did you call them? And in particular, did you
14 bring to their attention and how the filing that was made in the Ulster County Court and
15 how that contradicted the bankruptcy court filing?

16 MR. POSR: I did it by letter because there was no way to do it in person.
17 And one of the exhibits in the papers I just handed up was the certified docket sheet
18 from Ulster County where the lien was transferred from Mr. Hujda to Mr. Nachamie's
19 firm. And, you know, I questioned that. If there was no understanding, because as you
20 could probably tell, this case is very, you know, there are a lot of loopholes. There are a
21 lot of nooks and, but if there's something that's not understood, you know, at least in a
22 decision you get an answer, you get something that tells you how to go about correcting
23 what was happening.

24 MR. ZAUDERER: Do you have a letter and could you hand that up
25 that you got from the Committee explaining whatever they said to you?

MR. POSR: Unfortunately I don't have it. I -I -- well, I could get it to you before the close of business.

MR. ZAUDERER: Well, it could be after. You can send it to the Committee.

1 MR. POSR: And I will, but I don't even have the letter that they sent.

2 MR. ZAUDERER: That's fine.

3 MR. POSR: And I did call to find out how it was that the Committee
4 thought that he could file in one bankruptcy, file in one court that we paid and another
5 that we didn't. I asked —

6 MR. ZAUDERER: So we'll have your ultimate letter from the
7 Disciplinary Committee where they said they weren't doing anything? You can get
8 those?

9 MR. POSR: I can get those. I can get those.

10 MR. ZAUDERER: Thank you.

11 MR. POSR: Can I e-mail them to -- I don't see -- see Mr. Caher's name
12 up there.

13 MR CAHER: You can.

14 MR. POSR: Thank you.

15 JUSTICE COZIER: Thank you, sir. The next witness is Professor James
16 Milles from the University at Buffalo School of law.

17 PROFESSOR MILLES: Thank you. I realize I was a late admission to
18 the witness list so I appreciate the time. I also realize that many of you probably have
19 not had a chance to read the witness submission, so I'll try and cover my main points
20 but be very succinct with it.

21 Like Professor Wendel, I'm not from around here.

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1 I'm from Missouri and I've been in Buffalo for 15 years, teaching legal ethics
2 for the last six of those years. And I currently teach the required legal ethics course
3 at the University at Buffalo. So I basically see all of the law students that come out
4 of U.B. in my class.

5 So the concern I want to address is the issue of lack of consistent
6 sanctions across the board of departments and how that I think that appears to
7 students to, to the next, next year's lawyers. We don't talk about sanctions much in the
8 legal ethics classes. None of the case books that I've looked at spends much time on
9 it. I think there's a couple of reasons. One is that sanctions are kind of embarrassing.
10 There's such wide variation among the states and some of that can certainly be
11 justified by looking at the state variation in the rules. But the fact of — and I'm
12 drawing on Professor Gillers' article, because I'm not aware of much else in the way
13 of data on how this works in New York. But given his article, there do appear to be
14 wide variations which I think magnifies the problem when we see these variations in
15 one state under one set of ethical rules as opposed to how various states handle it.
16 Some, my concern is how does this come across to our students? What message does
17 this send to students learning ethics? And they're required to be there. They don't
18 want to be there, so
19 it's, it's a hard class to teach for many reasons. But why is it that the, the variation
20 standards, it makes the system of discipline in New York appear arbitrary, and I think
21 that undermines law students, in-coming lawyers with respect for the disciplinary
22 system and for the disciplinary rules themselves.

23 I think that although we do have a single set of disciplinary rules across
24 the state of New York, the message that, the sanctions that we impose for similar
25 infractions from downstate to upstate to Western New York send a different message. It

1 sends a message that this is a, it's a highly subjective system. I'm
2 uncomfortable by coming to talk about the way the Eighth Judicial Department works
3 and everybody knows each other and it's all a very cozy system. I'm not sure that that
4 would be a very reassuring statement to the public and I don't think it sends the right
5 message to our students. You would think that with a standard set of rules with
6 sanctions would be more or less commensurate across the state, but they don't appear to
7 be.

8 Again, drawing from Professor Gillers' data, in there, for instance,
9 misappropriating client funds is treated, may be treated more harshly in the First
10 Department than it is in the Fourth Department. And I'm not sure that that tells us that,
11 I'm not sure what that
12 tells us about the differences in nature of the practice, but I think it raises a lot of
13 questions. And I think it raises uncomfortable questions for students. When I talk
14 about sanctions in my classes, we're always somewhat dumbfounded by how
15 different what seems to be very egregious matters were treated fairly lenient.

16 Just so — I go into this in more detail in my written submission, but I
17 think Professor David McGowan has a good comment on this. He talks about the
18 difference between states and has written comments. The significant variations in
19 judicial reactions to similar conduct, students who actually throw up their hand and
20 there's a tendency toward nihilism, I think. And that's a problem. It's less — certainly
21 there are variations and sanctions in every area of the law, but in this area where we're
22 trying to teach students how they should act, not on behalf of our students, but what
23 kind of values they are meant to have when there's vast inconsistencies or appear to
24 be vast inconsistencies, I think it can breed a lack of respect for the ethical rules for a
25 disciplinary system. Thank you.

1 JUSTICE COZIER: Thank you, Professor. Yes, Judge Lindley?

2 JUSTICE LINDLEY: Thank you for your testimony, Professor. It
3 appears as though you haven't done any independent review of cases. You haven't
4 done your own research on the matter?

5 PROFESSOR MILLES: I have not.

6 JUSTICE LINDLEY: So in concluding that there are vast disparities
7 in the grievance procedures with respect to sanctions, it sounds like you're relying
8 exclusively on the law review article from Professor Gillers?

9 PROFESSOR MILLES: I'm relying on the state of New York, yes,
10 that's what I'm relying on. I'm speaking more broadly of the fact of different states
11 and similar infractions, but, yes, I am mostly relying on Professor Gillers' article.

12 JUSTICE LINDLEY: And you acknowledge, I believe, that there's
13 vast disparities in other areas of law. For example, criminal sanctions. You have
14 individuals charged with a particular crime down in Manhattan, say, or in the Bronx
15 on a drug felony is going to get a vastly different sentence than somebody, say, in
16 Ontario County up here. You have personal injury actions, lawyers here know,
17 lawyers across the state know you're going to get a lot more money downstate than
18 you will upstate for the same exact injury. Why is it more troubling that we have
19 these disparities, alleged disparities? I want to make that clear. Professor

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1 Gillers, I read very carefully his law article. I looked at a lot of the cases he cited. I'm
2 not convinced that there are significant disparities, because there are a lot we don't
3 know.

4 PROFESSOR MILLES: Absolutely.

5 JUSTICE LINDLEY: Two lawyers may engage in the same conduct,
6 but they may have different backgrounds. One may have acknowledged
7 responsibility and have taken steps to correct the problems, one may have denied
8 responsibility. One may have had prior a grievance, one may not. We just can't look
9 at what they did and then look at their sanction and say, Oh, geez, there's a problem.
10 But anyhow, why, we accept it. It's inherent in the nature of law for all the other
11 areas of law, but why is it a problem with respect to grievance? Why does it have to
12 be?

13 PROFESSOR MILLES: I think it's certainly inherent in other areas of
14 law, but I think other areas of law also breed a certain degree of cynicism in our law
15 students, and make it then so that it's all a matter of how well the lawyer argues,
16 which may or may not be true. But I think it'S, it's a different kind of problem when
17 we're looking at ethical values because I do think — I mean, I teach professional
18 responsibility, but I also try to teach ethics to some extent. And I think most of us
19 who teach — Professor Wendel, I know, also address these questions. I think we're
20 trying to infiltrate a sense of respect for the, for the disciplinary process, for the idea
21 of a self-regulating profession. And I think to the extent that there are indications that
22 the process is, is broken, then I think that makes it, it's a bad message to be sending
23 to future lawyers.

24 JUSTICE LINDLEY: So you're saying the law students will lose
25 respect for the process if a lawyer in one jurisdiction gets suspended for, say, three

1 years and then another lawyer in another jurisdiction for the same
2 kind of conduct gets suspended for two years? That somehow —

3 PROFESSOR MILLES: I think there are a lot of reasons why law
4 students may not be very respectful of legal ethics, but I think that this may be one
5 of them.

6 JUSTICE COZIER: Yes, Mr. Zauderer?

7 MR. ZAUDERER: You know, particularly I'm glad I had the
8 opportunity to put this to you as a law professor. You know, sometimes when we
9 study something and we have a predetermined conclusion or bias, we look
10 selectively at the evidence. And I think, you know, that could have some actual
11 applicability here. As one Commission member pointed out that, there could be, as
12 I think you acknowledge, many individual differences in the cases that are not
13 reported. So, you know, a law student goes in, you know, under an assignment and
14 tries to catalog, you know, all the, all the charges versus the punishments that, yours
15 doesn't take into account that data, but I suppose in contrast to that on the other side
16 you could say there's a cluster, a serious cluster that suggest differences that you
17 would expect that those differences and individual cases would fall randomly in
18 different departments, so I would acknowledge that. But when we talk about for
19 example the fact that other states do things differently, I think it was suggested for
20 example by a colleague that, you know, well, Texas does it differently than the
21 other states. Well, you know, Texas, executes a lot of people. We don't have capital
22 punishment. So, you know, I don't know whose system is better, but we have a
23 different system here. So, you know, the fact that other people do it differently,
24 maybe we do it better.

25 And, finally, let me say that the tough issue seems to me to sort this

1 out is are we really talking about disparity, you know, behind what's
2 conflated in the Gillers article, I have great respect for Professor Gillers as a
3 colleague. As you have touched upon, what you really seem to be saying is not that
4 there's a disparity, but what's troubling you is that in one instance, one local
5 jurisdiction where the punishment is severe and the other is not severe, the one that's
6 not severe should be severe. So it sounds to me like you're really criticizing the lack
7 of severity as being attached to the violation rather than the disparity.

8 PROFESSOR MILLES: Thank you for that question. I tried to make,
9 to clarify that a bit in my written submission, but I think it's not so much a matter of
10 severity. I think it's a matter of procedural justice. That the system should be
11 perceived to be fair and not arbitrary. And whether the punishments themselves are
12 severe or, or, or are less severe I think may be, it may be less significant than whether
13 sanctions are perceived as fair.

14 JUSTICE LINDLEY: Thank you.

15 MR. DOYLE: Professor, thank you very much for coming. My
16 question's following up a little bit on the prior two commissioners. When the decision
17 from the, whichever Appellate Division has come out, when they do talk about
18 weighing the possible discipline in, when they do express a standard, it's usually
19 expressed in some version of the purpose of discipline is to protect the public from
20 lawyers who are not fit to practice. So we have that on the one end, which is
21 inherently a very subjective thing and, and, and allows and requires the
22 type of consideration that Justice Lindley's talked about with what's the prior record of
23 the attorney? You know, what has been their response to this? Are there medical,
24 substance abuse, other issues that are plagued? Was there loss to the client or not? All
25 of those factors, they're subjective and very different case to case, not all of which are

1 written in the decisions, by the way, as we know. But you have that on one end. And I
2 don't know if you're advocating for this, but I get the sense when I hear what you're
3 saying is that -- that another option would be, okay, there was a violation of Rule 3.3,
4 go to a chart, you know, six-month suspension regardless of what any of the other facts
5 are. And obviously those are two, you know, very different ends of the spectrum. Am I
6 misreading what you were saying?

7 PROFESSOR MILLES: No. I certainly take the point about the
8 problems with the federal sentencing guidelines and I don't think it should be something
9 like that. However, there are ABA guidelines for sanctions which some states refer to,
10 some don't. I'm not, I don't know that New York looks at them very much at all. But it's
11 —

12 MR. DOYLE: They don't say that they do. The court
13 decisions don't talk about them very much.

14 PROFESSOR MILLES: But I don't — I haven't examined this
15 in enough detail to say that I have a recommendation
16 or solution. I think that there should be some greater guidance in sanctions so that
17 there's at least, that there's some rationale to that that is apparent to outsiders. If the
18 process, if the, if the purpose of sanctions is not punishment but deterrence, I think
19 that needs to be the, the reasoning needs to be clearer. So it may be a matter of
20 further opinions.

21 MR. DOYLE: Their opinions — and perhaps that's one of the things
22 the Commission is considering is recommending the possible adoption of advisory
23 guidelines along the lines of the ABA — that's something that you think would be
24 positive?

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1 PROFESSOR MILLES: I think it would. I do think it would. And I do
2 want to say this, that certainly, yes, I acknowledge that my data is drawn from one
3 article 'cause I'm not aware of much else.

4 MR. DOYLE: Either are we.

5 PROFESSOR MILLES: But I do hope that the perspective of law
6 students and how this appears to law students I think has not been represented, so I
7 hope just for what it's worth that my testimony is helpful.

8 MR. DOYLE: Oh, very much so. Thank you very much, Professor.

9 JUSTICE COZIER: Professor Wendel?

10 MR. WENDEL: Just a quick follow-up. Would your concerns be
11 mitigated by opinions that explain discipline in greater detail so that the factors that
12 went into the determination of sanctions would be explained? It seems to me that if
13 students could understand, and in this case, the attorney had a unblemished record
14 versus this attorney had a pattern of previous violations, that would satisfy your kind of
15 rule of law concerns, and without having to adopt something like a grid or sentencing
16 guidelines so that the problem could be addressed not by some sort of statewide
17 commission or guidelines but merely by recommending more detail in published
18 opinions, would that be enough?

19 PROFESSOR MILLES: I think that might very well be
20 enough.

21 MR. WENDEL: As compared to something like the Upstate/Downstate
22 disparity in personal injury verdicts, you really don't have any kind of explanation. Just,
23 that's the way it's done. If there's an explanation to be given, then let's put it out there.

24 JUSTICE COZIER: Yes, Mr. Guido?

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1 MR. GUIDO: Thank you. Professor, thank you. I just want to also make
2 sure at least for myself I didn't misread what you testified to, but with respect to your
3 remark about the cozy relationship in the Eighth Department based on the testimony of
4 some of the other
5 witnesses who are respondent's counsel. I'm not sure I understood that testimony to
6 suggest there was a cozy relationship other than to say that the staff up there was
7 professional and fair in the way that they approached disclosure and how they look at
8 disclosure up there, voluntary open disclosure. And the reason I'm concerned about
9 the term or your perception of that being cozy, we had witnesses come before the
10 panel advocating open disclosure and greater disclosure, and if the perception is going
11 to be, well, that's just forcing a cozy relationship between respondent's counsel, it's
12 troubling to me as a Committee Member and how do we deal with that? I don't know
13 if, if maybe you wanted to revisit that or clarify what —

14 PROFESSOR MILLES: Well, first of all —

15 MR. GUIDO: — what your perception was?

16 PROFESSOR MILLES: — that was probably out of order. The point
17 of my testimony was just a reaction to the earlier testimony. But the, the, the at least
18 the way I interpret it, the other witnesses who — was it Mr. Daniels I believe
19 mentioned it? And I apologize if I'm misstating what he said. Just that, that there's,
20 there is something to be said for a process which is sort of low cost to the community,
21 where people know each other and people know the circumstances. But at the same
22 time

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1 it can also look like the, the odds are stacked against clients and the public. It can look
2 very protectionist I think.

3 JUSTICE COZIER: Thank you very much,
4 Professor Milles.

5 PROFESSOR MILLES: Thank you.

6 JUSTICE COZIER: Our final witness this afternoon is Chris Kochan,
7 a legal consumer from Buffalo. Mr. Kochan?

8 MR. KOCHAN: Thank you very much for allowing me to testify in
9 such a short notice. The law profession should be considered one of the most noble
10 of all professions in American society. Each lawyer, when they take on a client,
11 literally becomes responsible for the life of their client, whether it be a public
12 corporation, or a private natural person. And depending on their client's status in
13 society, that client's families, friends and society itself can be greatly affected by the
14 quality of the attorney's representation.

15 Further, when an attorney takes on a client, that is all they should have to
16 worry about. However, this is not the case. The honest attorney is bound by an
17 unwritten code of economics, that code being: Do not challenge the status quo, for if
18 you do, your career could be ruined as well as your family may suffer the
19 consequences.

20 The only example I need to point out is former Erie County Assistant
21 District Attorney Mark Sacha. The Attorney Grievance Committee has looked at
22 nothing more than the fox guarding of the hen house. What occurred in my complaint
23 is a prime example of that. Further, if you take any average citizen who has any
24 feelings with these types of oversight committees, most of them, most of them feel
25 they are ineffective and a complete waste of time. The damage from this train of

1 thought can easily be seen in the exodus of people from this state
2 which is one of the highest in the nation, not something any of us should be proud
3 about in this once great state.

4 What type of evidence must be provided and at what point should a
5 Committee member be mandated to take action against an attorney who violates the
6 laws and/or rules of professional conduct and it should be the same across all
7 departments?

8 As I've reviewed four departments and their procedures in filing the
9 complaints and what is to occur thereafter, all vary in one degree or another. As to the
10 procedures and flow for filing complaints, I have created many websites throughout
11 my career. My first one being in 1995 so I know what I'm talking about. Some of the
12 Grievance Committee pages for their
13 departments do not appear to have been updated for quite some time. For example,
14 the Third Department's page on nycourts.org reminds me of my first website I
15 designed in 1995. Of all of these departments, this one lacks the most.

16 The grievance procedures for all the departments are on the same
17 website so they should be, they should provide for a uniformed design as well as
18 procedural guidelines so the average layman can easily find and file the documents
19 needed for the Committee to review and investigate and render a proper decision.
20 Why is it called the Unified Court System if it's not unified?

21 Further, all the rights of the citizens and taxpayers, as a complainant,
22 should be clearly spelled out and easily found on the official website, as well as the
23 pages of the various committees and departments. Our rights as citizens and taxpayers
24 should not be hidden through the art of words and voluminous amounts of laws that
25 only the most skilled of researchers spending long hours on a subject have the ability

1 to uncover.

2 I can give you a recent example of the difficulty of locating these
3 rights. I only discovered last week that I, as a complainant, would have the right to a
4 copy of the response the attorney provided against my complaint pursuant to 22
5 NYCRR 1022. However, it took
6 hours to locate this right.

7 Presently, the law provides that all attorneys that have a complaint
8 filed against them are provided a copy of the complaint, and the attorney is required
9 — if the attorney is required to respond to the complaint, who for the most part to the
10 complainant — who for the most part is a citizen taxpayer, the citizen taxpayer is
11 only allowed a copy of the attorney's response upon the approval of the staff attorneys
12 of the committee. This is not fair. If a response is filed, the complainant should have
13 every right to a copy of the response if they wish. This should not be left to the
14 discretion of the staff attorneys. That can easily be seen as a conflict of interest,
15 especially when the complainant is not an attorney.

16 Another important issue this Committee needs to address is the claim
17 that the Grievance Committees do not have jurisdiction over the conduct for attorneys
18 acting in an official capacity as a DA or ADA. 22 NYCRR part 1200 does not
19 delineate between attorneys acting in a public or private capacity. Therefore, it
20 demands that all attorneys are mandated to abide by the Code of Professional
21 Conduct. Further, the American Bar Association clearly shows that all attorneys, and
22 I repeat, all attorneys, are governed by the Rules of

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1 Professional Conduct.

2 The news is full of examples of ADAs and DAs who acted in
3 questionable manners concerning questionable conduct of other public officials. This
4 inevitably leads to accusations of cover-ups. It is evident that the law is not clear on
5 whether or not a person can file a grievance against a DA or ADA. You talk, you
6 write to one public official versed in the law, their response is, yes, you can. Then you
7 talk or write to another public official versed in the law and their response is the exact
8 opposite. The most disturbing response I have received concerning this matter of
9 authority is that the Committee will not act unless there is a judicial finding of
10 professional misconduct. With this response they admit that the Committee has the
11 authority to review, investigate and act upon the complaints; however, they won't do
12 so until there has been a judicial finding of misconduct.

13 I can find no law to support this claim, and if indeed it is a
14 requirement, what is the purpose of the Committee in the first place? They should,
15 they should be, there should be more than an adequate solution to that. James I.
16 Meyerson, the attorney for the Staten Island Branch of the NAACP, wrote in a recent
17 Article 78 proceeding that there was a disturbing proposition that a
18 district attorney was free to do almost anything, maybe everything, with impunity
19 and without review or oversight of that attorney's conduct except the prosecutor
20 attorney's own self-oversight. This thought is a prime example of conflict of interest
21 and why people no longer trust the system.

22 This statement was made against the Second, 11th and 13th Judicial
23 District Committees concerning the Eric Gardner matter. These Committees claimed
24 it was not the proper forum to raise issues of misconduct. If the issue — if the issue
25 of not the proper forum is indeed fact, then the law must be changed to ensure that it

1 clearly authorizes the Committees to review and investigate DAs or
2 ADAs and to act if the evidence warrants it. And the powers of the Committees must
3 be clearly and thoroughly documented so that all can understand it, including, but not
4 limited to, the Committees themselves.

5 To this day I have not received a clear precise answer as to whether or
6 not grievance committees have jurisdictions over questions of conduct of DAs and
7 ADAs. As such, the committees now appear to actually shield DAs and ADAs from
8 such allegations as echoed in Mr. Meyerson's statement.

9 This is exactly what happened in my matter. I
10 alleged serious acts of misconduct by a DA, an ADA, and the Eighth Judicial
11 District's response was that while they didn't have the authority to act on a matter,
12 they had the authority to forward a copy of my complaint to the very DA and ADAs I
13 complained about. If this — if they don't have the jurisdiction to act upon the
14 complaints, then they should not be allowed to forward a copy of the complaint. By
15 providing a copy of the complaint to the very DA and ADAs I complained about, the
16 Committee added fuel to the fire which can easily act as a catalyst for them to, for
17 them to engage in further unethical behavior because they believe they are
18 untouchable.

19 This is especially worrisome when the same DA is presently subject to
20 a lawsuit because of substantially similar misconduct in another matter. Other
21 obvious shares, others obviously share my concerns. There appears to be a bill right
22 now pending before the state Legislature. Its purpose is for forming a committee to
23 look into prosecutorial misconduct. It did not just mysteriously appear. It is there for a
24 reason.

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1 If the New York State Commission on Judicial Conduct can take
2 action and remove a judge from the bench for misconduct, the Attorney Grievance
3 Committee should be able to do the same for a DA or ADA. However, the Committee
4 -- if the committees do actually have the power
5 now, will they exercise the standard kitchen sink approach that the New York State
6 Commission on Judicial Conduct constantly utilizes? That approach being the officials
7 in question is immune because they have a broad range of discretion. No district
8 attorney, assistant district attorney, or judge, for that matter, has discretion that they are
9 acting outside their legal authority and/or procedural professional guidelines.

10 I will provide you with clear recent example of acting out of, of acting
11 outside of legal authority, where actions should have been taken but were not. In my
12 case, I provided a verified complaint with a corresponding evidence packet that was, in
13 the words of the chief counsel, voluminous. This is what I, what I provided.

14 In this packet, in this packet and affidavit I proved that one DA had no
15 authority to prosecute. Of the four charges, three were not verified and the fourth
16 clearly showed I was acting within my rights. That charge was obstruction of
17 governmental administration in the second degree for remaining silent. Their conduct in
18 my matter is one for the history books. One has to wonder if these three simplified
19 informations which are presently not verified well after the alleged arraignment
20 occurred will mysteriously appear in the file with signatures upon them. I will not put
21 anything past the DA or ADA in the
22 matter. I have videotaped the contents of the court file many times to ensure that if
23 this happens I have proof that they were unsigned well up to and well past the alleged
24 arraignment.

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1 Over 40 percent of the documents I have provided in the evidence
2 packets were created by the very attorneys I filed the complaints against, or other public
3 officials involved in the matter, in their own words, sworn to in their own signatures, as
4 well as certified court transcripts and so forth. Yet I was told I did not offer any proof.

5 JUSTICE COZIER: Mr. Kochan, you'll have to wrap up your remarks.

6 MR. KOCHAN: I've got two more pages to go.

7 JUSTICE COZIER: Well, it's not a question of pages. You'll have to
8 wrap up your remarks. But you have been speaking very, very quickly which is pretty
9 taxing on the court reporter. So I'll ask you just to conclude your remarks 'cause your
10 time is up.

11 MR. KOCHAN: Okay. I'll give you one perfect example. The one
12 perfect example I was told I was no longer allowed to file any more motions because
13 the omnibus motion rule of Article 55 of the Criminal Procedure Act. This was by an
14 ADA. Article 55 of the Criminal Procedure Act does not exist. It's a complete
15 fabrication and lie. This was placed in there. The purpose I believe our best bet is to
16 fully inform, have fully informed grand juries where the citizen/complainant can go
17 in front of these grand juries and present their evidence under the powers granted to
18 the grand juries and the Article One of the New York State Constitution. This way,
19 this will help eliminate any unfounded complaints and make the system much more
20 open for the public to see and transparent.

21 JUSTICE COZIER: All right. Thank you, Mr. Kochan. Are there any
22 questions?

23 MR. KOCHAN: Yes, sir.

24 JUSTICE COZIER: Mr. Zauderer?

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MR. ZAUDERER: Just two quick questions. See if we can focus on it. First of all, is there an extant, an existing order prohibiting from making filings of any kind? Is that —

MR. KOCHAN: That was the answer to my omnibus motion where the ADA claimed that I was not allowed to file at issue. And she swore to it under penalties of perjury, sir.

MR. ZAUDERER: And that's false?

MR. KOCHAN: I cannot find any Article 55 anywhere.

MR. ZAUDERER: So what was the essence of what

1 the DA charged you with or investigated you for that gave rise to this concern you
2 had?

3 MR. KOCHAN: Well, this was for three or four charges total, three
4 which were traffic violations, one was refusal to, refusal to blow into a Breathalyzer.
5 I was, I was handcuffed to a metal chair and knocked out by a deputy sheriff who's
6 been sued in federal court for the same thing, plus perjury.

7 MR. ZAUDERER: But refusal to take a Breathalyzer
8 test is not a crime, right?

9 MR. KOCHAN: Well, that is a civil matter, but it does have criminal
10 ramifications because you are tried for it, but also it was a DWI.

11 MR. ZAUDERER: DWI gave rise to this?

12 MR. KOCHAN: Yes, sir.

13 MR. ZAUDERER: Thank you.

14 JUSTICE COZIER: Any other questions? Thank you very much.

15 MR. KOCHAN: You're welcome.

16 JUSTICE COZIER: That concludes the testimony for today's hearing.
17 On behalf of the Chief Judge and the Commission, I want to thank everyone who has
18 joined us today, particularly the witnesses and the members of the public. And over
19 this next several weeks, the Commission will be reviewing both the oral and written
20 comments that had been submitted and take that into consideration in preparing its
21 report. Thank you. The hearing is concluded.
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I, Danielle M. Gregory Daigler, an Official Stenographic Reporter,
do hereby certify that the foregoing is a true and accurate transcript of the
proceedings as recorded by me at the time and place aforementioned.

Danielle Gregory Daigler

DANIELLE M. GREGORY DAIGLER, RPR, CRR SUPREME COURT REPORTER.

DANIELLE M. GREGORY DAIGLER, RPR, CRR
SUPREME COURT REPORTER

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