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FACT-FINDING HEARING
ON
PUBLIC DEFENSE SERVICES
BEFORE
THE NEW YORK STATE DEFENDERS ASSOCIATION
AND
THE LEAGUE OF WOMEN VOTERS
HELD ON
DECEMBER 1, 1998

Stenographic minutes of the proceedings held in the above-entitled matter on Tuesday, December 1, 1998 commencing at 9:00 a.m., at the Legislative Office Building, Hearing Room C, Empire State Plaza, Albany, New York; before Holly A. Santspree, RPR, a Court Reporter and Notary Public in and for the State of New York.

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PANEL MEMBERS :
JONATHAN E. GRADESS, Executive Director, NYSDA
MARION H. HATHAWAY, Chair, NYSDA Advisory Board
EDWARD NOWAK, President, NYSDA Board of Directors
LEONARD NOISETTE, NYSDA Board of Directors
WENDY S. POGORZELSKI, Research Associate, NYSDA
AUDREY KIBRICK, League of Women Voters, Albany County
MELANIE TRIMBLE, League of Women Voters, Albany County

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1 SPEAKERS:
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3 Ray Kelly, Esq., Public Defender in Albany County
4 Kathryn Kase, Esq.
5 Alice Green, Center for Law and Justice
6 Gary Brown, Fund for Modern Courts
7 Steve Pittari, Westchester Legal Aid Services
8 Leon Tucker
9 Milton Zelermyer, Prisoners' Rights Project, LAS-NYC
10 Professor Mary Lynch, Albany Law School
11 Gerard M. Damiani, NYS Association of Criminal Defense
12 Lawyers
13 Gregory Kottmeier, Esq., Delaware County
14 Roy Neville, Alliance for the Mentally Ill
15 Bob O'Leary, Broom County Public Defender
16 Tom Saitta, Esq.
17 David Leven, Prisoners' Legal Services
18 Gregory Lubow, Green County Public Defender
19 Manny Vargas, New York State Defenders Association
20 Jeffrey Anderson, Criminal Justice Specialist,
21 Rensselaer County Executive Office
22 Jeffrey T. Richards, Esq.
23 David Lewis, Esq., Lewis and Fiore, Esqs.

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1 MR. GRADESS: Good morning. I think we

2 will open the Albany hearing. I just want to give the
3 opportunity to the panel members to introduce themselves.
4 I'm Jonathan Gradess, Executive Director of
5 the New York State Defenders Association.
6 MR. NOISETTE: I'm Leonard Noisette, Board
7 of Directors, and a director of Defenders Services of
8 Harlem.
9 MR. NOWAK: My name is Ed Nowak and I'm
10 President of the New York State Defenders Association and
11 Monroe County Public Defender:
12 MS. HATHAWAY: Marion Hathaway, CAC, the
13 Client Advocate Committee of Nassau County.
14 MR. GRADESS: Our first witness is Ray
15 Kelly.
16 MR. KELLY: Good morning. I'd simply like
17 to preface the remarks and any questions that come from
18 the panel by trying to emphasize the fact that the public
19 defense, whether it be through public defender' offices,
20 whether it be through Legal Aid offices, whether it be
21 through the 18B panel of assigned counsel, that the people
22 who do the job are the sentinels of liberty in this
23 country. They are the people who truly protect the

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1 constitution of this country. They are the people who are
2 truly in charge with making sure that our system of
3 justice operates in the fashion in which it was designed
4 to operate by our founding fathers.
5 I'm going to suggest to all of you that the
6 greatest lawyers, the best trial lawyers, the most
7 important trial lawyers in this country are not the ones
8 who are the media darlings, who are seen every single day,
9 or the people who the media call up and want to act as
10 pundits. The people that truly do the job are the public
11 defenders and the 18B counsels, and the people who come in
12 and, many times, defend cases for free in the courtrooms
13 of this land, without any press, without any fanfare, but
14 they stand up and they have their client's voice be
15 heard.
16 And the idea that having the client's voice
17 be heard is the most important fabric towards keeping all
18 of us in this society put together and running on the same
19 track, trying to get something done so that it becomes
20 better for all of us across the board.
21 I've said many times along the way that
22 client representation, representing the client from the
23 client's point of view, being able to walk a mile in the

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1 client's moccasins so that you can present your client's
2 point of view to a jury, so that a jury can make a
3 determination as to what the extent of guilt is, if any,
4 and then to appropriately argue for punishment is indeed
5 the homeliest job that there is, but it's the most
6 important job.

7 Unfortunately, in our system of justice, in
8 the political climate that began with Nixon and the war on
9 crime, when he first ran for office in 1968 -- that has
10 never changed. And we now find ourselves in a situation
11 where, with all due respect to the war on crime, so to
12 speak, it's something that is forwarding a political
13 agenda and which allows for a political agenda which
14 permits the position that crime is big business in this
15 country.

16 And I'm going to suggest that if we are
17 going to share and we are going to try to get things in
18 this state on an even keel, we are going to need to
19 address the fact that if there is to be a strong public
20 defense system, which there should be, that there has to
21 be adequate funding, so that the lawyers who are doing the
22 job have the opportunity to do the job and can combat the
23 effort that seems to be being made regarding setting up a

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1 prison industrial complex, an entire league, a cadre of
2 law enforcement after law enforcement after law
3 enforcement, where we flush more money down the drain, we
4 create more and more police officers, we create more and
5 more crimes. And by the same token, we are creating more
6 and more people who are eligible to go to jail.

7 The bottom line is crime is big business in
8 this country and the politicians have a vested interest in
9 seeing that crime is not resolved. And one of the ways
10 that they are going about seeing that the crime problem is
11 not resolved is by ensuring that the voting block, the
12 people that they give jobs to, whether it be corrections
13 officers, probation officers, police officers, subsidiary
14 police -- I don't care what you want to call it -- the
15 bottom line is more and more money is being funneled into
16 the prosecution end of it and less and less money is being
17 funneled to the defense.

18 And unfortunately, if the defenders are
19 going to stay the sentinels of liberty that they should
20 be, and they have to be, because no one else is going to
21 protect the control of the government -- control of the
22 government takes place in the courtroom or it doesn't take
23 place at all, in my judgment.

1 The bottom line is unless we have an
 2 adequate defense bar that is funded so that it can take
 3 control of the government, make sure the police do the job
 4 they are supposed to do, so that they don't transgress and
 5 so and they know full well that when they do transgress on
 6 the constitution, there's going to be a price to pay for
 7 it. You have to have people dedicated to taking that
 8 position.

9 Without adequate funds, it makes it
 10 difficult for anyone who has a wife, children, trying to
 11 get by in the world, all the things competing in your life
 12 and the professionalism you are trying to give -- there's
 13 nothing more difficult than to have to be defending four
 14 or five or six murders at the same time a case is coming
 15 to trial and having a caseload that is taller than you
 16 are, and trying to go home and support your family, trying
 17 to be a father or trying to be a mom and trying to take
 18 care of your kids and trying to do the job. And in the
 19 meantime, society is saying to you, we are going to place
 20 upon you the burden of indigent defendants, you do it by
 21 gratis, do it because it's the right thing to do, do it
 22 because when you were young and you came out of law
 23 school, you were principled, and you wanted to be able to

1 fight for the constitution.

2 It's an unfair burden that's being placed
 3 on the defense bar across this state and it's an unfair
 4 burden when the money they pay you isn't enough to do the
 5 job. It hurts to be sitting in a courtroom and either not
 6 have adequate investigative services or have investigators
 7 that are getting paid poor sums of money, or having judges
 8 sitting there riding herd on you. They look at your
 9 vouchers and willy-nilly become the keepers of the public
 10 fisc.

11 The bottom line is what I'm going to
 12 suggest is that there has to be adequate funding if the
 13 system is going to work. And it's an unfair burden that
 14 is being placed upon the public defenders, upon the
 15 assigned counsels across this state, to be paid at the
 16 paltry sums of money that they are being paid at, which
 17 does not, in most cases, even meet the overhead of the
 18 individuals who are trying to do the job.

19 You have quite a few folks who are assigned
 20 counsel who are sole practitioners, where people are in
 21 one- or two- or three-man, three-person offices. And the
 22 bottom line is that the overhead -- they can't pay the
 23 overhead based on getting \$25 an hour for out-of-court

1 work, \$40 an hour in-court work. It doesn't cover the
2 overhead.

3 And the bottom line is that, you know, the
4 politicians like to sit there and say, well, you have an
5 obligation as a lawyer, you do your job. The bottom line
6 is that there is a line where the limit should be drawn
7 and the line is that it should be shared fairly across the
8 breath of society, the cost of indigent defense.

9 None of us have the luxury of choosing who
10 our parents are and none of us have the luxury of choosing
11 what country we are born in. The bottom line is everybody
12 in this state, everybody who has the good fortune to be
13 born in this country, has the obligation of fairly sharing
14 the burden of indigent defense. Because what you do to
15 the least of us, you do to all of us.

16 And the bottom line is that that's the way
17 I feel about it, and I just think that the burden should
18 be shared fairly and the politicians should be made to
19 know that it's time for people to be paid fairly so that
20 they can live their lives, so that they don't have to work
21 with the unbearable.

22 There are loads of people having to be
23 defended. You have the responsibility for the lives of so

1 many human beings and you are trying to live your own life
2 and trying to be a good father, good parent for your
3 children and trying to do everything that life tugs on you
4 and you have all of these things that are outside

5 influences trying to get you to do everything that it is
6 that makes you a human being.

7 It's unfair the way it's set up, and I'm
8 simply asking all of you to let the politicians know and
9 say, hey, look, let's share the burden fairly across the
10 board. It's a burden to society. Let's handle it that
11 way. Thank you.

12 MR. GRADESS: Questions?

13 MR. NOISETTE: I just have a couple
14 questions. If I understand correctly, first of all, you
15 currently work for a public defenders; is that right?

16 MR. KELLY: I've been working for the
17 Albany County public defenders for almost 20 years, since
18 1978.

19 MR. NOISETTE: And if I understand you
20 correctly, Counsel, one of your concerns is the level of

21 salary in the public defender's offices, number one, and
22 number two, a sense of growing caseloads; is that
23 correct?

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1 MR. KELLY: Correct.

2 MR. NOISETTE: Could you give me some sense
3 of to what extent the problem of caseload in your office
4 has gotten more dramatic, say, in the last ten years? Can
5 you give us an idea what those numbers are and the impact
6 that's had?

7 MR. KELLY: Obviously, with the creation of
8 more and more police, with the creation of more and more
9 crimes that are eligible, with the creation of the public
10 climate regarding the "us against them" mentality, what
11 has happened is there are more and more people being
12 arrested, more and more people are getting indicted and
13 more and more people are being brought through the
14 system. And no one is being brought into the public
15 defender's staff to try and address the addition to the
16 caseloads.

17 When you talk about the amount of money
18 that someone gets paid, here in Albany County, I believe
19 there's currently a proposal in the legislature now
20 whereby a brand-new assistant district attorney, who has
21 never tried a case before in their life, is going to be
22 begun at a salary of somewhere between 42- and 45,000 a
23 year.

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1 I've been a public defender for almost 20
2 years now. I've been a trial lawyer for 25 years. I've
3 had over 200 trials in my life. I've had over 50 homicide
4 cases in my life. I'm getting paid somewhere around
5 \$23,000 a year as a public defender in Albany County.

6 And the bottom line is that it simply is
7 not fair. You know, how do you take somebody who is a
8 brand-new, wet-behind-the-ears law student -- not casting
9 aspersions on the law schools or anything -- but why is it
10 that someone who has never tried a case is worth twice as
11 much money as I am? And I have been doing it for over 25
12 years, I have over 200 trials experience, I've been
13 teaching at the law school.

14 Jonathan Gradess runs the trial program for
15 the indigent defendants' attorneys across the state at RPI
16 in the summer. I donate seven days of my life. I go from
17 Saturday to Saturday and we work from eight to nine at

18 night. That's something we don't get reimbursed for. But
19 you do it because that's an obligation of being a lawyer
20 in this state.

21 The bottom line is why is it that
22 everything has to be done for free? Why is it that people
23 are not fairly compensated for the time they give to try

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1 and make it right for everybody? That's basically where
2 I'm coming from. That's basically the message I'm
3 sending.

4 It can only be fair if the sides -- we have
5 an adversarial system of justice. We have a criminal
6 justice criminal justice system that says both sides are
7 supposed to be equally represented. Theoretically, we
8 both have the same amount of money, both have the same
9 competency, as far as lawyers are concerned, both sides
10 have the same reach as far as investigative services for
11 expert services, and you take it and give it to the jury.

12 The system works when the jury has a fair
13 fight in front of them. There's no such thing as wing or
14 losing in this business, no such thing as that, because
15 with every jury verdict, the system works. And the bottom
16 line is that it has to be a fair fight. You can't have,
17 you know, ten million dollars on one side and five hundred
18 thousand on the other side. It simply is not fair, and it
19 makes it very, very difficult for everybody and it does a
20 great injustice to the public and their view of the
21 system, regarding the fairness of the system, when they
22 see that it is not equally matched.

23 MR. NOWAK: In terms of the salary rate you

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1 mentioned, my question would be: Are you on a part-time
2 basis in Albany County?

3 MR. KELLY: We have a couple of full-time
4 staff and the rest of us are part-time staff. The
5 part-time is defined as -- it's supposed to average out to
6 30 hours a week for the part-time. And as you well know,
7 as the head of the public defenders over in Monroe County,
8 there are some weeks when you work five, six, seven, eight
9 hours and get away with it and that's all you have to do.
10 There are other weeks when you work 70 or 80 hours. And
11 it just happens to balance out. It's all on a part-time
12 basis here in Albany County -- well, not all.

13 MR. NOWAK: How do the full-time salaries
14 compare?

15 MR. KELLY: The full-time salaries are

16 about ten to twelve thousand dollars less than the
17 starting salaries for the assistant district attorneys.
18 MR. NOWAK: How about the number of cases
19 that you are expected to handle? Do you have any average
20 number that you have handled in a year, felonies, as a
21 part-time public defender?
22 MR. KELLY: There will be a difference,
23 depending on where you are within the structure of the

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1 office. I might end up having five murders, six murders,
2 seven murders during the course of the year. As a result,
3 I have a lesser amount of lesser crimes. I might end up
4 with 30 cases, 40 cases, I might end up with 50 cases. It
5 depends on how the draw comes when I have to serve a duty
6 day over in the Albany County courthouse, who I pick up on
7 that day. The bottom line is it fluctuates.
8 Now, across the board, if you go down to
9 the assistant public defenders who are working, for
10 instance, in police court, they are working with a
11 caseload of two, three, four hundred people, and it's just
12 an impossible load. It's simply impossible.
13 It's simply impossible for anybody to do
14 the job adequately, to try and get to meet the clients,
15 try and do the job with the clients, establish the
16 relationship with the client that has to be established if
17 you are going to be effective as a representative on their
18 behalf. It simply does not work.
19 It's an unbearable load and it's extremely
20 unfair load to place on someone, to have all of those
21 bodies, all those human beings, and all of their families
22 who are with them, if you are lucky enough to have some
23 who have families, to have their freedom placed in your

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1 hands and their futures placed in your hands. It's a very
2 heavy load. Most people don't understand that.
3 MR. NOWAK: Thank you.
4 MS. HATHAWAY: You made a statement that I
5 fully agree with -- my sentiments exactly, although I may
6 be coming from a different perspective -- when you said
7 that crime is big business in this country. However, my
8 question to you is -- and I really understand the plight
9 of the public defenders and I also understand the plight
10 of the clients who have to rely upon the services, and I
11 do know that the work is very hard and I have been in
12 situations where public defenders work -- the work that

13 they put out was three times the amount of work, and they
14 work as if they were working for great sums of money.
15 They really were committed.

16 My question to you is: What would you
17 consider a fair and adequate amount of funding if that
18 question comes up -- hopefully it will -- that you would
19 consider that you could begin to work with as public
20 defenders? And if the money were to come forth, how long
21 do you think it would be before the system that you and
22 others that I've heard talk about could be set in place
23 where you could begin to really do what you really said

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1 you want to do?

2 MR. KELLY: Number one, I think in every
3 county across the state, every budget in every county,
4 should say, if you are an assistant district attorney and
5 you are just starting, here's the salary you start at.
6 And if they have 45,000 or 50,000 or 55,000, then for the
7 public defenders the same salary should be given to the
8 assistant public defender.

9 The prosecutor's job is not more important
10 and, in my view, it's less important because the
11 prosecutor doesn't have a human being they are sitting
12 with, with a family that they are sitting with, and they
13 don't have the same amount of time that they have to spend
14 to investigate, to walk a mile in their client's moccasins
15 and try to get engaged in what we call client
16 representation.

17 The bottom line is there's no reason for
18 the disparity in salaries. Defense lawyers are not
19 second-class citizens. When you take somebody out of law
20 school, it's the luck of the draw as to whether you become
21 a public defender or a district attorney, if the truth be
22 known. The bottom line is, why should there be any
23 disparity? There shouldn't be, in my judgment. If

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1 there's a cost-of-living increase for the district
2 attorney, there should be a similar cost-of-living
3 increase for the public defender.

4 Why is there a disparity? Why are we
5 supposed to be treated as second-class citizens when it
6 comes to money?

7 As far as what a fair fee would be under
8 18B, I would suggest that there should be an
9 across-the-board \$100 an hour, whether you are in court or
10 out of court. I think that would be sufficient to attract

11 people, and I think it would be enough so that there isn't
12 an unfair burden.

13 When you start talking about having
14 overhead between fifty and sixty dollars an hour, and
15 let's assume for a second you have 2,000 billable hours a
16 year, you are talking in terms of a hundred thousands
17 dollars. We are all out practicing on our own and trying
18 to keep the overhead down.

19 The bottom line is if you are going to have
20 \$60,000 in overhead -- and a lot of times it's higher than
21 that \$60,000, because who have people beyond the cost of
22 the office. You have the cost of the office staff, the
23 cost of the copy machine, the 401(k)s for the secretaries,

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1 the health insurance, your own insurance, you go across
2 the board and you see that the money comes in and it just
3 kind of passes through. It isn't yours.

4 The bottom line is it simply isn't fair.
5 All of the things that the district attorneys and the
6 judges and everybody else who are on the state's side take
7 for granted, that you have to pay for as a defense lawyer
8 when you are trying to run an office -- they are
9 absolutely clueless about overhead and they seem to think
10 that, you know, that the money all goes to you. It never
11 touches us. It goes right through everybody. You know,
12 we have bills to pay.

13 If you are sitting there and talking about,
14 you know, the overhead on life, you are sitting there and
15 you are worried about how you are going to pay the bills
16 and you are trying to figure out how you are going to pay
17 for this, that or the other thing, or anything that's
18 family-related, and it's just not fair.

19 I mean, when you are being asked to work
20 for \$25 an hour out-of-court or \$40 an hour in-court, as
21 we are right now in a murder trial over in Schoharie
22 county, the bottom line is it doesn't pay overhead. And
23 that simply is wrong.

21

1 MS. HATHAWAY: My other question was: Out
2 of these hearings, if we said, all right, we will give you
3 \$100 an hour -- that's an element of surprise because you
4 weren't expecting that -- then with this money, would you
5 have a plan in place already or an partial plan in place
6 as to how you would use this windfall, so to speak?

7 MR. KELLY: Number one, it's not a
8 windfall, it's fair compensation.

9 MS. HATHAWAY: No, no, no. You
10 misunderstood what I'm saying. I said if -- and there's
11 an element of surprise -- if the legislature were to say,
12 all right, we will give you this \$100 an hour, and you
13 find that you have it, would you have some mechanism in
14 place about how you would begin, is there some groundwork
15 that you already have set up as to how you would begin to
16 use this \$100 an hour, how you would begin to implement it
17 in your staff, get more staff? Because the certain
18 disparity that you feel and everybody else feels because
19 you are human beings is going to rub off sooner or later
20 on the people that you have to represent. So if, all of a
21 sudden, you got this, are you prepared to begin to do
22 something with it?

23 MR. KELLY: I'm not quite sure, frankly, I

22

1 understand your question. Let me try this and you tell me
2 what you are asking. Okay?

3 Number one, there should be an independent
4 fund. If I'm getting paid \$100 an hour to do the work as
5 an attorney, as an 18B lawyer, that \$100 an hour should be
6 money that's going to go to me, my law office, having to
7 live a life. That is not money that should be shared with
8 investigative services, expert services, or any other
9 services. There should be separate funds, adequate funds
10 that deal with that.

11 If the prosecution gets, for example, a
12 five hundred million dollars from the CJS funds, the same
13 amount should go to the defense. There should be a pool
14 there so that everything can be the same, so that we can
15 all work with experts, investigative services, we can all
16 do the job we are supposed to do in order to present a
17 case to a jury.

18 The bottom line is with the disparity of
19 funds, the disparity makes the system completely unfair.

20 Now I'm not quite sure I answered your
21 question and I'll try again. You are saying surprise, if
22 there was a surprise --

23 MS. HATHAWAY: It would be a surprise if,

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1 all of a sudden, we said we are going to give you \$100 an
2 hour, as opposed to \$25 or \$40. That would be a
3 surprise. I think it would be a surprise to all of us.
4 However, you are saying that the public defenders should
5 be put on a par with all the other divisions, is that what
6 you are saying?

7 MR. KELLY: Yes. I think they should be on
8 a par. What I'm suggesting is that public defenders
9 should be paid fairly for what they do. And it doesn't --
10 \$100 an hour -- I think \$100 an hour is the barest minimum
11 that should be paid to people who are sitting out there as
12 18B lawyers. You know, the salary in a public defender's
13 staff is a different setup. But I'm talking about the 18B
14 focus out there, the people who are needed to do the job
15 and who are being very poorly compensated for the work
16 they do.

17 MS. HATHAWAY: I understand. Thank you.

18 MR. GRADESS: I want to take this occasion
19 to introduce Audrey Kibrick, who is here from the League
20 of Women Voters of Albany County.

21 MS. KIBRICK: Thank you. .

22 MR. GRADESS: Would you like to ask
23 questions?

24

1 MS. KIBRICK: I guess I would like to ask
2 you: The \$100 an hour you mentioned, that does not
3 upgrade the office in any way?

4 MR. KELLY: No, it doesn't upgrade the
5 office. It can't. I mean, just as a matter of simple
6 dollars and cents, it doesn't upgrade the office. It just
7 helps to pay the overhead that exists in the office.

8 And are there some people sitting out there
9 who maybe IT would help if they could put a PC in. I
10 assume most people work with PCs nowadays. You have to
11 have a PC, a printer and you have to have access to the
12 Internet. The bottom line is all of that costs money.

13 If we are sitting here getting paid \$25 an
14 hour, that doesn't come close to paying anywhere near what
15 the weekly or monthly or yearly overhead is. We are
16 operating at a loss. There's only so much you can ask one
17 human being to do. You have an entire cross-section of
18 human beings sitting there as the defense bar and saying
19 to them, you folks, you have to take the burden of
20 defending the poor, it's not society's burden, it's yours
21 and yours alone -- that's not right.

22 MR. GRADESS: My staff is already yelling
23 that I have to clarify the record by asking a couple

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1 questions, if I might.

2 You made reference to a part-time service
3 being the model for Albany County for both the prosecution
4 and the defense. And in response to a question, you

5 indicated that there are two full-time public defenders in
6 the public defenders. I wonder, if you could for the
7 record, state the overall staffing of the D.A.'s office
8 versus yours, if you know it, and, to the extent they are
9 also part-time.

10 MR. KELLY: The district attorneys here in
11 Albany, they are all paid as full-time assistant district
12 attorneys. A great majority of them practice outside of
13 that office or share an office or do whatever they do on
14 the side.

15 The public defenders are deemed to be
16 part-time, although we are supposed to spend 30 hours a
17 week working on the job.

18 The great majority of the -- how many D.A.s
19 are there? There are about 25, give or take, I'm not
20 quite sure. There are about 25 district attorneys and
21 there are about 20 assistant public defenders. Both
22 offices need more people, without question, because the
23 caseloads are immense.

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1 In relationship to working part-time and
2 working full-time, I have my own beliefs. I don't think
3 that either office should be allowed to work part-time in
4 any way, shape or fashion. I think if you have an
5 obligation, if you accept the obligation of being either
6 an assistant district attorney or an assistant public
7 defender, it should be a full-time position, it should be
8 fairly salaried, it should be fairly insured, it should be
9 fairly benefitted, similarly benefited for both people. I
10 mean, if the assistant district attorney is in the
11 retirement system, then the public defender should be in
12 the retirement system also. Whatever it is, the benefits
13 should be shared across the board.

14 But if you take on the obligation of
15 working in the system of justice, as such, it should be on
16 a full-time basis, and the compensation should be for
17 someone who is working on a full-time basis, and it should
18 be a compensation that allows both the assistant district
19 attorney and the assistant public defender to make a fair
20 living so that they can live a life.

21 MR. GRADESS: Thank you very much.

22 MR. NOWAK: Let me clarify something. You
23 are indicating that, as a public defender, at least 30

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1 hours a week is expected for part-time work?

2 MR. KELLY: That's correct.

3 MR. NOWAK: Just doing the math, 50 weeks a
4 year, you are putting in your job, at a salary of \$23,000,
5 that means that per hour part-time compensation is about
6 15 or 16 dollars an hour.
7 MR. KELLY: You got it. You are right on
8 the money.
9 MR. NOWAK: That's far less than the
10 assigned counsel rate of \$25.
11 MR. KELLY: You've got it. You are looking
12 right at it.
13 MR. NOWAK: I just wanted to make sure
14 that's correct.
15 MR. GRADESS: Thank you. Kathryn Kase.
16 MS. KASE: Thank you for asking me to
17 testify today. My name is Kathryn Kase. I'm of Counsel
18 to the Albany law firm of Crane, Greene and Parente. I'm
19 a director of the New York State Association of Criminal
20 Defense Lawyers and, in January, I will become president-
21 elect of that organization. I'm also licensed in Texas
22 and the District of Columbia, as well as New York, and I
23 have practiced in Texas before coming to New York.

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1 In my judgment, New York stands at a
2 crossroads with indigent defense. We can go down the
3 road, that poor dirt road laid down by Texas,
4 West Virginia, Mississippi, Alabama, we can continue not
5 to fund indigent defense in this state, and we can suffer
6 the consequences; or we can go in another direction, we
7 can pave a new road where indigent clients in this state
8 feel that Gideon's promise has been fulfilled, where
9 indigent clients see defense lawyers providing competent,
10 ethical representation, and where indigent defense lawyers
11 have the tools to ensure that indigent individuals who are
12 innocent are not convicted.

13 At this time, we cannot be assured that the
14 innocent, albeit indigent, accused are not convicted in
15 this state. And it has to do with the way that they fund
16 indigent defense. Simply put, the fees are too low for
17 lawyers who are appointed counsel under County Law
18 Section 722-b. The fees, as they are currently
19 structured, do not cover overhead.

20 Before I joined Crane, Greene and Parente,
21 I was in solo practice. I still am concerned when I take
22 court appointed cases that I'm not going to be able to
23 cover the overhead that I'm responsible for in the firm.

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1 And now, in addition to being responsible for myself and
2 for my secretary, I'm also responsible for my share of the
3 law firm's overhead as it applies to the photocopier, the
4 computer system and the other individuals and the
5 equipment that we need to operate as a law firm in the
6 State of New York.

7 And I would like to refer this panel to a
8 1996 study by the New York State Bar Association's law
9 office economics and management department. And according
10 to this study, which had a very small sample size -- and I
11 will tell you there were concerns about the margin of
12 error -- but the average hourly overhead for a solo
13 practitioner throughout the State of New York was \$24.45.
14 When I saw that figure, I thought, hmmm, now I know why
15 I'm not able to cover my overhead with 18B fees, because
16 I'm only clearing 50 cents an hour on the \$25 out-of-court
17 reimbursement.

18 And then, according to the New York State
19 Bar Association, the average hourly overhead rises as a
20 law firm gets larger. In other words, there are no
21 economies of scale. Once a law firm becomes larger than
22 six people -- and the firm that I practice with is larger
23 than six lawyers -- overhead, according to the New York

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1 State Bar Association, rises to an average of \$40.74 an
2 hour.

3 So essentially, what we know through this
4 study is that a law firm that takes on a court appointed
5 case is committing to lose money.

6 When we last raised indigent defense fees
7 in this state for lawyers who were not with public
8 defender's offices, the national average hourly charge was
9 \$128 an hour for partners and \$82 an hour for associates
10 with five years or more experience. Those numbers are
11 from a 1985 survey. That was in 1985, 13 years ago. In
12 1997, the average hourly charge for partners was \$207 an
13 hour and \$134 an hour for experienced associates.

14 I can tell you, because I practice with a
15 law firm that does civil work as well as criminal work,
16 that those figures are low. And, in fact, I practiced
17 with a large law firm in Texas and I was billed out as a
18 four-year lawyer at \$125 an hour. Now we may debate as to
19 whether I was worth that, but that's the marketplace.

20 And the irony here is that if my law firm,
21 Crane, Greene and Parente, bid on doing civil work for the
22 State of New York, we would be expected to do civil legal
23 work at market rates. In other words, the State of

1 New York would not expect us to come in and downgrade our
2 hourly fees to \$25 an hour out-of-court and \$40 an hour
3 in-court. The state would accept and expect that we were
4 going to bid based on what we were charging in the legal
5 marketplace. However, this does not appear to apply to
6 the criminal defense lawyer.

7 And I have to say that the real danger here
8 is not only that we have innocent people being
9 investigated, which we surely do, we also have a false
10 economy in this. For those who are persuaded not by the
11 innocent individuals going to prison but by the economic
12 situation, they have to spend hundreds of thousands of
13 dollars on the criminal justice system in appeals and
14 postconviction remedies and, in some cases, applications
15 for a writ of habeas corpus in federal court.

16 I pose the question: Do we want to do it
17 right the first time, or do we want to keep spending money
18 and try to get it right somewhere down the line? So far,
19 New York seems to be answering that question yes in
20 regards to the latter.

21 The incentive for court appointed lawyers
22 is really to either not take any of these cases because
23 they don't cover overhead or, you know, take the

1 occasional case or to do volume work, you know, take
2 hundreds of these cases or tens of them and then quickly
3 run through them in order to get a check. Either way,
4 effective representation can't be provided.

5 We can't expect law firms to take the
6 occasional criminal case, appointed criminal case and
7 provide appropriate representation. It does not happen.

8 I say this to you as one who now only does
9 criminal work. I can't imagine dividing my time between
10 criminal cases and civil cases and trying to remember,
11 when I get on to those criminal cases, all of the various
12 twists and turns of the system.

13 This is tremendously complicated work.
14 It's not something that you just pick up and remember like
15 riding a bicycle. It's something you need to go to
16 continuing legal education for. It's something you need
17 to spend time on. And yet the way the compensation system
18 is set up for indigent defense, we are not supposed to
19 take the practice of criminal law seriously. We are
20 saying, pick it up when you get around to doing it, you
21 know, do it in your spare time when you feel like you are
22 having some sort of generous motivation. That's not
23 right. It's not right for the clients. It's not right

1 for us.

2 The other aspect of the system that you
3 need to be aware of is that the fees that are available
4 for appointed experts are way to low.

5 I was court appointed in a case that took
6 the State of New York ten years to bring to trial. They
7 spent hundreds of thousands of dollars on expert
8 witnesses. I had an excellent judge, I loved him, I
9 thought he made excellent rulings. But when I went to him
10 for an expert witness -- and this was a securities fraud
11 case and I needed an expert witness who understood
12 financial planning -- I could not find, first of all,
13 anyone in the industry who would talk to me when I told
14 him what the statutory fees were for expert witnesses.

15 But then when I went to the judge and said,
16 you know, your Honor, I need more than the statutory
17 hourly rate because financial planners earn hundreds of
18 dollars an hour and no one is going to talk to me for \$40
19 an hour or \$50 an hour, the judge, who had been this
20 wonderful, marvelous judge, suddenly felt responsible for
21 the public purse and he didn't want to give me extra money
22 for an expert because he feared, I think, what OCA would
23 say to him, the Office of Court Administration, or perhaps

1 the administrative judge for the region. He feared that
2 someone was going to look at the fact that he had
3 authorized this expenditure.

4 And here I was with a client whom the
5 government had been investigating for ten years, who had
6 declared bankruptcy, who was indigent, although very
7 intelligent, who kept saying to me, "How can this be
8 happening?" I mean, this was more than 30 felony counts.
9 "How can I be on trial for this many felonies and the
10 judge says that I don't get to have an expert witness
11 because the state can't afford it? How could the state
12 afford to prosecute me for ten years?"

13 You know, this is a question that I, as a
14 defense lawyer, don't have a good answer to. And if the
15 State of New York would like to give me an answer, I would
16 appreciate it because, believe me, clients are not happy
17 when I go to them with this.

18 Someone other than judges needs to make the
19 decision as to whether fees are justified. It should not
20 be these judges. And, in fact, in the federal system,
21 there's discussion in Congress as to whether lawyers who
22 are appointed pursuant to the Criminal Justice Act, should

23 have their fees looked at perhaps by someone in the

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1 clerk's office, as opposed to the federal judges who
2 preside over their cases, because there is some
3 understanding now in Congress that there's a conflict of
4 interest there. And certainly, we need to take judges out
5 of this.

6 And what I would like to -- if Wendy could,
7 perhaps, pass this out to the panel. I have brought a
8 redacted copy of an order that Ray and I received in a
9 case that we have where we started out as capital
10 counsel. The case became a regular first degree murder
11 case, which is to say that they are no longer seeking the
12 death penalty, so now we are compensated under 18B rates.
13 And Ray and I put in a very comprehensive application for
14 enhanced compensation at the federal rates, which is like
15 \$65 an hour in-court, \$45 an hour out-of-court, which I'm
16 telling you doesn't even cover our overhead, but at least
17 it wasn't 40/25. And we felt that based on the fact that
18 this lawsuit had been in litigation for a year by the time
19 they decided not to seek the death penalty against our
20 client, that we were justified in asking for enhanced
21 compensation.

22 Well, I direct your attention to page three
23 of this order, where the Court denies our application for

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1 enhanced compensation and where, in the last line of the
2 last full paragraph on the page, the Court finds that
3 enhanced compensation would, quote be grossly unfair to
4 the many other attorneys who serve on the 18B panel,
5 unquote. Well, I submit to you that that's not the
6 standard. The standard is the facts of the case, how
7 complicated it is, the number of motions that have to be
8 put in, the investigation.

9 And unfortunately, this judge in this
10 case -- and his name is redacted -- is a judge who I
11 respect tremendously and otherwise like and who, I think,
12 tries to do the right thing. But he clearly feels his
13 hands are tied when it comes to enhanced compensation.

14 So here I am now, in the third week of
15 trial, my law firm hasn't gotten any other work out of me
16 because I'm working on this trial and my partners are,
17 frankly, very concerned.

18 Now, as you can tell from my testimony, I'm
19 a very forthright person and I am willing to go to them
20 and say you're just gonna have to live with it, you know,

21 we committed to doing this back in June, 1997, so we are
22 going to see it through. But how many lawyers can do
23 that? How many lawyers can afford to say to their

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1 partners and their associates, I'm sorry, you know, you
2 might have to take out a loan to cover the overhead
3 because I've decided to pursue my calling of defending the
4 indigent? This not right.

5 The system is not right and it needs to be
6 changed. Not only so that I can get up in the morning and
7 look myself in the mirror and say, yes, I'm following the
8 ethical rules, I'm providing competent representation, I'm
9 getting cases investigated, I'm getting experts to assist
10 me in understanding the issues when I need it, but also so
11 that the innocent aren't convicted in this state.

12 I'm here for questions, if you have any
13 questions.

14 MR. GRADESS: Thank you.

15 MR. NOISETTE: I guess I have one
16 question: You talked a lot about the level of payment of
17 18B rates. Are you also concerned about the caps, not
18 simply for expert fees but the caps for attorney fees that
19 exist in 18B cases, as well?

20 MS. KASE: Absolutely. I frequently go to
21 judges and I seek compensation over the caps, and
22 sometimes I'm successful and sometimes I'm not.

23 But the thing is that now that I know the

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1 judges a little bit, I will tell you that some judges will
2 work with you. But what if you don't know the judge?
3 What if you are an inexperienced attorney who doesn't do a
4 lot of these cases and you don't know how to sweet-talk
5 the judge into going above the cap?

6 You know, there shouldn't be a cap.
7 There's no typical criminal defense case, there really
8 isn't. Each case is unique. Each client is unique. How
9 can we arbitrarily impose a cap?

10 And I'm not saying that there should be no
11 oversight. There should be oversight. But the oversight
12 is when you look at the itemized bill. The legal
13 profession has advanced such that we should all be keeping
14 time and we should all be stating very specifically what
15 we are doing with our time. I certainly learned to do
16 that as an associate in Texas. I continue to do it
17 today. I'm not saying there shouldn't be oversight, but
18 we shouldn't arbitrarily say that once your fees rise to

19 this level, sorry, you don't get any more.
20 MR. NOISETTE: My second questions is: You
21 talked about the negative incentive of the current rates.
22 Have you noticed any significant increase in the number of
23 lawyers who are unwilling to do 18B work as a result?

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1 MS. KASE: What I see is an unwillingness
2 of experienced defense lawyers to take these cases.
3 Increasingly, when I go to the courts, I see inexperienced
4 lawyers, lawyers who have only been out of law school a
5 couple of years, taking on the most complicated cases.
6 And these are lawyers who I know professionally, who I
7 know, you know, from the legal community. And there are
8 some of them who don't even have secretaries; they can't
9 even afford it. They don't even have receptionists. They
10 have an answering machine.

11 Now I'm not trying to criticize the way
12 people practice law, please understand me, but in dealing
13 with clients, particularly those who are in jail, you need
14 somebody around to answer the phone and talk to them. I
15 mean, I think a client should be able to call your law
16 office and talk to you. And I have bumped into many
17 clients who have told me, well, the last appointed lawyer
18 I had wouldn't even accept collect calls from the jail.
19 And I ask you, how can this be?

20 I also have other clients who tell me,
21 well, you know, my last lawyer didn't have a secretary, he
22 had an answering machine, so if I couldn't get to the
23 phone at the right time 'cause they didn't let me out to

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1 go use the phone to call my lawyer, I couldn't get ahold
2 of him. How can this possibly be?

3 Try to imagine yourself in a situation
4 where you need a law to do a house closing and not being
5 able to get that lawyer on the phone because he won't
6 accept your call or because he's got an answering
7 machine. You know, really, why is it only indigent
8 defendants who get to experience this peculiar form of
9 help?

10 MR. NOWAK: Just a question: I notice on
11 the redacted order that you provided us on the murder case
12 you are assigned to, the judge, in conclusion, indicates
13 you can spend up to \$300 for investigative services, which
14 is the cap under 722-c, the County Law, and then he says,
15 beyond that, you have to notify the court. Do you think
16 that it would be a fair statement that the prosecution

17 expended an amount far in excess of \$300 for investigation
18 on the prosecution side of the case?

19 MS. KASE: The prosecution continues to
20 spend more than \$300. In fact, their investigator sits in
21 the courtroom next to the reporter for one of the
22 newspapers who are reporting on this case and leans over
23 and comments on the witnesses' testimony. It doesn't

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1 surprise me when I open the newspaper every morning and
2 all that is reported is the testimony against my client
3 and none of the cross-examination and none of the points
4 that the defense makes on behalf of the accused.

5 MR. NOWAK: Would it be fair to say, in
6 your particular case -- did you approach the judge to seek
7 a modification of the order to obtain more than \$300 for
8 investigative services?

9 MS. KASE: I did. But I also had to spend
10 an hour preparing the application, I had to get it out to
11 the judge, I had to encourage his secretary to get it
12 before him -- he's a very busy judge. In other words, I
13 had to jump through a lot of hoops that the State of
14 New York does not have to jump through or that it doesn't
15 require its prosecutors to jump through to get this
16 assistance.

17 And I'm fortunate, I have a secretary who
18 can help me. What if I were a sole practitioner and it
19 was just me and my keyboard? Would I have to decide
20 between asking for additional investigative funds and
21 doing my motion in limine? I'll tell you, when you are a
22 solo practitioner, that's what you have to do. And it's
23 like triage. It's not supposed to be that way.

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1 Gideon says that people have a right to a
2 competent defense. How can we possibly say we are giving
3 this to them?

4 I go home at night and I have to tell you,
5 I cry about this. I'm like Ray Kelly -- I don't have
6 kids, this is my life, I'm committed to this. But I look
7 in the mirror and I ask myself, am I doing any good for
8 these clients if I'm so hamstrung by these rules?

9 My husband always says, "What would you do
10 if you won the lottery?"

11 I'd open the world's largest free law firm
12 for indigent defendants you could find. I'd give it all
13 away.

14 MR. NOWAK: Thank you.

15 MS. HATHAWAY: Please keep in mind that I'm
16 asking from an advocate's point of view, from a layman's
17 point of view: If the 18B rates were increased, how does
18 that assure specifically that the innocent would not be
19 convicted and that competency would prevail?

20 MS. KASE: Well, I think one of the things
21 it does -- and this just in one area -- is it permits the
22 disciplinary panels to start disciplining indigent defense
23 lawyers who provide crappy representation, and it permits

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1 the indigent defense panels to go in there and say, hey,
2 you have the tools, why aren't you using them?

3 In July I spoke to the National
4 Organization of Bar counsel at the ABS meeting in Toronto
5 about the ethical responsibilities of counsel and the
6 failure of states to adequately fund indigent defense and
7 how it causes unethical representation. One thing I was
8 astonished to learn was that bar counsel throughout this
9 country do not discipline criminal defense lawyers who are
10 accused of shoddy representation if the criminal defense
11 lawyers say, hey, I was court appointed, you can't expect
12 me to give anybody even a Volkswagen defense if they are
13 not even paying for roller skates. And then the bar
14 counsel let's them off because the bar counsel says, well,
15 the system made them do it. I think that's one thing that
16 would change.

17 If people had the money for the tools and
18 they fail to use the tools, then I think the bar counsel
19 would lose the free pass that they are now handing out
20 when clients complain about shoddy representation.

21 I think, number two, judges start to expect
22 more because judges say, hey, wait a minute, you are
23 actually getting some money here, you know, when this

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1 client complains to me that he has to file application for
2 a writ of habeas corpus because he hasn't heard from you,
3 I'm going to find out why you don't have a secretary or at
4 least a part-time receptionist, I'm going to find out why
5 you don't have these tools.

6 And I think that I do agree with Ray Kelly,
7 that \$100 an hour basically covers what we are trying to
8 do now, those of us who are responsible in the system.
9 But I think it does raise expectations on the other side
10 of the system. And right now, expectations are low
11 because everybody knows that no matter what they say to

12 the media, these low rates are not permitting competent
13 representation. So that's my view of it.

14 Have I answered your question?

15 MS. HATHAWAY: Yes. I just have a
16 suggestion, as a lot of people do, myself included. When
17 you want to ask for something, rather than ask for the
18 bear minimum, you don't know if you are going to get it or
19 not, always ask for much more and maybe, by the time the
20 decision comes down, you will get something you can deal
21 with. Thank you.

22 MR. GRADESS: Two quick questions: When
23 Ray Kelly testified, he indicated he didn't want to be

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1 judgmental about voucher cuts and then didn't talk about
2 it. I wonder if you have had experience with the cutting
3 of vouchers as an assigned counsel.

4 MS. KASE: I have had voucher cuts and I've
5 had judges cut them arbitrarily and not tell me why they
6 were cutting them. So I'm at a loss to understand whether
7 I'm supposed to go to hearings because I'm not supposed to
8 run up my fees. Maybe I'm not supposed to talk to my
9 clients so much.

10 But I have had voucher cuts and they have
11 been arbitrary. And it seems to me, my general
12 understanding from the judges who have cut those vouchers
13 is that they just have a feeling that the rates are too
14 high.

15 I should tell you that I use a time and
16 billing program called Time Slips. I've recently switched
17 to Tabs. This is an itemized billing program. It's made
18 really for civil law firms who deal with insurance
19 companies and the type of clients that my firm, Crane,
20 Greene and Parente, deals with. So I'm not giving them
21 vague bills, you know, I drove to the jail, saw the
22 client. I'm giving them very, very specific bills to the
23 tenth of the hour. And yet the overall fee for

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1 out-of-court representation is usually what's cut. It
2 will just be cut and I won't know why.

3 And it's very delicate for me to go back to
4 a judge and to demand on the record that he state why he
5 cut the bill. I mean, what really is my remedy? To go to
6 the Third Department Appellate Division and take an
7 Article 78 against him? I mean, there's no good response
8 to that. So I generally accept the fee cut and then I go
9 back to my law firm and explain why it got cut.

10 I will give you one example with an
11 appellate case. I got a three-two division out of the
12 Third Department. It took the Third Department six months
13 to issue its decision. Normally, they issue their
14 decisions in six weeks. The word on the street is that my
15 case was something people really talked about up there.
16 Do you know that the Third Department cut my bill for that
17 appeal?

18 MR. GRADESS: I can believe it. I'd be
19 interested if you could give us the numbers.

20 MS. KASE: I don't have them with us. The
21 bill -- when they cut the bill, the bill was less than we
22 would have charged a client to take an appeal to the Third
23 Department Appellate Division. When they cut the bill, my

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1 law firm went, "What? How did this happen?"

2 I was like, "I don't know." But what can
3 you do?

4 MR. GRADESS: We have had a lot of
5 testimony about that. If you could supply us with that,
6 we would be very grateful.

7 MS. KASE: I'll look for it and redact it
8 so no work product is in there, and I'll get that to you.

9 MR. GRADESS: Thank you. In the case where
10 New York State pursued a ten-year investigation and you
11 were denied 722-c services, did there ever come a time
12 when the investigation was made to you or do you have that
13 number?

14 MS. KASE: I do not have the number. Let
15 me tell you what ultimately happened in that case was that
16 I shared an expert witness with one of the codefendants,
17 with whom, I might add, we were adverse on some issues.
18 We weren't adverse on the general issue that the expert
19 was testifying on. I will see if I can find that file,
20 Mr. Gradess. That case is now on appeal, so I obviously
21 don't have the file anymore, but I'll see what I can find.

22 MR. GRADESS: Thank you. And if you win
23 the lottery, will you make sure that I'm the first one you

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1 call?

2 MS. KASE: Yes.

3 MR. GRADESS: Thank you. Alice Green.

4 MS. GREEN: Good morning. First of all, I
5 want to thank you for the invitation to be here this
6 morning. I appreciate this opportunity very much.

7 I'm the executive director of the Center

8 for Law and Justice. And prior to assuming that position,
9 I was also the manager of the Albany office of the
10 New York State Civil Liberties Union. I also served as
11 the chairperson of the local NAACP legal redress division
12 for a number of years. And in all those capacities, I've
13 had the opportunity to listen to a number of complaints
14 that have come to me from people in the communities that I
15 serve.

16 The Center for Law and Justice is a
17 community-based criminal justice practice that serves to
18 do three things:

19 One is to educate low income communities,
20 particularly communities of color, about the legal and
21 criminal justice system. So we provide a number of
22 educational kinds of programs in the order of seminars,
23 community meetings, workshops, printed materials, what

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1 have you.

2 We also serve as an advocate for people who
3 have problems or issues that they would like to address in
4 light of the legal or criminal justice system. We do not
5 represent clients. We do not have a legal staff, other
6 than we had have a part-time attorney who works in our
7 office.

8 The other thing is we work with the
9 community to organize around certain legal or criminal
10 justice issues, and our center is able to provide some
11 kinds of technical assistance in those circumstances.

12 The center is 13 years old. Each year, we
13 receive somewhere in the order of 3500 or more requests
14 from the community for information or assistance in some
15 way.

16 Obviously, when you are an agency, an
17 organization like ours, it's very difficult for people to
18 understand exactly what you have to offer. And we work
19 with a population that's interested in receiving legal
20 assistance in whatever forms that is for a number of
21 different kinds of problems.

22 Of those 3500 calls and requests for
23 assistance that we get, approximately 2,000 of them come

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1 from people who are in jail or in state correctional
2 facilities. The remainder, the 1500, is probably evenly
3 divided between clients who call us with some criminal-
4 related problem and others which are civil cases. People
5 might ask us how to go about finding an attorney, or they

6 might want to complain about discrimination in the
7 workplace, those kinds of issues.

8 Regarding the public defender's office, we
9 do attempt to develop a cordial working relationship with
10 the area public defenders' offices. And we have been able
11 to do that usually, through the time that we have been in
12 existence. We basically serve as an intermediary between
13 the public defender's office and the defendants or their
14 family members.

15 I thought what I would do this morning is
16 to give you some idea of the kinds of complaints or
17 requests that we do get related to public defense.
18 Basically, I think people call us for three major reasons
19 related to public defense.

20 One is they are looking for us to provide
21 them with information and, also, to request legal
22 assistance. As I mentioned before, the community is
23 oftentimes very confused about what the center provides or

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1 what the public defender's office provides, as a matter of
2 fact, so they are asking us if we will represent them. So
3 we have to explain to them how the public defense system
4 works and that we don't provide that kind of assistance.
5 Many do not understand that they might be entitled to an
6 attorney. They are just not sure how the system works,
7 especially if it's the first time they have been involved
8 in it.

9 A lot of the calls we get are from family
10 members, not understanding what is going to happen if some
11 member of the family is arrested or they think is about to
12 be arrested, which is the other reason they call. Some
13 people call seeking information before an arrest takes
14 place. Someone might have heard that there is a warrant
15 out for their arrest, or they might even be a fugitive or
16 they expect that they are going to be arrested at some
17 point in time. So they call our office trying to
18 understand what is going to happen if they end up in the
19 system.

20 Again, we receive a number of calls from
21 people who simply want to understand how the Criminal
22 Procedure Law works and what's going to happen when they
23 go to court. So we might have to oftentimes walk people

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1 through that whole process.

2 The second major reason we get calls from
3 the public is to express what I call fear and mistrust of

4 the public defender's system. For instance, there is this
5 public view that public defenders are not really
6 attorneys. And I think you have probably heard all this
7 before. But people are always calling to ask, what is a
8 public defender? Is that a real lawyer or not?

9 They understand or believe that the public
10 defender or the person they are going to get to represent
11 them is going to be inexperienced, they are going to be
12 incompetent, and they really won't work in their behalf.
13 Some of the exact language a lot of people use is like,
14 "I'm afraid this person is not going to work for me."
15 They even ask us to represent them. Even though we tell
16 them that we don't represent clients, they say, please
17 represent me or make a referral because I'm afraid that
18 I'm going to have to have a public defender. The fear is
19 that strong.

20 Oftentimes, people call and ask us to refer
21 them when they know they can't afford an attorney. They
22 are convinced that if they can find a person of color,
23 that that person will understand the problem and represent

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1 them pro bono. We find that's a common misconception of
2 how the system works.

3 The other problem is people feel that the
4 public defender representing them is politically connected
5 and, therefore, they will not work in my behalf. Being
6 from a political town, I think you can understand the
7 depth of that fear.

8 The other thing we get a lot of is that the
9 perception is that the public defender and the district
10 attorney's office is very much connected, that the
11 attorney who works as a public defender probably used to
12 work for the district attorney or vice versa, and that
13 they relate to each other socially, and that there's just
14 no way that I'm going to be adequately represented because
15 of that connection.

16 As a matter of fact, a few years ago, as
17 some of you might remember, when there was a Mr. Rudnick
18 as the public defender in Albany County, there was also a
19 Mr. Rudnick who served as an assistant D.A., and people
20 were convinced that that relationship confirmed what they
21 thought was happening between the D.A.'s office and the
22 public defender's office.

23 We also get asked to serve in a kind of

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1 oversight or monitoring role. People are desperate to

2 find someone who can watch out and see that the system
3 actually works for them. And it's very, very difficult
4 dealing with clients who want us to do that. It's very,
5 very difficult for them to understand that we cannot take
6 on that role in our office, that attorneys are not always
7 going to be willing to share information, even if they do
8 give consent. But they are looking for someone who can
9 help them trust and believe that the system will actually
10 function and work for them.

11 The third area is that most of the clients
12 who call our offices really want to complain. They want
13 to complain about the public defender's office and the
14 kind of service they are receiving and the treatment
15 that's given to them.

16 One of the first things that happens when
17 someone does make contact with a public defenders of
18 course is they reach a receptionist or a secretary. And
19 many people are left with the belief that the whole office
20 is extremely hostile because the receptionist is the
21 person that they have to deal with most often. And that's
22 certainly a perception that I've found to be true across
23 the board.

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1 I know, even in our office, when we contact
2 some public defender's offices, that it's very, very
3 difficult to talk to a receptionist because they are
4 hostile. We have had encounters in both Schenectady and
5 Rensselaer counties on this issue. Albany has been -- the
6 receptionist has been very helpful and cordial, but we
7 have had difficulties in getting the treatment that we
8 think we deserve from the receptionists in both of those
9 counties.

10 There's also communicated to us a great
11 deal of confusion about assigned counsel and public
12 defenders. They are not sure who represents them. Most
13 of the time, we find out that our clients do not know the
14 name of the public defender who is assigned. They are not
15 even sure when an assignment is made. That's the other
16 problem. When you go into the court the first time, you
17 might see some representative from the public defender's
18 office and your expectation is that that person is there
19 to represent you. But when you go through two or three
20 public defenders, you are very, very confused about who is
21 actually representing you. So there's a great deal of
22 misunderstanding and confusion there.

23 The other big area, of course, is

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1 communication. We will get reports from the public that
2 the attorney has not spoken to me and, you know, I have a
3 court date and I don't believe anything is going to happen
4 because I have not even had the opportunity to talk to my
5 attorney, they don't return phone calls -- which I think
6 you've probably heard. But we get told these things over
7 and over again -- I tried to reach my attorney by phone
8 but I was told they will call me back but this never
9 happens.

10 So there's a failure on the part of the
11 public defenders, according to our clients, to really
12 communicate the issues of the case. They do not
13 understand what issues can be raised or what is really
14 going on. They complain that the attorneys often seem
15 hostile and uncaring about their case, they are hurried,
16 suggesting that they do not have enough time.

17 And even public defenders have talked to
18 us, once we have been in contact with them, and admitted
19 to us that they are overwhelmed, you know, they have a
20 large caseload, there's very little time and they just
21 can't spend that much time talking to individual clients.

22 A number of people complain that the public
23 defenders are insensitive, not only to them but to their

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1 family members, that they won't talk to them. And I know
2 one public defender did tell me that, you know, I have no
3 obligation to talk to someone's mother and, therefore, I'm
4 not going to, you know, that kind of thing.

5 Again, we hear this phrase over and over
6 again: "They are not representing me the way that they
7 are supposed to." They are not quite sure what that
8 means, but they are left with the feeling that something
9 is not right. "They ignore me when I talk about
10 witnesses. They don't hear me when I say I'm innocent."
11 And there's that feeling that, something is going on here
12 and I'm going to have to suffer for it.

13 The other area is there has been reported
14 to us a great deal of insensitivity on the part of the
15 public defenders regarding the culture and language of our
16 clients. As a matter of fact, I understand that. Because
17 we did have one public defender who called us, asking us
18 if we could interpret black English because they couldn't
19 understand what their clients were saying and they kept
20 explaining to the client what some of the issues were and
21 what was going to happen and the client was not
22 understanding, and they were not understanding the
23 client. So it's that kind of thing, in terms of

1 communication, that we hear over and over again.

2 The other thing, of course, that many of
3 our clients complain about is that they believe that they
4 are forced to plea bargain. "I'm innocent. No one is
5 hearing me. I really didn't understand that I was being
6 asked to plead guilty."

7 We recently had a 16-year-old boy who was a
8 client of the public defender. His mother called us and
9 explained to us that her son was developmentally disabled
10 and that the attorney would not talk to her. Her son was
11 not able to communicate his problem and his condition and
12 he ended up pleading guilty and she didn't know how to
13 deal with that. So that's another kind of problem. But
14 certainly, plea bargaining is certainly one of the major
15 issues that's raised with our office.

16 The other thing we hear is that our clients
17 feel that their right to a preliminary hearing has been
18 waived without their knowledge and consent. That's
19 something we hear over and over again from so many
20 people. They also call our office, hoping that we can
21 help them with their complaints and maybe help them to
22 formally complain about the treatment they have been given
23 by their attorney. So they are always looking for that.

1 "How do you do it? Where do you go?"

2 They are also asking us how to change
3 attorneys because there's a conflict, either because of a
4 lack of communication or a feeling that there is
5 hostility. Many people want to find out how to actually
6 change their attorney.

7 In terms of jail clients, during the summer
8 of 1996, the center sponsored a program on issues of
9 public defense with the chief public defender in
10 Rensselaer County, and the meeting was intended to serve
11 as a general informational session for inmates who were
12 clients of the public defenders in their county. During
13 that meeting, the jail inmates expressed the following
14 concerns, which I think sort of summarizes a lot of things
15 we hear from clients who might not even be in jail.

16 They said that public defenders are not
17 available when the inmate called their offices and it's
18 difficult to ascertain when the attorneys are available
19 for telephone calls. Telephone calls are a major source
20 of tension and frustration. Oftentimes, when the clients
21 ask the secretaries for any information that the office
22 has on the court date, et cetera, there's no information
23 in the client's file, they claim. And some of them claim

1 that the secretaries have no record of them at all.

2 As a matter of fact, yesterday, we got a
3 call from the Albany County Jail, from a person who has
4 been there for 11 months and is being represented, I
5 think, by the Albany County Public Defender's Office, but
6 there is who record of him at the Albany County Public
7 Defender's Office. And so the client called their office,
8 waiting and waiting for the attorney to get back to him,
9 but that hasn't happened. So it's been 11 months.

10 And often clients do not know the name of
11 the public defender assigned to their case, as I mentioned
12 before. They generally won't answer any written
13 correspondence from the inmates.

14 Inmates complain that they do not have any
15 time to discuss their cases with their public defenders
16 before their court dates and, as a result, do not
17 understand the charges against them, the meaning of
18 certain procedures. And a comment is that their right to
19 a preliminary hearing is often waived without their
20 knowledge and consent. And, again, there is the issue
21 regarding forced pleas.

22 What we tried to do is to interest the
23 public defender in spending some time at the Rensselaer

1 County Jail, which he agreed to do. As a matter of fact,
2 he committed himself to being there every two weeks to
3 meet with the inmates at the jail, to discuss their case
4 and answer their questions. But it's our understanding
5 that that happened for about two or three weeks and then
6 the program was dropped. And so we are back to square
7 one.

8 So these are some of the issues that are
9 raised by our clients that come to our attention. I do
10 not work necessarily, at this point, directly with many of
11 the clients. The attorney in our office handles most of
12 those cases. But that's the information that we get.
13 Thank you.

14 MR. NOISETTE: Just want to thank you for
15 giving us a client's point of view. I think that these
16 hearings really benefit from hearing the client's point of
17 view. I'm not sure I have a question, so thank you very
18 much. Well, I do.

19 What do you take from this, in terms of
20 recommendations or a recommendation that could be made in
21 terms of improvement of the public defense system? And I

22 guess, implicit in my question is the fact that most folks
23 who work for public defenders are doing it for legitimate

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1 and noble reasons, and so these problems are symptoms of a
2 greater problem. What do you glean from the series of
3 complaints you hear, and what recommendation, or series of
4 recommendations could you make?

5 MS. GREEN: Well, to scrap the whole system
6 probably. First of all, I think there should be an
7 adequately public funded comprehensive program that will
8 address the legal needs of poor people.

9 But short of that, certainly I would hope
10 that we could have full-time public defenders, where
11 people do work full-time. I don't believe that it can
12 work part-time. Most of the time, people are complaining
13 that they haven't had an opportunity to talk to an
14 attorney or reach an attorney. And it's very difficult
15 for us, and we are in the office all day, to get a call
16 back from a public defender or find out where they are.
17 And usually, you know, they have a part-time -- they have
18 their own private office, and you just can't convey that.
19 So I think a full-time office is needed.

20 And I think that attorneys certainly need
21 to be paid much more than they are paid now under the
22 part-time system.

23 The other thing I would hope is that there

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1 would be some way that the clients and the people that I
2 deal with would be able to get some legal advice and
3 information prior to an arrest. When you call the public
4 defenders, they say, well, if you haven't been arrested
5 yet, I'm not going to give you any information. And I
6 think that's another major concern of mine. I would hope
7 that they would be able to serve clients prior to an
8 arrest when they need some information.

9 MR. NOISETTE: Thank you.

10 MR. NOWAK: I would just like just to say
11 thank you for coming. And I share Mr. Noisette's
12 feeling. I know there are a lot of people who are doing
13 the work, as Ray Kelly talked about, in the trenches every
14 day, who are trying very hard. But it's important to
15 remember that on the other side of the equation there are
16 clients who are not happy and to try and solve the
17 dilemma. Attorneys who don't know that clients are
18 feeling that way, that's is a serious problem that needs
19 to be addressed.

20 I noted that you did indicate that the
21 majority of your calls come from the jail. And I wonder,
22 is the client's complaint that the lawyers won't come to
23 the jail to discuss their cases with them?

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1 MS. GREEN: Right. They won't come and
2 it's difficult to get a phone call from them.
3 MR. NOISETTE: So there's very little
4 communication between clients who are in jail and their
5 public defenders, so that you get the phone calls?
6 MS. GREEN: Right.
7 MR. NOWAK: I noticed you did discuss about
8 the Rensselaer County Public Defender, about going to the
9 jail. Have any other public defenders been approached
10 about having a program in the jail that required their
11 staff to go to the jail on a regular basis?
12 MS. GREEN: No, other than Rensselaer
13 County. That's the only one that we know of.
14 MR. NOISETTE: But has your organization
15 tried to start a dialogue to talk to them about that?
16 MS. GREEN: No. As a matter of fact, that
17 wasn't our idea. During our discussion with the
18 Rensselaer County Public Defender, he stated that he would
19 do that.
20 MR. NOISETTE: And obviously you need the
21 cooperation of the county sheriff who runs the jail.
22 MS. GREEN: And I'm not sure whether they
23 do it in any of the other counties or not.

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1 MR. NOISETTE: Thank you.
2 MS. HATHAWAY: Ms. Green, I just want to
3 thank you for everything that you said and I know I've
4 heard it almost verbatim, that this is a difficult thing,
5 not only in this county but all of the counties. And I
6 want to assure you that the legislators do hear, and they
7 choose maybe not to hear for whatever reasons. But
8 hopefully, out of this, the issues that you have presented
9 will be heard and will really be heard and not just pushed
10 aside. Thank you.
11 MS. GREEN: Thank you.
12 MS. KIBRICK: Thank you for coming,
13 Ms. Green. I think it's not just a question of money,
14 there's a lot more that can be done. And I agree with you
15 about bringing attorneys into the jail. It's not just a
16 question of money. But we need more money serving the
17 people and serving them better.

18 MR. GRADESS: Ms. Green, let me ask you a
19 question, if I could follow-up: On these pre-arrest
20 calls, I wonder if you could develop that a little bit
21 more for the record. Who do you talk to? What exactly
22 happens when a client calls you? They fear they are gonna
23 be arrested, they want access to the public defenders.

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1 Could you clarify that just for the record?

2 MS. GREEN: Yeah. We get an occasional
3 call -- I don't know how many we have had over the years.
4 But they are people who hear through the grapevine, or
5 whatever way they get the information, that there's a
6 warrant out for their arrest. They are not quite sure how
7 best to handle it, whether they should go and give
8 themselves up. They would like to talk to someone about
9 what this means legally.

10 So what we usually do is we operate with a
11 number of volunteer attorneys, and if we have a volunteer
12 attorney that we can connect that person up with, that's
13 great, so that they at least get some legal advice, which
14 we do not give.

15 I've had people call our office, someone
16 who was a fugitive from justice, and decided they wanted
17 to give themselves up, again, wanting advice and help of
18 an attorney.

19 And then there are those who just, for
20 whatever reason, they feel, you know, they are in a
21 situation and they expect that they are going to be
22 arrested at some point. They want to know more about how
23 the process works, what can they expect to happen if they

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1 should eventually be arrested. So that's the kind of
2 thing we are talking about.

3 Sometimes we suggest that people call the
4 public defender's office. And from what we gather, the
5 public defender's office usually will not speak to someone
6 about this issue. And it's been reported that the public
7 defender has said, basically, you know, once you are
8 arrested, then you might be able to get a public defender
9 assigned, that type of thing.

10 MR. GRADESS: Thank you very much. Gary
11 Brown.

12 MR. BROWN: Good morning, everybody. I'm
13 Gary Brown. I'm the executive director of the Fund for
14 Modern Courts. And on behalf of our board of directors, I
15 really want to thank you for the opportunity to speak this

16 morning.

17 As many of you may know, Modern Courts is a
18 nonprofit, nonpartisan organization devoted to improving
19 the New York State court systems. In 1975, Modern Courts
20 pioneered a program known as court monitoring, through
21 which we examine the day-to-day operations of the court
22 through the eyes and ears of citizen volunteers. The
23 concept is simple: Volunteers are recruited around the

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1 state to observe court proceedings on a regular basis.
2 The monitors assess the courts from the point of view of
3 outsiders to the system and recommend improvements to make
4 the courts more efficient and user-friendly. After
5 several months of observations in a particular court, the
6 monitors' findings and recommendations are published and
7 released to court administrators, lawmakers, judges, bar
8 associations, civic groups and the media.

9 Today, our volunteer court monitors --
10 almost all nonlawyers and outsiders to the court system --
11 number almost more than 600 and are active in 16 counties
12 across the state. Through this unique program, Modern
13 Courts learns about the travails of ordinary people who
14 use the court systems, including the criminal court. We
15 also hear much from the monitors about the state of public
16 defender services. I would like to take this opportunity
17 to share with you some of the recurring findings and
18 recommendations which our monitors have made in recent
19 years.

20 If there is one overriding theme to the
21 monitors' reports, it is that public defense attorneys
22 are spread too thin to ensure justice for all indigent
23 defendants. In no fewer than 11 recent projects, on

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1 courts ranging from the New York City Criminal Court to
2 the Rochester City Court, monitors have found that
3 attorneys representing indigent defendants are not nearly
4 as well-prepared as one might hope under ideal
5 circumstances. The problem, as perceived by the monitors,
6 is not that public defenders are lacking in talent or
7 dedication; indeed, the performance of public defenders is
8 generally praised by the monitors. Instead, the monitors
9 find that public defenders often seem harried and
10 overburdened by crushing caseloads and, as a result, are
11 unprepared or not fully prepared when they appear in
12 court. Thus, monitors have repeatedly called for
13 increased funding for agencies which provide legal

14 representation to indigent defendants.
15 For example, monitors who observed
16 proceedings in the Beacon and Poughkeepsie City Courts
17 observed that assistant public defenders often did not
18 have adequate preparation time before cases. Besides the
19 apparent injustice to criminal defendants being
20 represented, these situations caused adjournments that
21 significantly delayed the courts' calenders.
22 Monitors who observed proceedings in
23 Brooklyn Criminal Court found that while many Legal Aid

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1 attorneys seemed to know their cases well, it was not
2 infrequent to see attorneys meeting with their clients for
3 the first time just before going before the bench. When
4 called before the bench, they were discussing a lot of
5 information with their clients instead of gathering
6 information beforehand. It also appeared that Legal Aid
7 attorneys were harried, running from courtroom to
8 courtroom for different cases. Monitors wondered whether
9 indigent defendants can receive adequate representation
10 under such conditions.

11 And monitors who observed proceedings in
12 the Rochester City Court noted that assistant public
13 defenders are handling more than twice the maximum number
14 of cases recommended by the National Legal Aid and
15 Defenders Association (their caseload averaged over 800
16 cases per attorney per year).

17 To improve these conditions, the monitors
18 have consistently called on state and local governments to
19 provide increased funding for agencies which provide legal
20 representation to indigent defendants.

21 However, the monitors have found that heavy
22 caseloads are not limited to public defense attorneys.
23 Some private attorneys assigned by the court to represent

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1 indigent defendants (18-b attorneys) were also observed to
2 be overburdened with cases and occasionally unprepared in
3 court. The monitors are especially concerned that the
4 fees paid for out-of-court time are so low as to
5 discourage lawyers from adequately preparing for court.

6 Based on their observations, the monitors
7 believe that an increase in the fees paid to assigned
8 counsel is long overdue. The current fees of \$40 per hour
9 for in-court time and \$25 per hour for out-of-court time
10 are outrageously low, and are grossly unfair to the
11 lawyers affected. And the rates are equally unfair to

12 their clients, who must question whether their attorneys
13 can afford to pursue the most vigorous possible defense.

14 An increase in 18B fees would encourage
15 more lawyers -- and more experienced lawyers -- to serve
16 as 18B attorneys, and would undoubtedly improve the
17 quality of representation received by indigent defendants.

18 As our Dutchess court monitors observed,
19 the Legislature should provide suitable compensation for
20 assigned counsel, and the pool of 18B counsel should be
21 expanded. A higher pay scale would attract more attorneys
22 to this important work, and thus better distribute the
23 assigned cases. Increased compensation would also

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1 encourage these attorneys to do necessary out-of-court
2 preparation.

3 Similarly, monitors on Staten Island stated
4 that increased 18B fees would encourage lawyers to give
5 more attention to preparing their cases in between court
6 appearances.

7 The monitors have emphasized that these
8 conditions adversely affect not only the quality of
9 justice received by defendants, but the overall efficiency
10 and administration of criminal courts. Monitors in
11 several counties have observed that court delays often
12 occur because public defenders are not present when
13 scheduled to appear or are not prepared to go forward even
14 if present. For example, monitors on Staten Island
15 described defense attorney unpreparedness as a chronic
16 problem which results in many delays and adjournments, and
17 monitors in Brooklyn reported that delays frequently
18 occurred because Legal Aid attorneys were not present when
19 scheduled to appear. The monitors believe that increased
20 funding for agencies which represent indigent defendants,
21 and increased 18B fees, would do much to improve the
22 overall administration of justice in New York.

23 The monitors have made several other

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1 findings and recommendations which pertain to the criminal
2 justice system. For example, the monitors have
3 consistently found that the courts are short of foreign
4 language interpreters, resulting in long delays or in
5 cases needing to be adjourned until a particular date when

6 an interpreter will be present. And in some courts,
7 particularly in town and village justice courts, monitors
8 are seeing that friends, relatives, judges and even people

9 seated in the audience are occasionally used to interpret
10 in a case. The monitors have deep concern about the
11 propriety and fairness of using amateur interpreters,
12 noting that crucial intentional or unintentional
13 misstatements could occur when anyone other than a trained
14 interpreter is used. The monitors urge that professional
15 interpreters be used in all criminal cases (even if some
16 of the interpreters are hired on a per diem basis instead
17 of full time).

18 The monitors also have expressed great
19 concern about the inconsistent quality of justice that is
20 administered in town and village courts across the state.
21 The town and village courts operate, for the most part, as
22 independent fiefdoms, and monitors have found that
23 conditions vary widely. In some town and village courts,

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1 such as those in Dutchess, Putnam, Monroe and Westchester
2 counties, monitors have found that judges set too informal
3 a tone for proceedings (e.g., refusing to allow
4 proceedings to be transcribed, not wearing robes,
5 inadequately administering and/or explaining the rights of
6 defendants), seem overly friendly with prosecuting
7 attorneys, and even make jokes at the expense of
8 defendants or say inappropriate things to them. Other
9 judges have been found to purposely conduct proceedings
10 that are inaudible to members of the public, thus creating

11 the impression that the proceedings are private.

12 The monitors have recommended that,
13 ultimately, the town and village courts be made part of
14 the Unified Court System, or at the least be made part of
15 a county-level administrative structure. The monitors
16 believe that additional oversight is necessary to ensure
17 that defendants will receive a uniformly high quality of
18 justice, regardless of which town and village court they
19 appear in.

20 I thank you again for the opportunity to
21 present the views of our citizen court monitors, and I'd
22 be glad to answer any questions you have.

23 MR. NOISETTE: I just have a couple

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1 questions. During any of these studies, has there been
2 any examination of situations where indigent clients or
3 defendants were forced by the structure of the court to
4 appear without counsel, and are there any findings or
5 concerns with respect to that phenomenon?

6 MR. BROWN: They have seen it on occasion.
7 I can't tell you that it's been a recurrent theme in the
8 report. They have seen it on occasion, and I might add
9 not just in town and village courts but even, on occasion,
10 in county courts.

11 One other thing I would like to add is the
12 findings I just referred to basically include reports that
13 have been published to date, but the monitors, as we
14 speak, are in a number of courts, including the Suffolk
15 and Westchester courts, and without giving much -- the
16 reports haven't been written yet and the projects aren't
17 concluded, but suffice it to say that what I've read to
18 you this morning is going to be reiterated in the courts
19 that I've just mentioned.

20 MR. NOISETTE: A second question I have
21 is: Particularly with regard to the need of lawyers
22 speaking with their clients in court, has there been any
23 examination of the court facility and the adequacy or

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1 inadequacy of the interview space or other amenities,
2 particularly in the criminal courts in the state?

3 MR. BROWN: In fact, the monitors noted in
4 virtually all the courts they go to, with rare exceptions,
5 that there simply isn't enough space for attorneys to
6 confer with their clients. And monitors are embarrassed
7 when they sometimes overhear confidential discussions.
8 But a consistent comment by the monitors is that the court
9 system needs to create adequate space for attorneys and
10 clients to confer in private.

11 MR. NOISETTE: Thank you.

12 MR. NOWAK: I have no questions. That's
13 what I was going to get into.

14 MS. KIBRICK: I have monitored local courts
15 and, yes, everything you said is correct -- judges at
16 times being inappropriate, everything you said. However,
17 I would like to ask you, if I can: Have there been any
18 studies done on cost implications that you did bring up
19 about the adjournments, the case adjournments? There are
20 so many of them.

21 MR. BROWN: I haven't seen any actually,
22 like an accountant's study.

23 MS. KIBRICK: That might interest me.

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1 MR. BROWN: Maybe OCA has done some.

2 MS. HATHAWAY: From the conclusion of these
3 studies, do the monitors, are they allowed -- as part of

4 their studies and reports, are they allowed to make any
5 recommendations for the issues that they have concluded?
6 MR. BROWN: What we do is, in each report,
7 in the end, we have a series of recommendations that the
8 monitors make. In order to make a better job of drawing
9 out those recommendations, what we do is not only compile
10 the written forms that the monitors send to us when they
11 go to court each day, but we are now beginning to meet
12 with monitors to develop those recommendations and bring
13 them to court administrators and legislators to try.

14 There's a saying tacked on the wall of my
15 office that "court reform is for the short-winded." I
16 think those words are probably truer than we would like to
17 believe.

18 MS. HATHAWAY: Do you see any of the
19 slightest indication that someone in New York is paying
20 attention to what you are doing?

21 MR. BROWN: Many of the monitors'
22 recommendations, I'm pleased to say, have been
23 implemented. That can range from family courts where,

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1 parents are provided rooms to wait with their children, to
2 training programs for nonjudicial court employees, to
3 security changes. It's really run the gamut. But one
4 area where we really found a lot of resistance is in the
5 area of providing increased funding.

6 MR. GRADESS: One question: Does the fund
7 itself have a position on the justice courts? The way you
8 presented it, it sounds like the monitors' recommendation
9 is to fund them and take that issue on. Do you have a
10 position?

11 MR. BROWN: Here's what we are going to
12 do. To date, it has not been an issue that the board of
13 directors has really focused on. What we are in the
14 process of doing -- and it was a project that was made for
15 the next week -- a similar compilation of recommendations
16 is going to be presented to our board of directors, which
17 is then going to decide which of those recommendations to
18 adopt for conclusion in the board's agenda. And I suspect
19 that the town and village courts are going to make the
20 cut.

21 MR. GRADESS: Thank you. We are going to
22 take a ten-minute break.

23 (A recess was held from 11:05 a.m. to

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1 11:15 a.m.)

2 MR. GRADESS: Steve Pittari.

3 MR. PITTARI: Good morning. My name is
4 Stephen J. Pittari. I'm proud to say I've been a public
5 defense attorney for 30 years. I'm the chief attorney and
6 executive director of the Legal Aid Society of Westchester
7 County. Since 1973, I've been head of the criminal
8 division of the Legal Aid Society of Westchester County.
9 The criminal division provides the representation on
10 felony cases in over 40 local courts in all of the parts
11 of the superior courts and, of course, when necessary, in
12 the appellate courts.

13 Additionally, since 1982, I've been an
14 administrator of the assigned counsel panel, the so-called
15 18B attorneys, for Westchester County. The panel in
16 Westchester County consists several hundred attorneys who
17 handle 16,000 cases per year. The cases that the panel
18 attorneys handle in Westchester County, because it's a
19 bifurcated system, involve the misdemeanors in all the
20 local courts, city, town and village. They do felony
21 cases, not only conflicts with the Legal Aid Society, but
22 in its work they do about 14,000 cases per year.

23 I'd just say at the outset, I heard the

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1 last two minutes of Gary Brown's statement based on the
2 Fund for Modern Courts and I was interested in what he had
3 to say about the Westchester courts. I have seen those
4 reports. And I did mention to Mr. Brown, and he agreed
5 with me, that what you are seeing and what is reported
6 even on some of the judges who have done poor things or
7 inappropriate things, this is with full knowledge that the
8 monitors for were in court watching them. If you really
9 want to see something in the Westchester court system, you
10 should send some people in undercover to report on what
11 the judges do when they are not aware that they are being
12 watched.

13 I thought I would speak just briefly about
14 two particular problems from my viewpoint but, of course,
15 I'd be willing to address any questions that anybody might
16 have, whether they relate to what I speak about or
17 something else.

18 The most immediate problem that I see in
19 the criminal justice system, and I know it has been spoken
20 about by attorneys and others at prior public hearings,
21 that has to do with funding. This is the most day-to-day
22 immediate problem. And by funding, I mean that the rates
23 for assigned attorneys, the 18B attorneys, are

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1 abominable. I mean, that statutory caps placed for
2 assigned attorneys on how much money they can spend for
3 experts, investigators, et cetera, that cap, which is \$300
4 and has not changed since 1965, is atrocious.

5 It is true that some judges permit
6 attorneys to exceed the cap. However, I know, in looking
7 at the vouchers that I see as administrator of the 18B
8 panel, that many judges do not let attorneys exceed the
9 cap. And indeed, what occurs often is if a defense
10 attorney, an 18B defense attorney, is able to secure the
11 services of an expert for a particular case, the expert
12 submits a bill in excess of the cap, because if the expert
13 has any qualifications as an expert, he or she cannot do
14 much for \$300. And the judge will chop -- certain judges
15 anyway -- will chop that expert voucher down to the \$300
16 level. What that means, in practical effect, is that that
17 18B attorney and any other 18B attorneys for the county
18 can never get that expert to work for them again because
19 the expert feels that he or she has been dealt with
20 terribly.

21 Another facet of the funding has to do not
22 with 18B attorneys but with what we call the institutional
23 defenders, public defender attorneys and Legal Aid

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1 Societies. The state, since the time of the Gideon v.
2 Wainwright decision and the analogous New York Court of
3 Appeals cases, has not come anywhere near fulfilling its
4 responsibility toward the funding of the defense for poor
5 people.

6 In recent years, all of the state
7 offices -- and there are almost 30 of them -- state
8 defender's offices or Legal Aid Society offices that
9 receive aid to localities, funds from the state, have had
10 those funds cut by 45 percent since the beginning of the
11 1980s. The cost of picking up that balance of 45 percent
12 has to fall on the localities. And many localities are
13 unwilling or unable to pick up that cost, which means that
14 many defense services are cut out. This type of thing is
15 unfair to the poor people who are in court and
16 represented. It is unfair to the attorneys who are
17 representing them. It is, quite frankly, an embarrassment
18 to the legal profession. And it perpetuates the two
19 unequal systems of justice.

20 Theoretically, those in power -- certainly
21 they say this in their Law Day speeches and July Fourth
22 speeches and other occasions -- they certainly commit
23 themselves to having equal justice, and there shouldn't be

1 unequal justice based on poverty. That's not true in this
 2 state here, and it certainly is not true in the time I've
 3 been practicing here. And the primary reason for that is
 4 the lack of funding by the State of New York for the
 5 defense attorneys, those men and women who do the hard
 6 work of providing defense representation throughout this
 7 state.

8 What does this say to the poor? What does
 9 it say to the many minority people who make up a large
 10 percentage of the poor population, since economics, as we
 11 know, often translates inevitably into race? I think it
 12 is obvious what it says.

13 The second problem I wish to mention, what
 14 I view as a problem, is a more systemic problem. I didn't
 15 originally intend to, but I think I'm going to read you a
 16 short quote to start out with on this second problem, and
 17 it goes something like this: "We are, frankly, disturbed
 18 by what countless members of this state's judiciary have
 19 perceived to be determined and pervasive efforts to dilute
 20 and perhaps even eviscerate their constitutional,
 21 statutory, traditional and inherent decision-making
 22 powers, under the chivalry of 'administrative court
 23 reform.' We strongly oppose the implementation of

1 proposed changes in the name of court reform which are
 2 violative of statutes in this state and unjustly affect
 3 the rights of litigants. Indeed, it would be ironic if,
 4 in the quest to remove obstacles now impeding the
 5 consistent administration of justice, additional
 6 roadblocks were unwittingly set up by the precipitous
 7 promulgation of onerous and ill-perceived directives which
 8 result in injustice."

9 Those words are from a decision published
 10 in 1982 by the Appellate Division in Kings County. They
 11 are the words of Vito Titone, who will shortly be
 12 requiring as a Court of Appeals justice. This was in
 13 response to a case in court where the rights of the
 14 litigants were brutally affected because the trial judge
 15 thought that he no longer had any power to grant a
 16 continuance in a trial which was certainly justified. And
 17 the reason the trial court said he thought he did not have
 18 that power was because of orders from his administrative
 19 superior. Those words were true in 1982. They are much
 20 more true now.

21 There are many who feel that the huge
 22 bureaucracy that has sprung up with regard to court
 23 administration is one that is uninformed, insensitive,

1 uncaring, and somewhat egotistical and, toward defense
2 attorneys and their clients and constituencies, downright
3 insulting. I know this seems rather harsh to say. And I
4 know that many people in court administration, whether
5 it's the Office of Court Administration, members of the
6 executive board or the chief judge, mean well and have
7 some good ideas about what to do with regard to running
8 the court system. And I note that one of your speakers
9 earlier today -- I don't know if he was here or not -- was
10 Raymond Kelly. If he did speak, I hope he told you his
11 quotation, when he says that "justice is a process." And
12 indeed, justice is a process. I think some of the
13 bureaucrats and administrators have totally forgotten
14 that.

15 I have participated, in the course of the
16 past 20 or 30 years -- you would probably think quite
17 often because of the titles that I have -- in discussions
18 with administrators as to how to both fairly and
19 efficiently run the court system. You would be amazed to
20 find out how few times this has really occurred, on how
21 few occasions either someone like myself or other public
22 defenders, Legal Aid Society heads, 18B administrators
23 throughout the state have been consulted at all by anyone

1 in judicial administrative power.

2 Indeed, on those few occasions when we are
3 spoken to, it's not with those in power seeking our
4 advice. It's usually those in power either calling us
5 down for a command performance somewhere or coming in for
6 a sweeping visit in our county to tell us that they have a
7 new project or a new policy or a new standard or goal and
8 to tell us that we will comply with it or else. And the
9 or else usually means that our clients will suffer if we
10 do not. They never ask us how a 45 percent decrease in
11 funding will make it harder for us to comply with these
12 standards and goals. They never ask us whether the
13 standards and goals set forth for Monroe County or Albany
14 County or Kings County makes any sense in Westchester
15 County or Schenectady County. And what is very
16 dissatisfying about all these things is that these
17 decisions occur seemingly without any thought on the part
18 of the judiciary to the concept of justice.

19 Let me give you some examples of things
20 I've heard over the years that are so disheartening. A
21 session with a former administrative judge in the Ninth

22 Judicial District. The Ninth Judicial District covers
23 about five counties, a large population in the southern

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1 part of the state, including Westchester. The judge
2 wanted administrators to cut costs. In order to cut costs
3 of transferring prisoners from jail to court, he wanted to
4 build a court facility at the jail, which was pretty much
5 inaccessible to Westchester public transportation.

6 At some juncture, we were summoned to
7 discuss the plans he had. These plans were quite minute
8 and some of them, adopting the Office of Court
9 Administration guidelines, discussed exactly how high --
10 no more than 18 inches, no less than 18 inches would the
11 judge's bench be raised over the spectators, exactly how
12 large would the judge's robing room be, exactly how large
13 would the judge's private toilet and rest room be.

14 I asked the judge if he had put in any
15 thought as to whether there would be an attorney client
16 conference room. Well, no, he hadn't thought of that. I
17 asked him if there had been any thought to the fact that
18 proceedings in a public courtroom are supposed to be
19 public. Would there be public access for the relatives
20 and friends of our clients, who, after all, were poor
21 people and were at the jail -- they weren't charged with
22 anything worse than anybody who has money and is out on
23 bail is charged with, they just couldn't bail themselves

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1 out of jail. Would there be public access? This
2 administrative judge of five districts said, "Gee, I never
3 thought of that."

4 Now, how do you come to a point where
5 somebody in that position of power, responsible for
6 judicial administration, fair and efficient judicial
7 administration, never thinks of that?

8 A current thing is going on right now in a
9 similar vein with a new trendy thing called video
10 conferencing. What it really means is, we don't want your
11 clients to enter our room. Okay? Just tell them,
12 quote/unquote, that they should waive their appearance and
13 appear over a video machine. They will be allowed to come
14 into the courtroom to plead guilty to a felony or they
15 will be allowed to come into a courtroom to go to trial,
16 but if they insist on a trial and lose, of course, they
17 will pay very heavily in terms of sentencing. When it
18 involves poor people, they're referred to as "them."

19 I think we can do better. I've sat at
20 meetings with Appellate Division judges where they have
21 discussed telling administrators, giving administration
22 guidance on how to deal with vouchers, how attorneys'
23 vouchers should be slashed because, after all, most of the

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1 people that these 18B attorneys represent are really not
2 worth it. These cases can be tried off the seat of the
3 pants. What do you need to prepare for it?

4 These are very shocking things for a lawyer
5 to hear. Perhaps you expect to hear them from politicians
6 who are running for office sometimes, but you certainly
7 don't expect to hear them from judges.

8 In some of our courts in Westchester,
9 clients -- not convicted clients, clients still awaiting
10 disposition -- are still shackled and cuffed when standing
11 before the court. Why is this? Well, the court officers
12 tell me the judge says it really takes too much time to
13 unshackle them, to watch them and have them sit at their
14 side -- it's always "them," by the way -- and then to
15 reshackle them. Things can move much faster if we just
16 keep them shackled. I'm so tired of seeing black men
17 standing shackled in a Westchester County Court with the
18 flag there and with, "In God we trust" over the bench, and
19 to have a judge justify this because it will take an extra
20 minute and a half or two minutes for the court officers,
21 who don't do a heck of a lot anyway, to uncuff these
22 people. Is this the American system of justice?

23 Now, what can we do about this since we are

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1 talking about a systemic problem? Well, one thing I think
2 an independent group like the League of Women Voters could
3 do that would carry a greater voice than all of the
4 defense attorneys together would be to say to the
5 administrative judge, to the chief judge of the Court of
6 Appeals, that since 70 or 80 percent of all people that
7 pass through the criminal justice system are poor people
8 and are represented by institutional defenders, we assume
9 that it is only logical that you periodically, for example
10 once a year, meet with the chief defenders throughout the
11 state in a round table discussion so that they can tell
12 you what their problems are and they can tell you whether
13 it's reasonable or unreasonable to employ certain
14 procedures in court.

15 I'm not talking now about substantive
16 changes in the law that go to the merits of the case. I'm

17 just talking about these kinds of procedures. Somebody
18 has to point out to these people -- and one would think
19 they would already know -- why these things are unfair.
20 They are unfair in fact and they are definitely unfair in
21 appearance. And we just can't get in to those sessions.
22 Very recently we did -- we being the chief defenders of
23 the state under the auspices of the New York State

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1 Defenders Association -- were graced by the presence of
2 Katherine Lapp, who is the new director of Criminal
3 Justice Services, who actually listened to each of us as
4 we gave our little problems to her, or big problems to
5 her, that were existing in the different parts of the
6 state. Now, she's a member of the executive branch.

7 People in DCJS have spoken at us before,
8 but nobody ever spoke to us, and nobody ever listened to
9 us in that way before. We feel that Judge Jonathan
10 Lippman needs to do this. He is the head of the Office of
11 Court Administration, Chief Administrative Judge. And we
12 feel that Judith Kaye needs to do this too. Perhaps maybe
13 this time, we will be listened to. Thank you.

14 MR. NOISETTE: In your role as
15 administrator of the 18B panel in Westchester County, are
16 there any negative trends that you can speak about
17 specifically as a result of low enrollment on the panel or

18 because of the low rate?

19 MR. PITTARI: The enrollment of the panel
20 is down and we are particularly losing those attorneys who
21 do felony matters in situations where there's a conflict
22 and the Legal Aid Society could not do those felonies or
23 they do the other defendants in multiple defendant

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1 situations.

2 There are two reasons for this: one is
3 financial and the other is administrative. The financial
4 is the rates. This is a big loss of money for an attorney
5 who is skilled enough to be certified to handle
6 administratively any matters on our panel, to have to work
7 for these \$25 and \$40 an hour rates. That's one problem.

8 Administratively, there's another problem.
9 And it fits into what I was just talking about with regard
10 to this bureaucracy. One of the deputy chief
11 administrative judges for the courts outside of New York
12 City, Judge Trafficanti, recently visited Westchester
13 County to advise the administrative judge of the Ninth

14 Judicial District, Angelo Ingrassia, and the deputy
15 administrative judge, Joseph K. West -- all former
16 district attorneys, by the way, none of whom have ever
17 represented a human being as a defendant -- that
18 Westchester was not keeping up with the standards and
19 goals set arbitrarily 20 years ago for the criminal
20 courts.

21 And therefore, to make Westchester keep up
22 with it administratively, the judges were going to pull
23 cases from what's called the individual assignment judges,

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1 who have had cases on their calendar for several months
2 and who are fully familiar with the calendar, et cetera.
3 They are going to be pulled from those judges who are
4 knowledgeable about them, thrown into a pool which now
5 consists of several hundred cases, which the deputy
6 administrative judge just pulls out at whim, whenever he
7 feels he has to, and send to trial, whenever a judge seems
8 to be not busy, for an hour or so or a half a day or so.

9 What this has done is caused chaos in the
10 district attorney's office and caused chaos in our
11 office. But as to the 18B attorneys, they are being
12 called in and asked to leave their private practice and
13 private clients, sometimes at an hour or two's notice, to
14 start a trial. They had a session with the administrative
15 judge. They told him they could not continue doing it
16 this way. And he promised to be better. That lasted one
17 week and then it was back to the same business.

18 This alone has caused, in the last three
19 months, a half-dozen very skilled felony qualified trial
20 attorneys to leave our 18B panel. This is an
21 administrative fiat and that's all it is. It's got
22 nothing to do with justice.

23 MR. NOISETTE: Thank you.

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1 MR. NOWAK: Getting back to the point on
2 expert witnesses, when the vouchers are cut, you indicated
3 many experts will not come back. Is there a problem
4 trying to find competent experts to testify in various
5 areas in your jurisdiction?

6 MR. PITTARI: Sure, yes, there is. And
7 what has happened too, because the word has sort of gone
8 out -- there were a few experts who practice quite often
9 in our jurisdiction. Some of them have retired. One died
10 recently. Nobody is stepping forward to replace them
11 because they have heard these stories about cut vouchers.

12 Now, on the other hand, the prosecution has
13 experts -- in our case it's a woman -- at her command.
14 They have the county police, the state police, they can
15 send stuff to the FBI, and they have 35 different local
16 police departments. But when we need a fingerprint
17 expert, we have to go hunting for one. Then we have to
18 try and convince the expert, particularly in an 18B
19 matter, that they will be paid. I try to convince them,
20 look, if the judge gives extra money, I, as the 18B plan
21 administrator, will certainly not block that voucher
22 because I, as a defense attorney, know the importance of
23 the expert to your case. So I will sign off on that

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1 voucher on behalf of, in effect, local government. But I
2 can't guarantee that the judge will approve that voucher.

3 And with this bouncing around that we are
4 doing now, where you never know which judge you're gonna
5 get from one day to the next, I can't even say you are in
6 front of judge who always grants a reasonable fee because
7 they may send him to another judge who does not.

8 MR. NOWAK: As I'm sure you know, we get a
9 number of phone calls from defenders who are looking for
10 experts in various areas. And it seems to me that the
11 pool of qualified experts in this state for defense is
12 really drying up.

13 MR. PITTARI: It is.

14 MR. NOWAK: It's very difficult. And then
15 there's a tremendous concern on their part that they are
16 not going to be paid even an adequate amount for services
17 because it will exceed the state cap.

18 MR. PITTARI: That's correct. That's been
19 our experience. And especially too, because I'm in an
20 area that's in close proximity to both the Southern and
21 Eastern districts in federal court, so many of the experts
22 would prefer to be expert witnesses in federal court, in
23 the federal court system, the same way that many of the

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1 attorneys in the 18B panel would prefer to sign up to be
2 Criminal Justice Act attorneys in the federal court system
3 because they have more reasonable rates.

4 It was interesting to note and I read
5 recently in the paper where the judiciary is asking for
6 increased salaries for judges, et cetera, and a big
7 argument for that is that they think it's only fair that
8 the state judges should be paid at the same rate as the
9 federal judges. And I can't say I disagree with that.

10 But I just wonder why they don't make that same argument
11 with the 18B attorneys, compared to the federal Criminal
12 Justice Act attorneys. In my area of the state, they get
13 \$75 an hour whether in-court or out-of-court, as opposed
14 to the \$25 or \$40 that the 18B attorneys get.

15 MS. KIBRICK: How would you approach court
16 reform.

17 MR. PITTARI: Cautiously. It's so hard to
18 wrestle with that. I've thought of it often. I guess one
19 of the things does have to do with the method of selection
20 of the judiciary. That's just part of this. In terms of
21 the judiciary, a lot of that has to do with just
22 sensitizing the judiciary. You wouldn't think it's
23 necessary to remind the judiciary that their function is

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1 not just to make the trains run on time, so to speak, and
2 the courts run on time and to be efficient, but to see
3 people how such as our clients view this system of
4 justice.

5 And I think communication could help. I'm
6 not -- it sounds like such a small thing. I think Judith
7 Kaye is a very intelligent woman. She's always been an
8 expressive woman when I have seen her talk. But she
9 doesn't have the background knowledge, the experience of
10 dealing with poor people and seeing how they view the
11 criminal justice system. If she could come into a room
12 one day a year and spend that one day listening to the
13 public defender from Monroe County, listening to a Harlem
14 neighborhood legal services attorney, listening to me,
15 listening to somebody from Wyoming County, just hear what
16 we have to say, I think she would come up with a lot of
17 ideas on her own. She would be surprised by a lot of what
18 she would hear.

19 I keep thinking about what Warren kept
20 saying to one of the attorneys on behalf of the State of
21 Arizona, who was arguing -- or maybe it was -- in fact, it
22 was the attorney who was arguing in the Miranda v. Arizona
23 case, and he kept saying, "When, in your view, did defense

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1 attorneys become a menace?" He kept coming in and out and
2 back to that theme. In fact, it worked its way into the
3 decision too. But we are not listened to and our clients
4 know that.

5 MS. KIBRICK: Thank you.

6 MR. GRADESS: Let me ask you one question
7 if I might. You have a lot of passion and I would like to

8 capture it in this record. What would it look like,
9 Mr. Pittari, if we had a model law office for poor people
10 and low income people in the criminal field? What would
11 it need to look like?

12 MR. PITTARI: Well, I would need enough
13 attorneys to handle our caseload. But it's not just our
14 caseload. You have to remember three things when you are
15 dealing with this: You may have heard me make reference
16 to cases, places and paces. We have to have a number of
17 attorneys to deal with X number of cases, but we have to
18 do it in Y number of courts, and we have to do it at a
19 certain speed based on court rules.

20 We have to have enough personnel to deal
21 with all of that. They have to be paid well enough to
22 want to stay in this and make it a career. I think it's a
23 very noble, public service career. But if you want to

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1 support your family on the salaries that are being paid,
2 you have to leave.

3 The staff would have enough support --
4 definitely investigators to go out and do the work. You
5 know, when a young district attorney first stands up in
6 court and has, let's say, a felony complaint or indictment
7 in front of him or her, they have, along with that, a
8 police report, which is a little preview of what allegedly
9 happened in the case and what the witnesses will say,
10 et cetera. When the defense attorney first steps up to do
11 the defense on that same case, he or she has nothing. And
12 if your client is innocent, then you really have nothing.
13 I mean, if it's the type of case -- it might be a
14 self-defense case or something -- at least your client can
15 say, I was in a bar and a fight happened and this and this
16 happened. But if it's a robbery case and your client is
17 saying, I didn't do it and I don't know anything about any
18 robbery, I don't know anything about what happened at that
19 supermarket three days ago, you are starting out with
20 absolutely nothing. You know absolutely nothing, so this
21 has to be investigated.

22 You need social workers. You need people
23 who can help the attorneys set up, for instance, the

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1 client in an alternative to incarceration program.
2 Because a lot of that has to be done while the case is
3 pending.

4 Let's say I have a client who is sitting in
5 the County Jail. If I have a social worker -- and we have

6 only had a social worker in our office, large as it is,
7 for about the last four or five years. And I think 1999
8 we will be losing our social worker unless the county
9 makes up some money that the state is cutting back on us
10 in effect. But at any rate, if I have a social worker, I
11 can have the social worker work with the client and the
12 client's family to determine, what is the problem caused
13 by? Is it alcohol? Is it drugs? Is it mental
14 treatment? Is it a lack of education? Lack of a job?

15 If I can have the social worker work with
16 the client as the case is pending, then at the moment of
17 sentencing, I can say, Judge, here's a little social work
18 background on the client. And our social worker has
19 already gained admittance for the client in the XYZ
20 program, so if you give the client probation, he can stay
21 out and be in that program.

22 On the other hand, with without the social
23 worker, and if the attorney doesn't have time because he

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1 or she is bouncing around from trial to trial, what I'm
2 left with is saying, Judge, there are a lot of good
3 programs out there, if you let my client out and give my
4 client probation now, we have a decent chance of maybe
5 getting the client into one of those programs, or if you
6 defer sentencing for another six weeks. The judge says, I
7 can't, we have speedy trial guidelines, we have speedy
8 sentencing guidelines, it's costing the county this much
9 to have your client here in jail, I'd just as soon send
10 him out to state prison and save the county the money, I
11 don't have the time to get into that. With social work
12 services, I could do that type of thing.

13 Obviously, we would have a librarian,
14 things like that. We would be computerized. We should
15 have access at the defense office to fingerprint
16 information. The state would save so much money if they
17 could get accurate information -- and they could get it
18 from us actually, in terms of legal people, much more
19 quickly than they could from the state computer because we
20 follow cases through to the end and you don't have a lot
21 of instances with unfilled-in rap sheets, where the
22 fingerprint report doesn't tell you what ultimately
23 happened with the case because the clerk of the local

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1 court hasn't gotten around for the last three years to
2 reporting it to Albany.

3 And this has happened. I can think of at

4 least two occasions where we have been able to prove to
5 the court that the person did not have the felony
6 convictions that were listed on their rap sheet, that it
7 was a different Jonathan Gradess. Here it is. We
8 represented them on this indictment and it was a
9 misdemeanor. Okay? And it saved -- first of all, it
10 meant a better and more just disposition for the client.
11 It saved incarceration time, et cetera. If we had that
12 material on hand, we could provide that kind of thing --
13 if we got into that system.

14 But we have to be treated with some respect
15 basically and allowed into this process more.

16 MR. GRADESS: Thank you very much. Leon
17 Tucker.

18 MR. TUCKER: Good morning. My name is Leon
19 Tucker. I know you are hearing testimony from attorneys
20 and people within the judicial system. I am here to give
21 you the other side of the coin -- testimony from someone
22 that's been involved with the justice system for years as
23 a criminal defendant, and how we behind bars in county

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1 jails, how we see the public defenders and what we
2 perceive them to be to us when we are represented by a
3 public defender.

4 When we first hear that we can get a public
5 defender or an 18B lawyer, it's like a joke to the inmates
6 in the system because we feel that public defenders, 18B
7 attorneys, Prisoners' Legal Services are all hooked up
8 with the D.A.'s office. We feel they don't have
9 compassion, don't really care about the people they are
10 representing, that they only are in it to pick up their
11 paycheck.

12 We feel that between the district
13 attorney's office and the public defender's office there's
14 not really a comparison, that the amount of funds that are
15 given to the district attorneys is way out of kilter with
16 what is given to a public defender. For instance, here in
17 Albany County, Sol Greenberg has been granted a big raise
18 in his budget for the district attorney's office. For
19 years, I have never heard anything about the public
20 defenders getting any more money. It's always, they are
21 losing money, they are losing attorneys. So therefore,
22 when people within the system, when we hear about this, we
23 see it as an unfair practice. There is no real

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1 comparison, you know?

2 So when you are represented by a public
3 defender, you don't look for no real representation. You
4 feel an attorney is coming to see you and represent you
5 and he is gonna be looking to plead you out. And if you
6 are aware of the law, have any knowledge of the law
7 yourself -- most people will listen to what the attorney
8 tells them and whether they are innocent or guilty or not,
9 they wind up taking the plea simply because their attorney
10 tells them, this is what is best for you. A person could
11 actually not have committed a crime and wind up getting
12 prison time because the attorney's office or the public
13 defender's office doesn't have adequate funding to go out
14 and investigate into things that the gentleman before me
15 was speaking of. So that's why a lot of times they plead
16 out.

17 And I hear these attorneys talk about, you
18 know, fund raises being given to the state or whatever.
19 But it's like, how much of these funds are really going to
20 reach down to the attorneys that are actually representing
21 criminal defendants? In other words, if the attorneys
22 representing the criminal defendants aren't making enough
23 money to keep them there, then, quite naturally, they are

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1 gonna leave. So when they do get the funding, does the
2 funding really trickle down to the attorneys who are
3 representing the defendants, or is it that just the
4 attorneys at the top get the money and then benefit from
5 it, but not the actual attorneys who are representing the
6 defendants?

7 So, quite naturally, we feel that the
8 attorneys in the 18B system, public defenders or whatever,
9 they are young, experienced, they just got out of law
10 school. The real good ones, they don't stay no time
11 within the system because of the money. Once they make a
12 name for themselves within the institutional attorney
13 setting, then they are gone 'cause they have made a name
14 for themselves and then they can go into private
15 practice. There are a few exceptions, you know, dedicated
16 ones that stay on for years, but mainly they all leave,
17 you know, for private practice or to go with the district
18 attorney's office, whatever. But that's how the inmates
19 in the county and state jails -- that's how we see it. We
20 see it as being a joke.

21 For instance, you know, in my own case, one
22 time -- not recently, but maybe nine, ten years ago -- I
23 had a public defender doing an appeal for me. I was in

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1 the state system. I had a public defender doing an appeal
2 for me. The brief that she did came to me in the mail and
3 I looked at it and I read it, and it was a joke. The
4 brief was an absolutely joke. It was just standard things
5 that looked like she might have just taken off somebody
6 else's appeal brief, wrote it down, put it on paper and
7 mailed it to me. I had to ask the court for permission to
8 go pro se. I studied the law books myself and did my own
9 appeal. I got myself out -- not on the appeal that the
10 attorney did, but on the pro se brief that I did.

11 Whereas, this attorney is supposed to have
12 years of experience -- and I imagine that she did. She
13 went to law school and passed the bar and everything. She
14 was working in the public defender's office for years in
15 the appeals office. But it was just a matter that she
16 didn't care no more, that she would just throw something
17 together. I guess the caseload was so big that she just
18 threw something together and said this is the appeal and
19 that's that. You know, it's like a stock warehouse, you
20 know. So I had to do my own brief, pro se. And my point
21 is that if I can do it pro se and get myself out under
22 points of law, then an attorney should be able to do the
23 same thing. Maybe she could if she wasn't overworked or

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1 had such a big caseload or wasn't underpaid or whatever.
2 I don't know. But she just didn't do it.
3 So that's how we feel from the perspective
4 of inmates.

5 MR. GRADESS: Thank you, Mr. Tucker.
6 MR. NOISETTE: Mr. Tucker I have two
7 questions and maybe they are related. One is: Have you,
8 yourself, or someone you are close to ever had a public
9 defender that you think did rise to the level that you
10 think they should have? And what were the things that
11 person was able to do that satisfied you?

12 MR. TUCKER: The answer to your question is
13 yes, I did. The things that that person did, he showed
14 that he was very much interested in me as a person. He
15 showed that he cared. He showed that he believed in what
16 I was telling him as being the truth. And he actually
17 fought, you know, he didn't just go with everything that
18 the D.A. or the judge said. He actually put his foot
19 down, where he risked being held in contempt of court
20 because he believed in what he was doing.

21 So yes, I have had a good public defender.
22 But, on the other hand, that's maybe like having one out
23 of eight.

1 MR. NOISETTE: And I guess my other
2 question was: Have you ever been represented by a private
3 attorney, have you or somebody close to you been
4 represented by a private attorney, and what significant
5 differences stand out in your mind about the dynamics in
6 that relationship?

7 MR. TUCKER: I have been represented by a
8 private attorney also. And I believe the difference was
9 that between the private attorney and the average public
10 defender -- it's basically the same thing as with the
11 private attorney and this one public defender that I had
12 that was good. They get out and they investigate and try
13 to see what is going on. You know, they actually try to
14 find out the truth, or what you told them as being the
15 truth, they try to find out if it is actually the truth.
16 Are you telling the truth? They go out and actually
17 investigate or have their investigators investigate.

18 And it's a caring issue. It's individual
19 treatment of an individual, as a person, and not just as
20 somebody that's you know, stuck in jail. It's treating
21 the individual as a person. It goes a long way towards
22 helping somebody keep their self-respect while they are in
23 this type of environment.

1 MR. NOISETTE: Did you have a sense that
2 their ability to do these things -- either the private
3 attorney or the public defender you've described -- did
4 you have a sense that their ability to do these things was
5 related to how much work they had to do or didn't have to
6 do? Did you get a sense of what their other
7 responsibilities were that allowed them to service you in
8 the way that you described?

9 MR. TUCKER: I believe, yes, that I had a
10 sense of what the -- with the public defender, I had a
11 sense that even though he had a heavy caseload, it was
12 that, you know, he just believed in somebody as a person,
13 that he would go out and spend his extra time that he had
14 to investigate and take care of things that he had to take
15 care of at the time to win that case.

16 MR. NOISETTE: Okay. Thank you.

17 MR. NOWAK: I guess a question from my
18 perspective is: In terms of the caring issue and the way
19 you were treated, was a big piece of that that the
20 attorney you had that you thought did a good job for you,
21 whether private or public defender, took the time to
22 listen to you, listened to what you were saying and acted
23 upon what you were saying, as opposed to trying to talk to

1 you and to tell you what to do, that they listened and
2 then tried to act on what you were telling them? Is that
3 a factor, or am I missing something?

4 MR. TUCKER: No. You are right. That is a
5 factor. And this public defender that I am speaking
6 about, not only did he listen to me and, you know,
7 listened to what I was saying, he also went to my house,
8 he talked to my children, he talked to my wife, he talked
9 to people around me, to get a sense of who I am, who I was
10 at the time, not just accepted and said, yeah, yeah, like
11 some public defenders saying, okay, okay, we will get to
12 that, we will get to that and, at the same time, they are
13 putting you off. They know, at the same time they are
14 telling you, okay, okay, that they are never going to go
15 to your house and make that extra phone call. They know
16 ahead of time that they aren't going to do this. But
17 instead they try and put you off and make you think they
18 are going to do this, when they know that they aren't.

19 MR. NOWAK: And your appeal you mentioned,
20 was that here in the Third Department out of Albany?

21 MR. TUCKER: Yes, it was.

22 MS. HATHAWAY: Mr. Tucker, listening to
23 your testimony before Mr. Nowak just made these comments

1 to you, it brought to my mind that, in my observations of
2 the attorneys, whether they be public defenders or private
3 attorneys, how they approached your family members in
4 court is very important.

5 Most of the time they have not seen the
6 client, they don't know who they are. But it's been my
7 observation that how the family members of whoever comes
8 on behalf of the defendant in support, how they are talked
9 to, how they are approached, the whole body language gives
10 the family member or that supporter a very good idea as to
11 what their loved one or whomever, what they are going to
12 face. And I think that this is something that people do
13 not think about -- that their body language speaks volumes
14 on what's going to happen.

15 So to hear you and to hear what you said --
16 I've heard it countless numbers of times. I've
17 experienced it myself in my lifetime. And as the
18 gentleman earlier said, Mr. Pittari -- he spoke about
19 "them" and "nonpersons," that they treat them like a
20 nonperson. And it's is very, very real, not only to you.
21 So I do appreciate hearing your testimony and I thank

22 you.

23 MR. GRADESS: Mr. Tucker, I don't know if

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1 you heard the testimony earlier from the witness for the
2 Center of Law and Justice, Ms. Green, but she referred to
3 one of the roles that their office plays as an
4 intermediary, an intermediary between the public defender
5 and the client. I wonder if you could address the
6 question of race and address the question of class in
7 terms of that role that they play. What do you think is
8 going on here, that so many people need an intermediary in
9 this county?

10 MR. TUCKER: In this county?

11 MR. GRADESS: Yeah, or any county, for that
12 matter, but that's where she is from.

13 MR. TUCKER: Well, basically, I think in
14 Albany County -- I grew up in Albany County. I feel like
15 Albany County is a conservative town really and the race
16 issue here is not as open as people think it is. It's
17 very subtle. The race relations here aren't as cool as
18 people think. And why, I don't know. It's hard to say.

19 But I would say back a couple years ago, I
20 read an article where more people, more black people in
21 Albany County were being sent away to prison than there
22 were in South Africa at the time, in relation to the
23 population. So the race relations here in Albany are just

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1 as bad as it is in one of the deep southern towns, except
2 that it's not as open, it's hidden.

3 If you are not aware of what you are
4 looking for, you would think that everything is all right
5 here in Albany County. But in reality, Albany County is
6 just -- you know, it's just as bad as any other county in
7 the South. You would rather be in the South where you
8 know what you are dealing with, you can understand what
9 you are dealing with, than to be up here in Albany and
10 have to deal with race relations. You think that
11 everything is all right. You think the black man is
12 almost on an equal level with the Caucasian man, the white
13 man or whatever. But in reality, he's not, because it's
14 hidden, you are dealing with hidden agendas here.

15 You know it's the capital, it's a very
16 conservative town. And we know that at certain times of
17 the year, certainly during an election year, people know,
18 hey, people, don't be seen out in public. People know,
19 hey, don't be on the streets, don't be seen in public.

20 But within the court system, it's like, if
21 you're black, you know that on the average, that you're
22 going upstate to do jail time, whereas, if you are a white
23 boy, you might get a chance to get probation. You know,

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1 there's really no comparison as to who might wind up on
2 probation, who might wind up doing jail time, who might
3 wind up getting an alternate program -- which there
4 probably aren't that many in Albany anyway. But the ones
5 there are, there's no real wonder in Albany, who is going
6 to the get program and who is gonna do the jail time.
7 It's just how it is. And that's how people perceive it to
8 be.

9 I really feel that's how it is, 'cause, you
10 know, once you read an article like that, more black
11 people are being sent away per the population, as opposed
12 to South Africa, then, you know, it kind of opens your
13 eyes and makes you look at it.

14 MR. GRADESS: Thank you. Milton
15 Zelermyer.

16 MR. ZELERMYER: Hello. I'm Milton
17 Zelermyer. I thank you for the chance to speak to this
18 panel. I'm especially appreciative of the opportunity to
19 sit here and listen to Mr. Tucker speak. I think it's
20 important. It happens too infrequently at hearings and
21 forums of this sort and it also happens too little in our
22 daily work environments, our offices. Not many attorneys
23 that I know have had the experience of being clients, so

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1 they may not understand what that feels like --
2 particularly, clients in a criminal case. And in my area
3 of work, prisoner advocacy, I don't know many attorneys in
4 that field who have ever had the experience of ever being
5 a prisoner. So it's important for this communication and
6 this dialogue to take place.

7 It's also nice to see Lenny Noisette. I
8 don't know if he remembers me.

9 MR. NOISETTE: I do.

10 MR. ZELERMYER: He was a supervisor at the
11 Legal Aid Society about ten years ago when I started
12 working there. I now work for the Prisoners' Rights
13 Project of the Legal Aid Society. We call this unit PRP.
14 It's a small unit within the Legal Aid Society in New York
15 City. We engage in advocacy activities on behalf of
16 inmates in the New York City and New York State prisons,
17 including, when necessary, class action litigation to

18 force reforms and improvements in the conditions under
19 which the inmates live. Our staff consists of 11
20 attorneys, five paralegals, an office manager and a
21 receptionist, along with varying numbers of law students
22 and interns.

23 Prisoners' Legal Services is an

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1 organization with objectives identical to those of PRP,
2 and a remarkable record of accomplishments in the field of
3 prisoner advocacy. The two groups share a common vision
4 as advocates for constitutional and humane conditions of
5 confinement for prisoners, and they share a common
6 vintage, both having been created in the aftermath of
7 Attica.

8 David Leven, PLS's Executive Director,
9 testified at your fact-finding hearing in New York City on
10 October 14th, and I know that he will be testifying here
11 later this afternoon. He has told you, and will no doubt
12 tell you again, of the successes of PLS, the benefits to
13 the state of New York of having such an organization and,
14 most importantly, the needs for restoration of funding.

15 Unfortunately, Governor Pataki's veto of
16 funding for PLS has created an immense void. My
17 presentation today will outline the work the Prisoners'
18 Rights Project does and explain why PRP cannot come close
19 to filling that void.

20 Within the Prisoners' Rights Project's
21 paralegal staff, there are two paralegals who respond to
22 state inmates' requests for assistance. In the past three
23 months, correspondence from state prison inmates to our

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1 office has approximately doubled. We now receive
2 approximately 150 letters each week. The concerns raised
3 in this correspondence include discipline, harassment,
4 brutality (including assaults by correctional staff and by
5 other inmates), protective custody, medical care,
6 religious rights, racism, visitation, time computations
7 and immigration issues.

8 We have also begun to receive letters,
9 written by inmates, that are forwarded to us from the
10 State Division of Human Rights and a small number from the
11 Public Affairs Office of the Department of Correctional
12 Services. These used to go to PLS, but without any
13 prompting from us, those agencies have started to send
14 this correspondence to PRP.

15 We now receive many more letters about

16 disciplinary matters than we did previously, as well as
17 increased correspondence requesting legal representation
18 in the Court of Claims and in federal court. Numerous
19 inmates tell us that PLS used to represent me, but now
20 that they are out of business, I'm turning to you.

21 The size of our paralegal staff has
22 remained the same and is unlikely to expand, even with the
23 recent restoration of funds to the Legal Aid Society,

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1 through the settlement of the New York City budget. The
2 backlog in correspondence is large and growing larger. We
3 are currently more than a month, and hundreds of letters,
4 behind in responding to prisoners' inquiries.

5 PRP, like PLS, has prepared materials to
6 provide inmates with information about the Court of
7 Claims, Article 78 proceedings, Section 1983 civil rights
8 actions, habeas corpus, prison disciplinary proceedings,
9 grievance procedures, parole, temporary release, merit
10 time, immigration and many other subjects. These
11 materials enable us to respond to the questions and
12 complaints of the thousands of prisoners whom we will not
13 be representing directly.

14 Because of the size of its staff and the
15 fact that its offices were distributed at strategic
16 locations around the state, PLS was able to respond in
17 many situations where PRP cannot do so. These would
18 include situations where a rapid, face-to-face visit is
19 necessary, for instance, where there is a complaint of
20 serious injury at the hands of correctional staff or
21 another inmate. PLS had the resources to visit inmates
22 with such complaints, and to do prompt investigations
23 firsthand. Because of PRP's location and size, it would be

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1 impossible for us to step into PLS's shoes. Our staff
2 only rarely is able to visit prisoners in state
3 correctional facilities.

4 Our paralegals also engage in advocacy for
5 inmates by writing directly or telephoning prison
6 officials in an effort to resolve problems informally.
7 This is done in the following areas: Medical care,
8 concerns about personal safety, family reunion program,
9 funeral visits, temporary release programs. Similar to
10 the increase in volume of correspondence, the absence of
11 PLS has caused a substantial increase in the need for PRP
12 to do this sort of advocacy.

13 PRP's paralegal staff is stretched to its

14 maximum capabilities, yet the need for their services
15 continues to expand every day that PLS is not functioning.

16 In the area of litigation, PLS's resources
17 enabled them to represent prisoners in individual actions,
18 such as Article 78s, Court of Claims suits, deportation
19 hearings, civil rights claims, as well as some class
20 actions. By contrast, PRP pursues relief for prisoners
21 almost exclusively in class actions and almost never in
22 actions for damages.

23 PRP's current docket includes suits about

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1 conditions in the New York City jails and in New York
2 State prisons. These include Benjamin v. Jacobson, which
3 involves the treatment and living conditions of
4 approximately 17,000 pretrial detainees. PRP attorneys
5 have been defending numerous consent decrees in that
6 litigation against the efforts of the City to terminate
7 the decrees under the Prison Litigation Reform Act. We
8 have argued that the Prison Litigation Reform Act is
9 unconstitutional. After in banc rehearing, the case is
10 pending before the Second Circuit.

11 Also on our City docket are Sheppard v.
12 Phoenix, a case about brutality in the punitive
13 segregation unit on Rikers Island, and Handberry v.
14 Thompson, which challenges the failure of City Department
15 of Correction and Board of Education to provide regular
16 and special education to young jail inmates.

17 In our state prison litigation, we are
18 challenging the systems for the provision of medical and
19 mental health care to prisoners with HIV and AIDS. This
20 case, Inmates of New York State with HIV v. Pataki, after
21 several years of discovery, is nearing the end of that
22 phase. It has been a monumental undertaking and has been
23 handled by four attorneys and a paralegal. The paralegal

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1 provided services to class members similar to those
2 provided by our other paralegals, but were generally
3 confined to the medical issues raised in the case.
4 However, the workload of the paralegal assigned to the HIV
5 litigation has been substantially affected by the
6 disappearance of PLS. Class members who formerly
7 communicated with PLS regarding other types of problems
8 now rely on the paralegal for a much wider variety of
9 information and advocacy.

10 In two other class actions, Millburn and
11 Todaro, which challenged the medical care at Green Haven

12 and Bedford-Hills Correctional Facilities, respectively,
13 PRP attorneys are actively involved with the monitoring of
14 the state's compliance with judgments.

15 There are two cases on which PRP and PLS
16 have joined forces. One is Lee v. Coughlin, which seeks
17 to establish due process protections for prisoners serving
18 severe disciplinary sentences. PRP and PLS entered the
19 case after Judge Sotomayor granted the defendants' motion
20 for reconsideration in light of the supreme Court's
21 decision in Sandin v. Connor, 515 U.S. 472 (1995). The
22 plaintiff had the burden of proving that his 376 days in
23 the "box" was an "atypical and significant hardship...in

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1 relation to the ordinary incidents of prison life." With
2 the resources of both organizations, it was possible to
3 conduct discovery and make the necessary factual and legal
4 presentation to persuade the Court to grant plaintiff's
5 motion for summary judgment. It is highly unlikely that,
6 in the absence of PLS, such a presentation could be
7 mounted again.

8 Eng v. Coughlin is a case brought by PLS
9 about conditions in the special housing unit at Attica,
10 including mental health treatment for inmates in the "box."

11 The mental health issues had been settled at the time
12 that PLS was defunded, and PRP is now assisting with the
13 monitoring phase of this case. It is enormously
14 burdensome to monitor a prison at the far end of the
15 state. This is not a case that PRP would have been able
16 to undertake on its own and clearly not one we would have
17 been prepared to enter without the several years of
18 substantial work performed by PLS.

19 Given the size of PRP's staff, its location
20 in New York City, and its current commitments and
21 caseload, we cannot responsibly contemplate taking on any
22 greater share of the advocacy service or litigation work
23 performed by Prisoners' Legal Services. Perhaps, in the

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1 atmosphere which brought about the governor's veto, there
2 are some who are pleased that the work of PLS will not be
3 absorbed. We hope that you understand and agree with the
4 points made by David Leven, and that you will, therefore,
5 support restoration of Prisoners' Legal Services to its
6 rightful place in the state budget.
7 Thank you.

8 MR. NOISSETTE: I guess it's sort of
9 implicit in your testimony, but I would like to make it

10 more explicit. There have been put forth, on occasion,
11 the notion that much of the work that Prisoners' Legal
12 Services has done for clients can be done by the clients,
13 themselves, by virtue of having access to law libraries.
14 Respond to that and state if you agree with that statement
15 and, if not, specifically why you think that's not the
16 case.

17 MR. ZELERMYER: Well, I can begin by saying
18 that while I appreciate everything that Mr. Tucker said
19 about his experience in representing himself on appeal, I
20 find that in the area of prisoner and civil rights
21 litigation, things are getting much tougher.

22 I think that the Lee case is very
23 illustrative of the problem. Mr. Lee, a state inmate,

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1 began his case, I think, in 1993, pro se, and he was
2 successful for a few years. He actually, on his own, won
3 a summary judgment motion in the district court. However,
4 the Supreme Court intervened in a sense, by introducing a
5 standard for requiring a state to provide due process only
6 in very, very limited situations. It required a reopening
7 of his case. It required a very rigorous and fact
8 intensive process that that inmate -- and I'm not
9 commenting here on the state law libraries. I can't
10 comment on that with any personal experience, I don't know
11 what specific books are on the shelf at any given moment.
12 Access to a law library, from what I've heard from
13 different inmates, is very difficult. But it would have
14 been impossible from a factual, technical presentation and
15 legal presentation, given the standard the Supreme Court
16 had set -- it would have been impossible for an inmate
17 sitting in a law library to have put together the
18 necessary case in order to prevail.

19 And there are many more cases like that out
20 there. That was an individual case which may have wide
21 ramifications. There may be some ways that other inmates
22 could sit in the law library and read that case.
23 Judge Sotomayor may order that the facts be filed but

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1 that's not going to happen in prison law libraries. The
2 need for organizations such as PLS and the resources to,
3 say, higher experts -- there were experts hired for
4 Mr. Lee's case. Psychiatric experts, experts on
5 segregation and other experts testified, gave depositions
6 and their testimony was taken very seriously and taken to
7 heart by the judge and really was essential within the

8 given the facts of that case. So that's just
9 illustrative. But that's the best way I can answer the
10 question.

11 MR. NOISETTE: Thank you.

12 MS. HATHAWAY: I would just like to ask you
13 a question: In the very near future -- I'm asking
14 Mr. Zelermyer a favor. Hopefully, in the very near
15 future, I'm going to be involved in a project and I'm
16 wondering if -- it's in New York City, by the way. And
17 I'm wondering if it would be possible for me to get a
18 package listing the services that PRP, that you mentioned
19 in your testimony, if I could get a package with that
20 information, and if you have brochures for the services
21 that you do render. Is that a possibility?

22 MR. ZELERMYER: We don't have a brochure.
23 Legal Aid has an annual report and they publish a blurb

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1 about the Prisoners' Rights Project. But we have a copy
2 of our current case docket. It would be possible to come
3 up with --

4 MS. HATHAWAY: Well. Especially the things
5 you have talked about in your testimony. I don't know
6 where your office is. I'm located an at 270 Broadway. So
7 is it possible --

8 MR. ZELERMYER: We are at 90 Church Street.

9 MS. HATHAWAY: So if I can get your card,
10 maybe I can call you. And I'd be glad to run over and
11 pick it up. I think it would certainly help me in my
12 endeavors. Thank you very much.

13 MR. GRADESS: Mary Lynch.

14 MS. LYNCH: My name is Mary lynch. I'm a
15 professor at Albany Law School and formerly the director
16 of the Domestic Violence Postconviction Remedies Project.
17 My testimony today arises from the four years' experience
18 I had -- from summer 1993 to summer 1997 -- with the
19 Albany Law School project, in which myself and others
20 represented incarcerated domestic violence survivors who
21 had killed their abusers. From that experience, I submit
22 that New York State needs to provide a mechanism for
23 ensuring counsel for the indigent on 440 motions, that is,

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1 motions to vacate the judgment under Criminal Procedure
2 Law Section 440.10.

3 Let me give you a little background. Our
4 Domestic Violence Project was funded by the Department of
5 Education, under a series of grants provided to law school

6 clinics to serve under-represented persons. Those funds
7 no longer exist. But at the time they did exist, there
8 were two parts to the Domestic Violence Project: One part
9 served, and still serves under a different funding
10 mechanism, battered women in family court; and we were
11 also able to focus on clemency cases for incarcerated
12 women who were domestic violence survivors who had killed
13 their abusers.

14 The students under supervision represented
15 women at Bedford-Hills and Albion: All of our clients
16 were convicted of murder.

17 Although the grant originally focused on
18 clemency cases, because the clients' cases called out for
19 other kinds of legal assistance and because the clients
20 really had no way to raise their claims without us
21 representing them, that is, there's no counsel available,
22 we extended our representation beyond the clemency to
23 other forms of postconviction relief. In doing so, we

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1 learned a lot about what's missing in our criminal defense
2 system.

3 Today, I'm just going to talk about four
4 things that we learned from this experience.

5 The first is we discovered that there was
6 little, if any, assistance available for indigent
7 incarcerated persons beyond their first appeal.
8 Incarcerated persons are, by the nature of their
9 incarceration, not income producing, and those whose
10 family had resources most often had spent such resources
11 at the trial and the first appeal level. We received and
12 still receive many letters from inmates who did not fit
13 our grant requirements and had no one to whom to refer
14 these potential clients, even when the issue seemed
15 legitimate or when family members contacted us with
16 potentially meritorious issues.

17 Prisoners' Legal Services attempted to help
18 us find counsel for such persons or some resources to
19 assist the families, but the most common answer to such

20 requests was that no one really does that work.

21 When our funding eventually dried up, we
22 had a very difficult time obtaining new counsel for just
23 two cases where much fact investigation, research and

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1 issue identification had been already done evidencing
2 worthy issues to pursue.

3 The New York State Defenders Association
4 did assist us in pulling in some favors and trying to find
5 some counsel for these women, and I thank you for that.

6 So the first issue is that there's no place
7 for people to go to get representation.

8 The second one is that while reviewing
9 cases for clemency eligibility, we have discovered that
10 legitimate, meritorious claims deserving of legal
11 representation are not being made because of lack of
12 counsel. In our very small subset of criminal cases which
13 we were reviewing -- basically battered women cases -- the
14 need for people to have the assistance of counsel to
15 review claims to vacate the judgment became apparent. For
16 example, although we were reviewing cases for clemency
17 eligibility, the ineffectiveness of the trial lawyers in
18 some cases was so shocking that we took on that
19 representation as well.

20 In one case, a lawyer who may have been
21 quite competent in his younger years had grown deaf and
22 had not accommodated for his disability and incompetently
23 represented our client at the trial level. This is not

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1 the kind of case where a review of the record alone is
2 going to show this. You have to do a lot of fact
3 investigation. Once we knew about the deafness, his
4 behavior at trial and his bizarre responses on the record
5 were consistent with our client's description of his aged
6 deafness and could not be explained as trial tactics. We
7 were also able to gather information which put the
8 client's case and the attorney's behavior in an altogether
9 different light than the trial record did. We then had to
10 find new counsel when our clinic folded. The Appellate
11 Division, First Department, has granted the client leave
12 to appeal to hear about the evidence of ineffective
13 assistance. The appeal should be heard in January 1999.

14 In another case, a severely battered client
15 was charged with conspiring to murder her batter-drug
16 dealer boyfriend who had been killed by another group of
17 young drug dealers. It was a case where there wasn't a
18 lot of real physical evidence against the client. Again,
19 we found her trial lawyer to have been wholly
20 ineffective. For example, she appeared as if she did not
21 know how to cross-examine key witnesses in this murder
22 case, she never told the client about her right to
23 testify. The trial judge kept reprimanding her for her

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1 ineptitude. The trial court, in its discretion, granted a
2 hearing on the matter. The decision in that hearing is
3 pending.

4 Whatever happens in the outcome of these
5 two cases, what's important is that in each case, when we
6 got involved, something changed, something happened, the
7 system said this is something we would want to look at.

8 In a third case, the judge's charge was
9 later found to be inappropriate. It was the kind of thing
10 where, later on, there were some questions about whether
11 or not it was legal. The only way to raise that question
12 after an appeal had been filed is through again, a 440
13 motion. In the meantime, the woman came before the parole
14 board. We were able to appeal her wrongful denial of her
15 parole where the parole board failed to properly consider
16 the domestic violence she had suffered which triggered her
17 crime. The woman got out on parole, moved across the
18 state, got defunded and we never pursued that.

19 The third thing is we found that the
20 changes in the Federal Habeas Corpus Laws in the mid 1990s
21 made state postconviction work even more difficult to do.
22 Given the time pressures imposed on lawyers to quickly
23 investigate, identify issues, research and gather

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1 evidence, we weren't comfortable having law students
2 continue to engage in the work, at least not without
3 adequate funding for experienced supervision, private
4 investigator fees, transcript costs, transportation costs
5 for witness interviews and evidence gathering, express
6 mail, postage, Xeroxing, et cetera. The complicated
7 procedural nature of state and federal postconviction law
8 also makes it quite difficult for law students, never mind
9 incarcerated persons, to do as quickly as the new laws
10 demand.

11 So number three was this area has become
12 more complicated and there's more intense pressure to do
13 this work immediately.

14 The fourth thing was that we found that the
15 need in these cases for extensive fact investigation
16 cannot be over emphasized. We found that the very issues
17 which go to the heart of our justice system -- whether or
18 not someone received competent representation or a fair
19 trial -- are issues that are not resolved by pro se legal
20 research by an incarcerated person in a law library
21 someplace. Instead, we found that we needed to travel to
22 where the witnesses, experts, documents, transcripts and
23 facts were to be found.

1 In one case, we traveled to a prison across
2 the state from our client's prison to interview a
3 codefendant who confessed that he lied at trial.

4 In another case, we traveled to New York
5 City to meet with a psychologist who the trial counsel had
6 failed -- remember the very old attorney who had gone deaf
7 and had not dealt with his disability? -- had failed
8 inexplicably to call to trial for his defense of extreme
9 emotional distress. We had to track down files and old
10 transcripts and other necessary documentation. None of
11 this could be really done or be done as quickly from the
12 jailhouse library.

13 The confluence of all these factors -- the
14 absence of funding for postconviction work, the difficulty
15 in finding pro bono counsel, the complicated nature of the
16 work, the need for extensive fact investigation and the
17 need for quick and efficient investigation and filing of
18 440 motions under the federal habeas laws -- creates a
19 gaping hole in our justice system, a hole that can only be
20 filled by affording defendants the right to counsel in 440
21 motions.

22 Indeed, the 440 motion is the only
23 mechanism New York State provides to ensure a convicted

1 person's right to challenge the competence of counsel, the
2 existence of newly discovered exculpatory evidence, and
3 other issues which impugn the integrity of our system but
4 cannot be presented on a bare-bones record alone. It is
5 also the only mechanism to use to challenge convictions
6 based on interpretations of laws later found to be
7 illegal. Without the right to counsel at this level, such
8 injustices will go undocumented -- not because they were
9 hard to uncover but because we failed to afford
10 appropriate legal assistance. Thank you.

11 MR. NOISETTE: Other than in the context of
12 newly discovered evidence, many years after an appeal,
13 what is your -- how can I ask this question? To what
14 extent is this work not being done by a client's appellate
15 counsel as part of their responsibilities and, if so, why
16 isn't that happening?

17 MS. LYNCH: Well, I don't believe that most
18 assigned appellate counsel believes it's their
19 responsibility to go looking for newly discovered
20 evidence. In many cases, we found that they hadn't. When
21 we actually spoke with a person, they said, oh, "I know
22 why the record was saying that, my attorney was deaf."
23 But that question would never be answered unless you were

1 sitting there with the woman -- who, by the way, had a
2 language issue as well -- and you sat there with someone
3 who spoke Spanish and English and said, you know, we are a
4 little confused. And all of a sudden, she gave us
5 information which led to other information and we could
6 then go and talk to someone who may have been at the
7 trial. So that's why I think the process doesn't start,
8 because appellate counsel, they are not looking to talk to
9 people, they are looking to wait on the record.

10 MR. NOISETTE: And we have had testimony in
11 other hearings that part of the pressure on assigned
12 appellate counsel to focus in the way you described is the
13 cap on fees and also the cutting of vouchers. Is it your
14 sense that that's part of it?

15 MS. LYNCH: Absolutely. Part of the reason
16 is because of that type of thing with respect to the
17 amount of money they are actually paid for their appeals.
18 Absolutely. Because it takes a lot of legwork initially
19 to figure out whether there's a meritorious issue. That
20 legwork will not be compensated, as I understand it, under
21 the current system. I mean, you don't get, you know, fees
22 to go down to another state or another place to go talk to
23 someone to see whether or not this issue, you know, is

1 identified. And I don't believe that I'm aware of any
2 funding mechanism now to address that when the client
3 raises issues that may be legitimate under 440 motions.

4 MR. NOISETTE: Thank you.

5 MR. GRADESS: Thank you. Gary Damiani.

6 MR. DAMIANI: Good morning. My name is
7 Gary Damiani. I'm an attorney in private practice in
8 New City, New York, and I'm here representing the New York
9 State Association of Criminal Defense Lawyers. I'm
10 president of that group, having been elected president
11 during this past year.

12 By way of background, I've been practicing
13 criminal law actively since 1968. That's 32 years now.
14 I'm a past president of the Rockland County Bar
15 Association, past chairman of the criminal law committee
16 of that association, ninth district representative of the
17 criminal justice section of the New York State Bar
18 Association and I've been, for many years, on the
19 executive department, and I served as a member of the
20 selection committee for the federal magistrates in the
21 Southern District.

22 The practice of criminal law means a lot to
23 me and has meant a lot to me over the years. The issue of

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1 18B rates is certainly of most importance to me as a
2 private practitioner and one who is concerned about where
3 the practice of criminal law is really headed. I've
4 appeared with members of the Defenders Association at the
5 various Gideon Day events, trying to persuade legislators
6 to increase those rates over the last years. And although
7 initially it was my impression that it was a useless
8 process, I've come to believe that it's a necessary
9 process.

10 One of the important things that I think
11 that we have learned during the past two years and, in
12 particularly, the last year, was the fact that each and
13 every legislator that we appeared before or counsel for
14 those legislators all understood the need for the increase
15 in 18B rates. All understood the woeful inadequacy of the
16 present rate structure and what it means to the criminal
17 justice system or what it will mean, because we are
18 dealing with people who have either practiced privately or
19 are looking to move to private practice.

20 It becomes very disturbing to know that
21 it's recognized by everybody. Our association sent
22 letters to the various committees and to our legislators
23 and assemblymen. And every response we got back, every

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1 member we received a response from, indicated, yes, we
2 know there's a need for an increase. But unfortunately we
3 don't have an increase.

4 So one of the things that has brought my
5 position today to mind is an article that appeared in the
6 November 24th New York Law Journal. It's an editorial
7 dealing with the time for a raise for judges. If you can
8 just bear with me, I just want to read a couple things and
9 then use it as an analogy for where I think committees
10 such as this fact-finding committee might take an
11 approach. It starts off by indicating that:

12 "The salary increases for state judges
13 proposed in the judiciary budget submitted yesterday to
14 the governor are long overdue.

15 "The New York judiciary, which has
16 historically been a source of enormous pride and which has
17 spawned some of the most distinguished figures in American
18 jurisprudence, is now fleeing in ever-increasing numbers
19 for private practice and the federal bench. Six years

20 without a raise -- and both the purchasing power and the
21 prestige of our judges is suffering. This is especially
22 true when compared with the pay of their brethren on the
23 federal bench, who earn 21 percent more.

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1 "While a 21 percent raise may sound
2 enormous, it averages to just 2.7 percent for each year
3 since the last judicial pay raise was enacted. And the
4 proposed increase is far less than the average annual
5 raises won by nonjudicial court employees over the same
6 period.

7 "Even though it would be unrealistic to
8 expect judicial compensation to keep pace -- or even
9 approach -- the remuneration earned by partners in
10 New York's largest law firms, it should be kept in mind
11 that these lawyers are among the pool from which,
12 hopefully, we draw candidates for the state bench. Even
13 with the assumption that sacrifices are expected of those
14 entering public service, it becomes nearly impossible to
15 attract candidates from private practice at the stagnant
16 pay levels currently in effect. And with no guarantee of
17 ever winning an adjustment to keep pace with the cost of
18 living, it is the rare private practitioner who is able to
19 make such a sacrifice."

20 The editorial is a reasoned and passionate
21 one and we, from the New York State Association of
22 Criminal Defense Lawyers, would urge that the fact-finding
23 group and committees such as this perhaps use the same

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1 passion in urging the legislature to raise the 18B rates
2 for assigned attorneys handling the cases of indigent
3 defendants in criminal court matters.

4 The editorial bemoans that judges have not
5 received an increase in six years. Assigned attorneys
6 have not received an increase in 13 years.

7 The editorial compares the salaries of the
8 state judges with those of their brethren on the federal
9 bench who earn 21 percent more. Assigned attorneys in the
10 Southern and Eastern Districts earn almost three times
11 what their brothers and sisters in the state system earn
12 for out-of-court work and almost twice as much for
13 in-court work; the equivalent for the northern and western
14 districts are as much as fifty percent more.

15 The editorial points out that judges are
16 fleeing to private practice and the federal bench. 18B
17 panel attorneys are also fleeing to noncriminal matters

18 and federal panels.
19 The editorial notes that judges shouldn't
20 be asked to sacrifice so much for entering public
21 service. Well, we suggest that the panel attorneys who
22 fulfill the state obligation to provide effective
23 representation sacrifice even more by being paid fees that

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1 do not even cover normal office overhead, much less
2 provide income for their services.
3 The editorial suggests that judges are
4 required to make difficult decisions in the face of ever
5 increasing caseloads. Criminal defense lawyers also have
6 a difficult task and the current fee structure means there
7 are fewer of them willing to serve on panels and,
8 therefore, much higher caseloads for those who perform
9 that important work.
10 It has been uniformly recognized by the bar
11 associations, the judges and the prosecutors that 18B
12 rates are outrageously low and that an increase is
13 warranted if the criminal justice system is to adequately
14 address quality representation of the indigent defendant,
15 as required by the constitution and federal and state
16 mandates.
17 I know personally that there have been
18 numerous discussions at the New York State Bar
19 Association's criminal justice section concerning the low
20 rates being paid and the lack of any increase. I've
21 participated in those discussions. Many of the
22 representatives from these committees have appeared
23 already before this committee and indicated its position.

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1 The New York State Association of Criminal
2 Defense Lawyers have had a number of other representatives
3 appear throughout the state where you are holding your
4 hearings and our position, I think, is well-founded and in
5 the record.
6 And I can tell you personally from my
7 observations in the three years serving that I have, the
8 quality of assigned counsel becomes a problem. And I do
9 honestly believe that by increasing the rates to a fair
10 rate -- and perhaps the rate that's been recommended by
11 the Jack Hoffinger's (phonetic) committee and the work
12 that that has produced -- by raising those rates, I think
13 you are going to open up the pool of lawyers, and the
14 indigent defendant will have quality representation.
15 That's not to say that young fellow out

16 there is not doing the job. He is doing the job. I do
17 believe from what I have seen that those young attorneys
18 know more law than perhaps we will ever know once they get
19 out of law school. The problem is applying it, applying
20 it during the pressures placed on them by the judge, the
21 calendars, caseloads and things of that nature.

22 The judges will be getting the increase
23 that is being proposed -- there's no question in my

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1 mind. And when the judges get the increase, I'm sure
2 those judges will, in essence, as a reward, be looking to
3 make more of their calendar, they will be looking to work
4 harder. The criminal justice system can only succeed if,
5 in fact, there are attorneys there who are competent to
6 make those calendars work. Otherwise, we are going to
7 have chaos.

8 And just as the process is somehow
9 surfacing with a reduction of the capital defense rate,
10 where there is consideration by those who are on that
11 panel to actually stop doing the capital cases, there can
12 very well be a problem with the indigent lawyers on the
13 18B panel unless there is an increase.

14 So I just, as part of our association's
15 position, want it known that for the 1,000 lawyers that
16 are part of our association and Legal Aid lawyers and a
17 lot of private lawyers who do 18B work, that it's time,
18 that certainly the budget as it is now, that some money be
19 allocated to increase those funds. Thank you.

20 MR. GRADESS: Thank you very much. How
21 about we be back here in one hour, at five after two.

22 (A recess was held from 1:05 p.m. to 2:05 p.m.)

23 MR. GRADESS: Good afternoon. Gregory

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1 Kottmeier.

2 MR. KOTTMEIER: Good afternoon.

3 MR. GRADESS: Welcome.

4 MR. KOTTMEIER: Thank you.

5 I'm a lawyer from Delaware County, a solo
6 practitioner now. My main interest is in doing criminal
7 work.

8 Unfortunately, in Delaware County, we don't
9 have a public defender program. We have purely an
10 assigned counsel program, which pays the attorneys \$25 an
11 hour for out-of-court work and \$40 an hour for in-court
12 work. It's a poor county and there's not much private
13 work available, so most defendants receive an assigned

14 lawyer.

15 My main concern is that if your emphasis is
16 on criminal law, there's almost no money to be had. If
17 you don't want to just live own assignments and you don't
18 really want to focus on criminal law, you are basically
19 forced to have a shoestring practice. You can't afford to
20 have computer programs such as West Law and you have to
21 limit your expenses on law books and stuff like that. You
22 are basically operating on a shoestring.

23 I'm not just here to gripe about money

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1 though. I just think that the assigned counsel fees are
2 extraordinarily low, and I think the result of that is
3 some more established lawyers stop taking the clients.
4 What's the sense of taking a client for \$25 an hour?

5 One problem that happens a lot is your
6 assigned clients may get in the way of your paying
7 clients, if you have somebody that wants to pay. So a lot
8 of the more established lawyers do not take assignments or
9 they take a really lax attitude towards assigned clients.
10 I've heard the phrase, "it's only an assignment," thrown
11 around God knows how many times. I know some lawyers who
12 just basically take the assignments to please the court.
13 And I think, given some resentment towards what the fee
14 is, the client with a broken finger from a rear-end
15 collision gets more attention than the client looking at
16 prison.

17 Basically, I have a wife and two children
18 I'm supporting. And after a while you have to make a
19 decision as to whether or not you can actually afford to
20 keep doing this and whether or not you, sort of, reeducate
21 yourself and start doing estate work or something that you
22 have never had an interest in whatsoever. I think
23 something has to be done about that.

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1 There are a lot of conflicts with the
2 D.A.'s office because there is a part-time D.A., and
3 part-time ADAs often in private practices, and when there
4 is a special prosecutor, they can charge reasonable
5 attorney fees, which, in my area, cover around 150 or so,
6 and that's deemed acceptable. I think it's extremely odd
7 that the county is paying an assigned prosecutor a lot
8 more than the county is paying the assigned defense
9 attorneys. That's my main concern here and that's what I
10 wanted to express -- the problem with economics -- being a
11 defense lawyer in an assigned counsel county.

12 MR. GRADESS: Thank you. I'll just note
13 that we have been joined by Melanie Trimble of the Albany
14 County League of Women Voters and we welcome her.
15 MR. NOISETTE: I just had one question. In
16 addition to dealing with the low fees rates, are you also
17 dealing with the cuts in vouchers that we have heard about
18 in our counties?
19 MR. KOTTMEIER: I've heard about that. I
20 haven't had a big problem with that. One thing I have had
21 a problem with is if you want sort of a guarantee that you
22 will be paid for certain other services. For instance, I
23 once had some problems getting approval for DNA testing

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1 for a murder defendant. I finally did get the money but
2 it took more work than it should have taken. It took a
3 lot longer.
4 One time I had a custody case and the
5 respondent father was in jail in Nassau County. I wanted
6 to go down there. It would have taken me a couple of
7 days. I asked for permission in advance to be paid for
8 that and it was denied. Rather, the judge said he would
9 have the man brought up to Delaware County, which is a
10 good five hours. But that never happened because
11 Nassau County didn't comply with the court order.
12 So in the end, I'm looking at a stipulation
13 that everybody had signed and I never met my client -- I
14 met him once briefly. They wanted me to send the
15 stipulation to jail for his signature, which I thought was
16 unethical.
17 Finally, what I did was I had a friend down
18 in Long Island who was very knowledgeable in family law.
19 As a favor to me, I mailed it to him and he took it out to
20 the jail and explained the terms to my client. I was
21 satisfied with that. But it was it was a custody matter.
22 It wasn't as serious as a murder case.
23 I'm very honest in my billing. I mean, I

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1 do bill what I put in. I think I probably bill pretty
2 low, so in terms of cutting vouchers, I've never had that
3 happen.
4 MR. NOISETTE: Okay. Thank you.
5 MR. NOWAK: I guess what I would like to
6 ask is: You made a statement that many times around the
7 courthouse you heard the statement, "it's only an assigned
8 case."
9 MR. KOTTMEIER: I don't think I heard that

10 in court.

11 MR. NOWAK: Around the courthouse.

12 MR. KOTTMEIER: I've heard it in different
13 offices.

14 MR. NOWAK: What I'm trying to find out is
15 the context. Is it, I don't have time to do something?
16 What are some of the specific examples? I'm trying to
17 develop a record as to what people would say and about the
18 factual background, as well, that it's only an assigned
19 case.

20 MR. KOTTMEIER: Basically, if you are an
21 attorney with a large private practice and you have
22 clients paying you a lot of money or you have maybe a case
23 on contingency that looks like it might get to a lot of

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1 money, I think those cases tend to become priorities. So
2 if you have a limited amount of time -- which I don't
3 right now. I have quite a bit of time -- I think people
4 tend to give that case, the personal injury case, more
5 priority than the assigned case.

6 Again, I don't think it's proper.
7 Obviously, somebody going to prison for five years should
8 be a priority, as opposed to somebody who has a broken
9 finger.

10 MR. NOWAK: Thank you.

11 MS. HATHAWAY: You might have said but I
12 didn't hear -- I'm curious. How did you get a client that
13 was in Nassau County assigned to you when you are in
14 Delaware?

15 MR. KOTTMEIER: Because the child was in
16 Delaware County and there was a custody petition, and the
17 judge actually made him a party. He wasn't even a party;
18 the judge made him a party, sort of oddly. That's
19 basically what happened. He was the natural father, so he
20 was made a party to the action.

21 MS. HATHAWAY: So even though the judge
22 made him a party, you were still denied the travel
23 expenses to meet with the client?

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1 MR. KOTTMEIER: Well, I wasn't given
2 permission to go down there. Again, the deal was he was
3 gonna be brought up. But that never happened because
4 there was some problem down there.

5 MS. HATHAWAY: What ever happened to the
6 case?

7 MR. KOTTMEIER: I would have eventually

8 gone down if my friend not offered to do this. It was
9 really a moot point. There was a criminal case with
10 extremely strong evidence, videotapes and everything. So
11 my case was basically just the custody matter. And as for
12 what happened, I imagine he is now in the state
13 penitentiary. In the end, it was probably moot. But I
14 think if you are assigned the case, you work for the best
15 possible outcome.

16 MS. HATHAWAY: You are no longer assigned
17 to it or are you --

18 MR. KOTTMEIER: I wasn't assigned to the
19 criminal matter.

20 MR. GRADESS: Let me just pursue this
21 Nassau County trip one step further. So in the routine
22 course of your assigned counsel work in a criminal case,
23 do I take it that the general routine might be that your

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1 jurisdiction would frown on the idea of paying you for
2 out-of-county travel?

3 MR. KOTTMEIER: I mean, I think the judges
4 probably have their hands tied. I'm not really
5 criticizing the judge. I just think they probably they
6 have their hands tied too, in terms of what they can
7 approve in terms of travel. You know, I've been paid to
8 travel to the next county. I don't know what the limit
9 is, if it's expressly set. I don't think it is. I just
10 think that sometimes economics prevents you from doing the
11 best job that you can.

12 MS. TRIMBLE: Did you ever get an
13 explanation as to why the client was not transported up?

14 MR. KOTTMEIER: I kept pursuing that and I
15 was told I should work it out. I sort of tried to work
16 worked it out myself with the jail and police down in
17 Nassau County. I was a defense lawyer. The jail wasn't
18 in any great mood to cooperate with me. I never got
19 returned phone calls. I never really found out. So it
20 was just a dead situation.

21 MR. GRADESS: Thank you very much.

22 MR. KOTTMEIER: Thank you.

23 MR. GRADESS: Roy Neville.

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1 MR. NEVILLE: Hello. My name is Roy
2 Neville and my address is 1551 Grand Boulevard,
3 Schenectady, New York 12309. I'm president of the
4 Alliance for the Mentally Ill of Schenectady, now
5 NAMI-Schenectady) and formerly a member of the board of

6 directors and president of NAMI-NYS.
7 I'm going to discuss issues around the
8 public defenders' high caseloads and lack of time to deal
9 with individual cases, how well they recognize mental
10 illness in a client, and the difference between clients
11 with mental illness and others, and also, what I perceive
12 as additional training needs and the need to develop
13 relationship with mental health workers in court and with
14 families of the clients they represent.

15 The defenders' lack of time and high
16 caseload. The bluntest expression I received in talking
17 to others about this is that public defenders are not well
18 enough funded to do a good job for anyone. There needs to
19 be more money for public defenders. Poor people don't get
20 adequate defense representation because the government
21 won't pay for it. Mentally ill persons get shorted even
22 worse.

23 In a big city like New York, because PDs

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1 are so overworked and their offices are underfunded
2 everyone has enormous caseloads. They are running from
3 one courtroom to another and they aren't at the office and
4 don't answer calls. They are barely able to hold things
5 together.

6 To expect them to devote personal time and
7 attention to a client with mental illness may be too much
8 to ask. Some are said to be good at defending these
9 clients but the bulk of defenders have little time or
10 enthusiasm to deal with the special needs of mentally ill
11 persons.

12 People with mental illness jam up the
13 system. A lawyer has difficulty communicating with the
14 client, getting from the client what he wants to do,
15 understanding the plea process. Standards for competency
16 are so narrow, there are people who are very disabled but
17 they are legally competent.

18 From a PD's point of view, it's easier to
19 get a plea to get them out of jail than to plead
20 incompetency. A minor case may involve ten or 14 days in
21 jail, and if they plead incompetency, they will be in jail
22 for three months. But a person really disorganized, whom
23 the lawyer has difficulty communicating with, should be

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1 sent for a Section 730 competency evaluation, according to
2 an advocate. That's the Mental Hygiene Law Section 730.

3 How well do public defenders recognize

4 mental illness in a client? Someone with mental illness
5 presents a complexity of symptoms to the defense. We know
6 people who continually get in trouble with the law. They
7 simply make mistakes over and over or have delusional
8 thinking and behavior that leaves them vulnerable to
9 breaking laws and violating the norms of society.

10 We recoil at the high number of persons
11 with mild or severe brain disorders who are arrested,
12 convicted and sent to jail or prison. We believe most of
13 these defendants are not criminals, but act out of the
14 symptoms of their illness. And it follows that they
15 should have the option of obtaining community treatment
16 for their mental illness, rather than doing time in jail.

17 However, a big city court system like
18 New York City does not emphasize diversion. It has a
19 NYC-LINKS program, akin to probation, to take people out
20 of Rikers Island jail and steer them into treatment.
21 Upstate counties are uneven in providing diversion
22 programs. Albany, Schenectady and Rensselaer counties
23 each do this differently.

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1 Diversion programs and alternative
2 sentencing should be top priorities for criminal defense
3 of persons with mental illness, especially those facing
4 misdemeanor or less serious felony charges. But they are
5 often not available to the mentally ill defendant.

6 The need for additional training. Dealing
7 with persons with mental illness is said to be a
8 subspecialty of criminal law which is ignored in the
9 training of the lawyers. Public defenders do get ongoing
10 training but it's on techniques or technical trial skills
11 and substantive legal areas, rather than mental health or
12 substance abuse, we are told.

13 There should be more mental health training
14 or specialized training for a small number of PDs within
15 each office. A few lawyers deal with mental illness
16 really well and are sensitive to mental health issues and
17 try to find people programs. But the vast majority of
18 attorneys aren't going to develop expertise and they don't
19 like dealing with these clients.

20 A New York City advocate thought every PD
21 office should have mental health training. She noted that
22 the way the arraignment process works in the big city
23 system is that the next attorney scheduled goes to the

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1 arraignment and that's the first time the defendant sees

2 the judge.
3 What kind of training is needed? The key
4 area is to teach them to recognize mental illness and
5 figure out if the person has mental illness or not,
6 several people point out. Also, to be conversant with
7 what mental health services are available locally. This
8 is so they can talk to the judge about the kind of
9 treatment program needed such, as a MICA program -- that's
10 mentally ill chemically abusive. The attorney needs
11 specific knowledge about local services, too.

12 Some training courses offered by the New
13 York State Office of Mental Health and New York State
14 Division of Criminal Justice Services fit the needs of
15 police officers and corrections staff. They may be
16 adaptable for public defenders. Unless they are made
17 aware, signs of illness can go unrecognizable in court.
18 And if the defense doesn't recognize them, they won't be
19 brought up. As a recommendation, the New York State

20 Defenders Association might take this on as a training
21 mission.

22 Cooperating with mental health personnel.
23 In some upstate counties the PD has a close working

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1 relationship with a mental health jail intake worker and
2 court liaison. But in New York City, it's reported that
3 there aren't any mental health workers in the courts
4 working with public defenders at all. So it's hard to
5 generalize about ways to make this relationship work.

6 As a former defense attorney pointed out,
7 you need the mental health person in court. In busy city
8 or town courts there are so many clients with mental
9 illness, he said, it takes a level of expertise to screen
10 them quickly. The attorney can ask the mental health
11 worker to check a person out.

12 In Schenectady County, the defender's staff
13 has worked closely with mental health workers for years.
14 Currently, someone from Ellis Hospital's mental health
15 clinic goes with the PD into police report in the
16 morning. She screens newcomers for mental health status
17 and makes recommendations to the judge. Rensselaer County
18 also has a person in the jail mental health unit who
19 contacts community agencies and possibly notifies the
20 public defenders about new prisoners.

21 Albany County is said to have a whole
22 public defender's unit at Albany County Jail. The new
23 inmates on mental health are identified immediately when

1 they enter the jail, and public defenders have the
2 resources of an alternative services program for these
3 clients in the 17 city and county courts in the county's
4 jurisdiction.

5 These seem to be good models for working
6 with mental health professionals.

7 The need to develop relationships with
8 families. The New York State Alliance for the Mentally
9 Ill, that is, NAMI-NYS, encourages public defender offices
10 to work with families and it urges families to make the PD
11 an ally, if possible. Sometimes the family gets together
12 with the PD. In most cases in New York City, however, we
13 have been told that the lawyers do not work with families
14 for lack of time.

15 They recognize the need for outreach.
16 Shortage of time is what makes cases with mental health
17 issues so important for the PD to talk to the family to
18 get the client's personal history. If they are given more
19 time with each case, they will get better at it, according
20 to this attorney.

21 In the Capital District, in our ombudsman
22 program, if the client is willing to involve the family,
23 we tell families to get as much information as possible to

1 the defense counsel, including history, current
2 medications and recent behaviors that give an idea why the
3 person acted the way he did. Recognizing how busy a
4 public defender might be, we suggest they fax messages to
5 the defender's office and make every effort to reach him
6 or her at hours they are available.

7 Thank you.

8 MR. NOWAK: In terms of the training issues
9 that you've discussed, you did mention that, to your
10 knowledge, training goes on for police officers and that
11 might be able to be adapted. But in terms of the
12 Defenders Association looking at something to do and a
13 curriculum, obviously identifying the client is one of the
14 critical I think stages of the process. But beyond that
15 client identification, what other blocks of training do
16 you think should be put in place that would be helpful to
17 defenders in representing clients with mental illness?

18 MR. NEVILLE: There's a lot of training and
19 instructional materials on the different illnesses. Each
20 illness represents different characteristics, behavior
21 symptoms for the individuals, whether it's schizophrenia,
22 something very comprehensive or personality disorders.
23 And then they overlap with drug and alcohol abuse, making

1 it very important that that person be identified for what
2 he is and that the attorney know symptoms and behaviors.
3 Also, the services available to do something about that in
4 the community, where the families are, and we have had to
5 deal with the mental health services system in our
6 counties for years and years. And in Schenectady, for
7 example, we have a directory of every service entity and
8 phone numbers for people and an annotation of what they
9 do. Certainly, that basic information can be there.

10 But much more would be going over the
11 function of those programs and whether they have available
12 slots, as we say, to take people in so that this is a
13 resource for the attorney.

14 MR. NOWAK: Thank you. Would you agree
15 with the statement which I heard recently at a meeting
16 with our county mental health director, that the
17 deinstitutionalization of mental health facilities and the
18 placement of mentally ill folks in community based
19 treatment has had the result that they are now finding
20 their way into the criminal justice system and therefore
21 in a jail cell, as opposed to a community based
22 treatment?

23 MR. NEVILLE: Well, there's a trend and

1 more people are entering jails now. There was a big
2 article in the New York Times in the summer -- I don't
3 know if you read that. I can get it for you -- which
4 tells the numbers nationally and in New York State, how
5 many people are now in jail with mental illness and
6 substance abuse. And at the same time, as we know, in
7 New York they are emptying out the state hospitals. So
8 that's been a trend for 30 years. And there's a theory
9 that as you empty the state hospitals, the jail
10 populations go up. But you know, it's provable over
11 time.

12 In some counties, there's really a very
13 good network of mental health services, and it's very
14 unfortunate that people fall through the cracks and end up
15 in jail and in trouble with the law. But then again,
16 those are inevitable consequences of people with these
17 illnesses. People with delusional behavior are gonna get
18 in trouble sometimes. They can't control their anger or
19 rage or emotions. It might be in the family. We have a
20 lot of cases where the son beats up his mother and the
21 police are called and there's an assault charge. Things
22 like that don't seem terribly serious, but they are there

23 because people with mental illness need to be on medicine

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1 and in a service program, and a lot of clients choose not
2 to be in a services program and take their medicine, which
3 you might say, to take care of themselves as well as we
4 would like them to.

5 But it is correct, you have the prison
6 populations growing with mentally ill inmates at the same
7 time the hospitals are going down.

8 MS. TRIMBLE: You mentioned that in the
9 Albany County Jail they have a diversion program to
10 identify those with mental illnesses. Do they separate
11 the populations so that, as our prison rate is rising, we
12 could actually look at the statistics there, as far as
13 Albany County and the other counties that do separate
14 their populations, and see if there is an increase on just
15 that side?

16 MR. NEVILLE: The point there is to try and
17 divert them to an alternative program. A public defender
18 is available to that client. As soon as he is identified
19 as mentally ill -- he is going to have a preliminary
20 hearing in the city or town courts, wherever he was
21 arrested -- and they are there for him to plead an
22 alternative sentence, if that's appropriate for him, as I
23 understand. And this would reduce the jail population.

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1 If it's a more serious case, they have a harder row to
2 hoe. So it's the presence of defenders there immediately
3 to take that case, I think, which is unusual. And that's
4 a model of sorts for other counties to do. Did I answer
5 your question?

6 MS. TRIMBLE: Yes.

7 MR. GRADESS: Thank you very much. Bob
8 O'Leary.

9 MR. O'LEARY: Good afternoon. I'm Robert
10 O'Leary, I'm a public defender from Broome County,
11 New York. I'm in charge of a office that consists of 11
12 full-time attorneys and a support staff of ten. Our
13 responsibility is to handle criminal cases only. We do
14 not do family court. And the kinds of cases we handle
15 range from violations to misdemeanors, all the way up to
16 felonies. We also handle appeals in the Appellate
17 Division and the Court of Appeals.

18 The main issue I would like to address
19 today is to remind you that New York State fails to live
20 up to their expectation to provide adequate funding for

21 defense criminal cases for poor people. As you are all
22 well aware, what New York State has done is taken their
23 obligation and passed it on to each individual county.

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1 What this has done is created a system in New York State
2 that is not uniform in either the delivery of services nor
3 the quality of services.

4 You look from county to county. You have
5 different organizations set up. Some counties in New York
6 have a public defender. Other counties have a Legal Aid
7 Society. Other counties have a part-time public
8 defender. Other counties have no organized defense and
9 rely solely on assigned counsel. There's no uniformity in
10 eligibility standards, training for attorneys, attorney
11 qualification, the ability to secure expert witnesses and
12 even caseloads. And what results from that are tremendous
13 problems in representing poor people in criminal cases.

14 A couple problems. If you look at
15 caseloads, caseloads vary throughout the state from county
16 to county for different offices. And as a result of the
17 tremendously high caseloads, one of the biggest problems
18 is the ability to develop an adequate relationship with
19 your client. It leaves little time to see the client as
20 often as the client should be seen, either if the client
21 is out of custody or incarcerated. And very simply, what
22 happens as a result of that is the inability to have a
23 client trust an attorney. And when the client doesn't

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1 trust an attorney, the client is less likely to follow an
2 attorney's advice. And sometimes, because of this lack of
3 trust, they make the wrong decision, be that going to
4 trial or taking a plea.

5 Another major problem is experts. Expert
6 witnesses can often be the most critical part of a
7 criminal case. And many, many counties do not have or
8 afford the ability for criminal defense lawyers to hire
9 experts that are needed. In my particular county, I
10 happen to be fortunate because my budget contains a
11 separate line that allows us to hire expert witnesses. In
12 addition, I'd also have to say that in our county,
13 although I don't think jot it's uniform throughout
14 New York State, the judges are very, very lenient and
15 understanding in exceeding the statutory limits of \$300
16 for an expert witness for assigned counsel. That doesn't
17 exist throughout most of New York State. And I think
18 that's a major problem.

19 The bottom line is that what we really need
20 is a radical change in New York State, and the radical
21 change should be a statewide public defender's office that
22 is funded by New York State. And if that can't be
23 accomplished, at the very least what should be done is the

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1 state should live up to the responsibility of adequately
2 funding defense services. This should not be an
3 obligation of the counties. Some counties are unable and
4 other counties are unwilling to adequately fund defense
5 services. And really what we need is a radical change
6 going back and having New York State take the
7 responsibility for providing adequate defense services.
8 MR. NOISETTE: If we had a statewide public
9 defense system, how would you see that? I mean, have you
10 thought about what that position would look like?
11 MR. O'LEARY: Certainly not an elected
12 position. I know there are some states that do have
13 elected public defenders and I really don't understand how
14 a public defender would run if you can't pay him to get
15 elected. What would be the issues he or she would run on
16 to be elected to that position? I think the most
17 important thing is to take the appointment process out of
18 the political arena. And I think the way it could be set
19 up is by regional offices throughout New York State. And
20 certainly if New York City has certainly different needs,
21 there's not a reason why New York City, in and of itself,
22 would have to be part of the statewide system.
23 I'm familiar with both Upstate New York and

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1 Downstate because I was with Suffolk County for eight
2 enough years, and I've been with the Broome County public
3 defender's office for 13. I think there are a lot of
4 similarities. But I think Upstate New York is the major
5 area we are addressing right now. And I think in Upstate
6 New York there really should be a unified public defense
7 organization with regional offices. One regional office
8 may only cover a county, but others can cover multiple
9 counties. But I certainly think that's the way to do.
10 MR. NOISETTE: And this is to address
11 issues of uniformity in terms of delivering services?
12 MR. O'LEARY: That's part of the it. And I
13 think, certainly, if you have a state funded organization,
14 number one, I think the ability to have the organization
15 properly funded is better than relying on each individual
16 county.

15 have four attorneys doing exclusively misdemeanor and
16 violation work, and I would estimate that each of them
17 handle approximately 750 cases a year each -- which is far
18 too high, far too high. Now, that's compared to our
19 felony attorneys and, in general, their caseload is in the
20 low 200s each in a year. And that's certainly far closer
21 to the ideal than the misdemeanor and violations cases.
22 But that's a decision I made.

23 MR. NOWAK: And in order to strike that

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1 balance, what you have had to do is give a higher number
2 of misdemeanor cases than the felony staff, but yet it
3 ends up that your felony staff -- when you said 200, is
4 that felony only or would have would that include
5 misdemeanors as well?

6 MR. O'LEARY: No. Actually, in the low
7 200s would be felonies only. But in addition to that,
8 they also handle misdemeanor cases. If, for instance, a
9 client is charged with a felony and may have already had
10 several misdemeanors pending, they would take all of the
11 cases. We have one attorney handling one client. We
12 don't split it up.

13 MR. NOWAK: Thank you.

14 MR. GRADESS: Let me just ask you this one
15 question: If there were currently a set of voluntary
16 standards in this state, what impact would they have on
17 the funding of your office through Broome County?

18 MR. O'LEARY: Voluntary standards? Well,
19 the one impact I think it would have is it, at least,
20 would give me this standard that I could present to the
21 powers that be in my county, and that's the legislature
22 and the executive, as far as funding goes.

23 Now, when I present proposals to them that

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1 I need more funding for various things, I have to talk in
2 terms of the standards that were set -- and I believe it
3 was set something like 20 years ago -- as far as caseloads
4 go. And I use the standard of 150 felonies and 450
5 misdemeanors. But I get the argument, "Who set the
6 standards? Who says those are the standards that should
7 be followed? Who said they apply to New York State?"

8 And the other argument I get, which is one
9 that is difficult to address except simply -- you have to
10 argue with the people who really control the money, that
11 you can't compare what we have to other counties who are
12 doing more with less. And that's the biggest argument I

13 get. "Look at another county here. They are handling
14 more cases with less." And it's a poor argument because
15 the only way I can respond to that is, "Just because they
16 are able to do it and they are doing a poor job, that's
17 not something we should aspire to."

18 And what we should really be doing is
19 getting ourselves to the ideal situation. I happen to be
20 fortunate, when I look at other counties. I think our
21 caseloads are too high and I think I should have more
22 funding. But when I look at other counties, particularly
23 around my area, and look at the delivery of services

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1 there, I think the people in Broome County are fortunate
2 to be getting the services they do.

3 But I think, getting back to your question,
4 if we have voluntary standards, at least that would be
5 something I could present to the legislature and to the
6 county executive -- this is what we should be meeting.

7 MR. GRADESS: One last question. We have
8 had testimony today and at each of the hearings about the
9 justice court system and it's impact on the advocacy
10 representation. Do you have an opinion on that?

11 MR. O'LEARY: Yes, I do. First of all, I
12 had some familiarity with the justice court system when I
13 was practicing on Long Island because we did have a
14 justice court system. But to be quite frank with you, I
15 never realize the extent of the system and how it operated
16 until I moved to Upstate New York.

17 I think it's absolutely incredible that
18 New York State allows the justice court system, the way it
19 operates today, to even exist. These courts are not
20 courts of record, which means there's no requirement that
21 there be any tape recording or stenographic transcript
22 kept of the proceedings.

23 Secondly, the judges in these courts are

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1 not required to be lawyers, so the only legal training
2 they get is a very short training program conducted by the
3 Office of Court Administration, and I believe right now
4 it's only a week of training. And yet I think it's
5 absolutely incredible that myself and attorneys in my
6 office, if they are going to represent a defendant, have
7 to go through seven years of school and pass a bar exam --
8 same thing for the prosecutor. Yet the judge, all they
9 have to be is a competent person in a town or village and
10 get elected.

11 And the other major problem that you have
12 is that oftentimes judges, due to their lack of knowledge,
13 basically look it to the prosecutor as to what should be
14 done in a case, and they defer to the prosecutor often in
15 town justice courts. I cannot understand how New York
16 State thinks that we have an equal justice system when
17 someone who is charged with a misdemeanor and it's in a
18 court of record such as city court and they have a judge
19 who is a lawyer, full-time, and there is a recording of
20 the proceeding, yet you may be a mile or two outside the
21 city limits and you are not entitled to that. You may be
22 charged with the very same thing.

23 And one thing we need to remember is that

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1 town and village justices have a tremendous amount of
2 power. They can send someone to jail for a year. In
3 addition to that, they make decisions with regard to
4 whether or not someone is released on their own
5 recognizance or remanded to jail in lieu of bail. And
6 what you find is town and village justices, far more often
7 than judges who are full-time, remand people to jail, set
8 higher bail on minor offenses, where you wouldn't see that
9 in other courts.

10 And what really should happen in the state
11 is, as another radical change, the justice court system
12 should be eliminated. And what we should have is a
13 district court system. That exists in Nassau and Suffolk
14 counties. They should exist throughout New York.

15 MR. GRADESS: Thank you very much. Tom
16 Saitta?

17 MR. SAITTA: Good afternoon. My name is
18 Tom Saitta. I'm a partner with a law firm in Binghamton.
19 Im co-chair of the Criminal Defense Attorneys Association,
20 which is an association of private practitioners in the
21 Broome County area. I wanted to address a little
22 different problem than Mr. O'Leary addressed.

23 We have assigned counsel panels in

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1 Binghamton. Since we do have a public defenders, the
2 assigned counsel handles pretty much cases where you have
3 codefendants that can't be represented by the same
4 office. In the surrounds areas we have a list of private
5 practitioners who have indicated a willingness to
6 undertake representation for criminal defendants according
7 to set rates.

8 And there is a real problem in terms of the

9 availability and quality of representation through
10 assigned counsel panels that's gotten worse over the
11 years. I've been a member both of Broome County's
12 assigned counsel panel, as well as the federal court CJA
13 panel in the Broome County area.

14 Basically, the problem is the fee
15 structure. It's interesting in terms of timing that we
16 are having this decision the same day that the speaker has
17 asked to raise the judges' salaries under the argument
18 that they haven't gotten a raise since 1989. The assigned
19 counsel fee structure has been in place since 1984, I
20 believe, and it's presently \$25 an hour for out-of-court
21 time and I think it's \$40 for in-court time. The problem
22 is the rates are just too low.

23 What I would like to do is explain, at

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1 least in an upstate city like Binghamton or a more rural
2 area, the impact it has with some particular numbers. In
3 our area in Binghamton, and I think, pretty much, the
4 surrounding counties, the average overhead hourly rate is
5 between \$55 and \$60. If we are making \$25 an hour
6 out-of-court -- and quite honestly, most of the work you
7 do, if you are doing it right, would be out-of-court for
8 misdemeanors as well as felonies. If you are getting paid
9 \$25 an hour but your overhead expenses are between 55 and
10 60, not only are you not making money, but you are losing
11 between \$30 and \$35 an hour every hour you work on the
12 case. That sets up a clear system where you punish
13 attorneys with a financial penalty for doing a good job.

14 And the result has been twofold: You have
15 attorneys that don't do as good a job as they can for a
16 client because they are losing money doing it; or the more
17 common problem is you drive attorneys off the panel.

18 To give you some numbers from the Broome
19 County area, we have somewhere over six hundred attorneys
20 in the Broome County Bar Association. The assigned
21 counsel panel has 20 attorneys that will regularly take
22 these case. And the figures for assignments in Broome
23 County were over 1460 cases last year -- about 1000 were

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1 misdemeanors and violations. 454 were felonies. So if
2 you do quick numbers, each attorney would have to be
3 willing to take 73 cases a year in addition to their
4 private practice. The problem is that's just not going to
5 happen.

6 I mean, when I first started on the panel

7 in Broome County, people would take a couple of cases a
8 year, again to help with the representation as a favor to
9 the judge, and it wasn't that burdensome a process. But
10 as more attorneys got off the panel and the level of
11 criminal prosecutions increased, it's just gotten to a
12 level that's pretty much unmanageable.

13 Again, the problem is we are also competing
14 with the federal CJA panel. Their rates are a little
15 better but well below what the average hourly overhead
16 rate is, so they are running into the same problem.

17 What you get is it's very difficult for the
18 judges to find people willing to represent people charged
19 with crimes. It results in delays of cases. I've taken
20 assigned cases where it's two weeks since arrest, the
21 person is sitting in jail, and I'm told I'm about the 30th
22 person the judge has called to take the case. And some of
23 these people should never be in jail in the first place.

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1 That's obviously wrong. It certainly undermines the
2 confidence the defendant has in the system.

3 The other problem right now is you have
4 people who are taking assignments and are trying B level
5 C level felonies that really are not adequately prepared
6 to do that. Again, it's a hard thing to quantify. And
7 unfortunately, that's something that allows this type of
8 injustice to continue, you can't quantify it. The judges
9 are the ones that see a case, that have to go through
10 quite a few attorneys to get to take the case. Again, if
11 some of the people in the state legislature feel, well,
12 it's no big deal, it's not a real problem, well, these are
13 real people.

14 They are many people who are, for example,
15 overcharged that may end up going to state prison that
16 don't belong there. In our county, within the last two
17 years, an indigent defendant with no resources was found
18 not guilty of charges, was acquitted of charges he wasn't
19 guilty of in two second degree murder cases -- he would
20 have spent 25 to life -- because one attorney was willing
21 to take both those cases, at great financial hardship to
22 his practice. In my mind, rather than showing that the
23 assigned counsel system works because of that, it shows me

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1 that the only reason it worked was by an act of charity
2 by this attorney. That's the point. An innocent person
3 on trial for murder should not depend upon an act of
4 charity as to whether or not he is free or not.

5 Finally, as to the justice court system, we
6 see that also and it is a problem. Unfortunately, the
7 biggest problem is -- especially in the rural counties
8 where you don't have attorney judges -- the prosecutors
9 are well aware of the judge's ignorance and they take full
10 advantage of it, not only in terms of evidentiary rulings
11 in trial but in negotiating cases. But even simple
12 things. I'll go out to a courtroom and I will be barred
13 from going to the judge's chambers by the district
14 attorney, who acts as a gate-keeper. It's small, but if
15 you think about it, one, it's ridiculous and, two, it
16 conveys a message to your client that they are not going
17 to get a fair shake from the court.

18 So I would agree with Mr. Leary that, if
19 anything gets done in addition to raising the assigned
20 counsels' fees, there has to be at least more controls
21 placed on the justice court system. Thank you.

22 MR. GRADESS: I wonder if you would
23 characterize for the record -- you described a situation

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1 of delay generated by the difficulty of having a small
2 number of available lawyers. And I wonder if you might
3 characterize for us what it might sound like to the judge
4 as he makes 30 calls. What kinds of things have been said
5 so we can flush this out a little?

6 MR. SAITTA: Well, you usually get a call
7 from the judge and, one, you can tell he sounds
8 frustrated -- 'cause it's his job to make sure somebody
9 doesn't languish in jail and that he gets representation.
10 And he is frustrated because he has spoken to a number of
11 attorneys who have told him, "Sorry, I can't take the
12 case." They don't want to take the cases because of the
13 number he has to do. That's really the problem. If he
14 could go to every attorney, when you are talking 70 cases
15 a year with the same 20 attorneys, it just gets to wear
16 thin, and he feels like he is constantly going back to the
17 well and imposing on the people that are willing to do
18 that.

19 One of the problems you have in a rural
20 area, unlike the bigger cities like Albany, New York or
21 Buffalo, where there is an actual private criminal bar
22 that subsists solely on doing criminal cases, in Broome
23 County there's really maybe only one or two that do just

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1 criminal law for money. There's just not the business.
2 You don't have a pool of people that you can draw from

3 that can take, as part of their practice, these cases,
4 like you would in Albany or Buffalo or New York. You have
5 people that are just doing criminal work part-time, even
6 though they are knowledgeable. It's just not their whole
7 practice. It starts reducing in numbers. If they are
8 going to do something on a semi pro bono basis, they are
9 more likely to do it in family court or some other place
10 where it's not as difficult an arena.

11 The judges -- I know they are frustrated.
12 I've talked with both our county judges and they are
13 practical begging you, calling in you personal favors to
14 get you to take cases, especially, when you are talking
15 A level felonies. And time and time again, what you
16 usually see is a partner of someone who is willing to go
17 above and beyond the call for a couple years, but quickly
18 gets burnt out financially, you know, from the knowledge
19 that every hour they work on the case and the more they
20 do, they are losing money and, in a sense, being
21 penalized.

22 You add, on top of that, some counties have
23 been aggressive in cutting down vouchers. One of the

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1 cases I talked about where an assigned counsel got an
2 acquittal, his voucher got cut, even though it was signed
3 by the judge. That type of attitude is really driving
4 people away from the panels.

5 MR. GRADESS: Would you tell us about your
6 experience with voucher cutting?

7 MR. SAITTA: Well, I've had my voucher cut
8 on a couple of cases. One case was, in fact, very
9 difficult. This was a federal case, but I've had the same
10 through the state. I tend to get calls from judges with
11 difficult clients, clients that have been through other
12 attorneys, they are just difficult to deal with, because I
13 had been in the public defender's office for several years
14 and was used to dealing with difficult clients. I never
15 had an objection to taking a difficult clients.

16 On one occasion, I had a client where I
17 spent a lot of time getting him moved from a federal
18 facility to a hospital because he had high blood pressure,
19 and they would send him to the hospital for two days, send
20 him back to the jail, and I finally made a complaint.
21 When the voucher came back, the judge said, "I had to cut
22 you down 'cause you didn't go to trial. I had to keep it
23 in line with everybody else." The message that sent to me

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1 was, well, when you need the help, you ask for it, and
2 then when I go out of my way to help this guy, I'm willing
3 to go along with the rates 'cause I agreed to take it, but
4 don't cut me down. I did you a favor by taking a client
5 that nobody else would deal with. You run into that.

6 I don't think our legislators really
7 understand what goes into proper representation of a
8 criminal defendant. To me, the most striking example of
9 that is the fact that you get a different rate for
10 in-court or out-of-court. Where it might make sense to a
11 legislator, to a defense attorney who does the work, it
12 doesn't make any sense. You work just as hard, if not
13 more, out of court than you do in court. But that's been
14 a long-standing tradition and it really doesn't make much
15 sense to me.

16 MS. TRIMBLE: Are you familiar with the
17 changes that -- I'm sure you are -- that they would like
18 to make to the court system in general?

19 MR. SAIITTA: Some of them, I am. And I'm
20 familiar with the changes that Judge Kaye has been talking
21 about. To be honest, I'm also on the capital assigned
22 counsel panel. And unfortunately, it appears that some of
23 the deals that have been struck in return for her

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1 willingness to reduce the capital counts in order to push
2 these changes through in terms of reorganizing the
3 judiciary. I don't think any of these are really going to
4 help, one, obviously assigned counsel, but even the
5 justice court -- until you make them courts of record,
6 until you make them accountable and until you really set
7 them up as impartial and neutral magistrates, you're gonna
8 have problems.

9 One of the things, I guess, that's
10 overlooked, that you see as an attorney, the people
11 getting charged in town courts are the most law-abiding
12 citizens. They are not career criminals. They have
13 gotten into one situation or another, a DWI or a
14 shoplifting or something like endangering the welfare of a
15 child. These are your law-abiding people. And in a lot
16 of ways. They are taken advantage of because it's easy to
17 do. It's like the IRS -- they would target people with
18 less income because they knew they were less likely to
19 fight back.

20 MR. GRADESS: Thank you very much. David
21 Leven.

22 MR. LEVEN: Good afternoon. My name is
23 David Leven. I am the executive director of Prisoners'

1 Legal Services of New York. Last Thursday was
2 Thanksgiving. It also marked the 19th anniversary of my
3 being executive director of PLS. It was not a happy
4 anniversary. It's been an extraordinarily difficult
5 year. It's been a total nightmare.

6 I guess about half the audience right now
7 is comprised of former Prisoners' Legal Services staff.
8 Roz Becklyn (phonetic) a former paralegal with PLS who was
9 laid off this summer, worked for our program for 14 years
10 and, perhaps, would have worked for our program for the
11 rest of her career, had it not been for the fact that we
12 lost our funding. In the fifth row is Gavin Cook, who is
13 a staff attorney in our Albany office for ten years and
14 probably would have worked for at least another ten years,
15 if not for his entire career, doing prisoners' rights
16 work, had he not been laid off this summer as well. Gavin
17 is with me today as we lobby the legislature to try to get
18 our funding restored sooner than later.

19 Since April, we have laid off virtually our
20 entire staff, 58 of 62 people who worked at Prisoners'
21 Legal Services in six offices around the state. For 22
22 years we provided high quality civil legal services to
23 inmates in the state prison system. We are doing that no

1 longer, at least temporarily.

2 In a court decision three years ago, the
3 court noted that when corrections officers entered
4 Mr. Diaz's cell, essentially to escort him to the special
5 housing unit, they proceeded to administer a totally
6 unprovoked beating of Diaz and continued to assault him on
7 the way to SHU. Mr. Marquez (phonetic) another inmate
8 observed the beating. When the COs returned to get
9 Mr. Marquez, they beat him with batons, fists and kicks
10 even after handcuffing him and shackling him. They
11 continued to physically abuse him en route to the SHU and
12 after arriving there. This brutality case resulted in the
13 award of \$50,000 to each plaintiff. Much of the assault
14 was captured on videotape. Despite the videotape, a grand
15 jury refused to indict any of the officers, and there
16 were six or seven involved, for this crime. And only one
17 corrections officer was fired.

18 Without PLS, the inmates would, in all
19 likelihood, not have been able to have been compensated
20 for the damages that they suffered as a result of the
21 beatings. Their civil rights would have been violated
22 without recourse. Now, with the loss of our state funding
23 following the governor's veto of the legislature's

1 appropriation for PLS, some prison guards may feel that
2 they have a license to brutalize inmates with impunity.

3 I wanted to talk to you about justice
4 because that's what our program is about. And inmates no
5 longer have justice who are in the state prison system.

6 PLS is no longer able to intervene where,
7 in cases in the past, we have prevented the Department of
8 Correctional Services from housing numerous inmates with
9 AIDS together in one facility, in violation of their
10 privacy rights.

11 We can no longer ensure that mates will not
12 be deprived of visitation rights without due process.

13 We had stopped the practice of strip
14 frisking inmates in numerous situations which were not
15 security related. We can no longer do that.

16 How many inmates now will serve sentences
17 longer than required because their jail time is not
18 properly credited? We were able to get them that credit.
19 We cannot do so any longer.

20 How many inmates will serve a year or so,
21 23 hours a day, in a seven-by-eight foot cell, possibly
22 doubled up with another inmate, even though they may not
23 have done anything wrong or even though their due process

1 rights may have been violated? They can no longer get
2 justice because they have no one to represent them at
3 their disciplinary hearing appeals. And I can assure you
4 that they cannot adequately represent themselves.

5 How many inmates will suffer needless pain
6 because they have suffered injuries or medical problems
7 for which they are not getting timely medical care? With
8 our assistance, mostly administrative advocacy and
9 negotiation, we have been able to help them to get the
10 required medical care in a timely fashion. Obviously, we
11 can no longer do that.

12 Justice is being denied to inmates -- all
13 inmates in the New York State prison system today. The
14 words concluding our Pledge of Allegiance, "and justice
15 for all," are betrayed by the reality of our criminal
16 justice system -- certainly for prisoners but, of course,
17 also for many poor people as well.

18 The failure of government to assure justice
19 for prisoners is simply unacceptable. It is not unfair
20 for us to assert that until such time as funding is
21 restored for Prisoners' Legal Services, that our justice
22 system lacks integrity. And it will continue to do so

23 until that day arrives when prisoners who have meritorious

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1 claims which deserve to have the full and proper attention
2 of the courts -- until that day when inmates have
3 representation, our justice system will be unfair.

4 Funding for legal services for prisoners is
5 certainly a governmental responsibility. We have
6 attempted to raise funds privately. And even on an
7 emergency basis, we have only been able to raise
8 three-quarters of a million dollars. That is not enough
9 to keep a \$5 million program going. And as a consequence,
10 of course, we did have to layoff virtually our entire
11 staff. There's simply an absence of responsibility on the
12 part of state government not to fund Prisoners' Legal
13 Services.

14 It has been argued by some that law
15 libraries are sufficient, that that's all that inmates
16 need in order to prosecute their cases. In a letter to
17 Governor Pataki three years ago, the then president,
18 immediate past president and president-elect of the
19 New York State Bar Association responded to that
20 assertion. They said:

21 "We respectfully disagree. Our experience
22 indicates that a substantial portion of the legal needs of
23 the poor are presently unmet. Unquestionably, libraries

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1 cannot serve as a substitute for trained lawyers to
2 provide meaningful access to the courts. Experience
3 demonstrates that citizens are not able to adequately
4 represent themselves in litigation, particularly that
5 which requires discovery or trial. And inmates who are
6 not literate, who do not speak English well or who are
7 mentally ill, surely are entitled to the services of
8 lawyers. The fact is that lawyers are essential to the
9 fair administration of justice for prisoners."

10 In the October issue of a DOCS Data
11 (phonetic), a publication of the New York State Department
12 of Correctional Services, it is stated that, "Quite
13 simply, PLS is redundant and duplicative under the
14 standards set by the nation's highest court."

15 That's nonsense. In order to receive
16 justice, inmates have to have lawyers representing them.
17 Commissioner Goord will not go into court without a
18 lawyer, I can assure you, nor will any of his staff. If
19 you want to level the playing field right now, that's what
20 should happen. But I can tell you they would never agree

21 to that. And of course, they are entitled to have lawyers
22 represent them when they are sued. But inmates are
23 entitled to have lawyers represent them when they have

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1 been brutalized, when they have been denied due process,
2 when they have been denied medical care.
3 It is difficult to try and explain the
4 impact of the veto of our funding on our laid off staff,
5 much less the prison population. I really can't do so
6 adequately. But consider how you might feel, as one of 58
7 talented and dedicated and skilled legal workers who has
8 worked for PLS for over a decade and were making a career
9 of this important work that you deeply believed in.
10 Suddenly, in the middle of the best fiscal year the state
11 has had in memory, you are laid off. Your career as a
12 lawyer or a paralegal for prisoners comes to a halt, at
13 least temporarily, through no fault of your own.
14 What has happened to those people so
15 committed to justice who now must, themselves, endure a
16 serious injustice? Some people have found other jobs.
17 Roz has, but Gavin hasn't. A lot of our attorneys are
18 still looking. Why? Because they want to do public
19 interest work. They want to work on behalf of people who
20 seriously need help, particularly prisoners. There are no
21 other jobs available unless they want to move to another
22 location. A couple of attorneys have. One is now working
23 for the Prisoners' Rights Project. He is commuting two

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1 hours every day to go to work each way. Another attorney
2 who had just moved to Buffalo about a year ago had to move
3 to Washington to work in the D.C. Prisoners' Rights
4 Project. Many are holding out, hoping that funding will
5 be restored in the summer, if not sooner, and at that time
6 their positions will be restored.
7 In the meantime though, we are going to
8 lose a lot of very dedicated, very experienced attorneys.
9 What that means is we'll have to start all over again with
10 a lot of new staff who will have to spend years training,
11 who will take years to develop the expertise of the staff
12 that left, who should not have had to have left.
13 In the meantime, the state unemployment
14 insurance fund has paid out over \$100,000 -- something
15 that should not have been necessary.
16 Unless funding for PLS is restored, we
17 should heed the words of the Rev. Dr. Martin Luther
18 King, Jr., who said, "Justice denied anywhere is a threat

19 to justice everywhere." I urge you to make a strong
20 recommendation for restored funding for PLS and restored
21 justice for inmates. Thank you.

22 MR. GRADESS: Thank you.

23 MR. NOISETTE: Could you just give us a

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1 sense of, on average, how many inmates you were helping
2 each year in sort of, roughly, the categories that you
3 described, with the time application issues, things of
4 that sort?

5 MR. LEVEN: We receive about 12,000
6 requests during the course of a year from a now 70,000
7 inmate population throughout the state. We respond to
8 each of those requests in some fashion. Most inmates who
9 ask for our assistance, if we are unable to provide it
10 directly, we will provide them with form materials so that
11 they can at least attempt to represent themselves. In
12 some cases, they will be successful. In most cases, they
13 will not be.

14 We need a much larger staff than we had to
15 begin with. It should be at least three or four times
16 larger.

17 With respect to the breakdown in
18 representation, we would ordinarily be able to help some
19 150 inmates with jail time credit problems, getting back
20 usually in the neighborhood of 100 years of jail time
21 credit, thereby saving the state a good deal of money. We
22 can document we save the state at least as much money as
23 they invest in PLS by saving the state the need to have

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1 150 prison cells a year.

2 We represent perhaps a couple hundred
3 inmates a year in disciplinary hearing appeals, about half
4 of which we are successful, either at the administrative
5 appeal level or in Supreme Court or at the Appellate
6 Division level. Again, inmates are very rarely successful
7 in representing themselves in that. In fact, we are so
8 backlogged with requests in that particular area, that, up
9 until the time of our the veto of our funding, we were
10 limiting our representation to inmates who were serving a
11 year or more in disciplinary confinement. So an inmate
12 who, for example, received a hit to serve 23 hours a day
13 in a cell for six months as disciplinary confinement, we
14 would not be able to see him.

15 The brutality cases might number 20 to 25
16 new cases a year. Again, we have been successful in at

17 least half of those cases, either through settlement or
18 after trial. But again very few inmates are successful in
19 representing themselves.

20 I should mention in this regard, when our
21 funding was vetoed, we made a real effort to try to find
22 private counsel to take the cases that we could no longer
23 handle. We made motions to withdraw in most cases because

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1 we were unable to find other counsel, particularly lawyers
2 in the Northern District where mostly the prisons are
3 located, particularly the mid-Hudson area, the
4 northwestern part and the northern part of the state,
5 where there simply are not lawyers who are available who
6 have the resources, the knowledge or the expertise to take
7 these cases. We were able to find counsel to take some
8 cases in the Southern District, lawyers from New York City
9 who work in large law firms who do have the resources, do
10 have the interest and, if not the expertise, certainly a
11 lot of attorneys who can work on developing those cases.

12 MR. NOISETTE: Thank you.

13 MS. HATHAWAY: Just a statement -- my
14 statement. I cannot speak for anybody else. The way I
15 see it, plain and simple, your program worked, and the
16 veto was designed, in my mind -- if the program can be
17 crippled, then kill it.

18 I would just like to know, how sure are you
19 that PLS will be refunded by the spring of 1999? Because
20 it will still be a continued threat, maybe not a large
21 threat but, if you get it together, it is still a threat.

22 MR. LEVEN: Your question is a good one.

23 It's clear we have tremendous support in the legislature

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1 and we have had since near the beginning of the program.
2 There were a lot of skeptics, I think, who didn't believe
3 there was a need for a program like ours. Why would we
4 provide legal services to prisoners is what we would hear
5 from people who had no understanding why it was important
6 to ensure justice for all people, corrections officers or
7 others who work for the Department of Correctional
8 Services.

9 But over the years, we have educated
10 legislators in both houses, both Republicans and
11 Democrats, and frankly, even though the Republicans have
12 not put up money for PLS, from Senator Bruno to most of
13 the leaders in the senate, they are supportive of PLS and
14 they will tell you there's a need for PLS to act as a

15 safety valve and to ensure justice for inmates.
16 As far as the governor is concerned, we
17 were able to get a letter from the governor's counsel in
18 June which indicated that the governor has an open mind
19 towards our funding next year. And the fact that he
20 vetoed our funding this year shouldn't be taken as a
21 reflection necessarily that he thinks that PLS should not
22 exist. Probably the best we could have done -- I think
23 what happened, in part, was that we were a victim of the

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1 new budget process. I think that the legislature somewhat
2 miscalculated what the governor was going to do once they
3 passed their budget. They passed a budget which exceeded
4 what the governor said the limit was and the governor
5 vetoed 1300 items. We are certainly not one of his
6 favorites, but we were not vetoed in the first years of
7 his administration and I expect that this year the
8 legislature and the governor will find a way to ensure
9 that there will be a Prisoners' Legal Services program
10 that is funded at an adequate level.

11 MR. GRADESS: Do you, at the moment, have
12 the resources to last until next years' budget at a
13 skeleton level?

14 MR. LEVEN: Well, to last virtually with no
15 staff, yes. And the staff we have is our associate
16 director, Tom Teresi, who is working on cases, although
17 being paid for 60 percent time, working full-time; and
18 myself, also being paid 60 percent time. And I'm doing
19 administrative work, fund-raising. I've become a
20 landlord, subletting to five different not-for-profit
21 organizations. I collect rent every month to help pay our
22 rent. And I think we can hold out until April with the
23 funding that we now have, but that's all. But that's not

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1 a program that's providing legal services to prisoners.
2 What's happening now with the complaints we
3 are getting from inmates -- and we are still getting about
4 50 letters a week -- is that those letters, the same
5 letters that come to us are going right back to the
6 inmates with a form letter from us saying, we are sorry,
7 we are unable to handle your case at the moment, there's
8 nothing we can do for you, and a form letter from the
9 Prisoners' Rights Project of the Legal Aid Society, which
10 essentially says they can provide some advocacy for you if
11 you have a serious medical problem, but that's the extent
12 they can help. So essentially, we can exist with the

13 staff we have, but we are not providing legal services to
14 prisoners.

15 MR. GRADESS: I wonder if you could
16 characterize -- I'm concerned that you have to build up
17 staff again. I'm trying to hear, sort of with a
18 mathematical ear, what the years of experience are like on
19 the staff you laid off. I take it that there are several
20 hundred years of experience combined for the staff that
21 have been laid off. Do you have any qualification of
22 that?

23 MR. LEVEN: Well, several hundred is a good

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1 estimate. Most of the attorneys in the program worked
2 with PLS for over ten to 12 years. We had some who worked
3 for 15 to 20 years before they were laid off. Again, some
4 of whom have other jobs, others who do not. Some of those
5 are trying to exist or subsist until such time as our
6 funding is restored by doing either 18B work or some
7 private practice work, working on immigration cases,
8 trying to make a living doing that, at least temporarily.
9 But in terms of longevity, most of the people working in
10 the program with us worked there for at least ten to 15,
11 20 years.

12 MR. GRADESS: I guess the question comes to
13 mind -- and you can do this with names or without names.
14 Obviously, we have known about your program for many years
15 and many of the staff of your program. It seems, from
16 this vantage point, that much of what we have referred to
17 you over the years and the public defender's offices of
18 the state have referred to you are beyond the canon of the
19 ordinary lawyer and are not within the realm of the
20 ordinary public defender.

21 Could you characterize for the record some
22 of the expertise of some of your nontenured lawyers you
23 are losing, particularly things that are not easily

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1 restorable, experience with particular kinds of actions or
2 expertise, if that's possible?

3 MR. LEVEN: Certainly guard brutality is
4 one type of case. We lost a number of attorneys who had
5 expertise in bringing and trying guard brutality cases.
6 Gavin was one of them. For the last 16 years, he handled
7 a number of guard brutality cases. He knew how to handle
8 them from beginning to conclusion, discovery through
9 trial. You could not find an attorney with five years of

10 experience practicing a different kind of law who could
11 come in and take over one of those cases and would be able
12 to handle that type of a case adequately. So that's one
13 type of case.

14 Disciplinary hearing appeals is another
15 type of case. These are not always simple cases. There
16 are a lot of issues which are raised at disciplinary
17 hearing appeals, from a lack of effective assistance in
18 bringing the case, to not having witnesses provided at the
19 disciplinary hearing, to biased hearing officers. There
20 are a whole range of issues our attorneys are trained to
21 look at and look for in handling a disciplinary complaint
22 coming into our office. Someone who has not handled this
23 type of case, in terms of writing briefs, writing

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1 petitions, would not be able to easily handle them with
2 any skill.

3 It takes years to develop the kinds of
4 expertise which our lawyers have to be able to handle
5 these kinds of cases adequately and effectively. So if we
6 are required to hire a lot of new staff -- and it looks
7 like we are going to have to do that -- it's going to take
8 years to develop the kind of expertise which is needed to
9 handle these kinds of cases as well as they should be
10 handled.

11 MR. GRADESS: Thank you. One last
12 question. Earlier today, Milton Zelermyer, from the
13 Prisoners' Rights Project, testified eloquently on behalf
14 of the restoration of PLS funding. One of the things that
15 was mentioned was the difficulty in getting access to the
16 prison law libraries that currently exist, not knowing
17 what books are on the shelf. The question is: Are there
18 problems with prisoners' access to those law libraries, in
19 other words, the ability to get books, to access them in a
20 timely fashion? Could you indicate what you know to be
21 the case of that level of access and those problems?

22 MR. LEVEN: That's an accurate assessment.
23 If you have packs of cigarettes then maybe you can get to

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1 the law library relatively quickly. If you don't have
2 anything to pay a correction officer or another inmate
3 then you may be waiting for some time. Law clerks like to
4 get paid for their work in the library. So there is no
5 question that you get help if you have something to pay.
6 If you don't, you may not, or you may not get timely help
7 or the kind of help you really should be getting.

8 Although, frankly, I'll go back to the
9 original statement I made about law libraries. It doesn't
10 matter. They could be the best law libraries in the
11 world. Commissioner Goord isn't going to go to those law
12 libraries to represent himself when he is being sued. He
13 is going to go to an attorney. That's what the inmates
14 should be allowed to do. The libraries certainly don't
15 tell you how to prosecute a case, how to do discovery and
16 how to try a case and how to prepare and present expert
17 testimony.

18 MR. GRADESS: Thank you very much.

19 MR. LEVEN: You're very welcome.

20 MR. GRADESS: We're gonna take a little
21 break. Then we will come back.

22 (A recess was held from 3:40 p.m. to 3:50 p.m.)

23 MR. GRADESS: Greg Lubow.

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1 MR. LUBOW: My name is Greg Lubow. I'm an
2 attorney. I have a private practice in Tannersville,
3 New York, which is a small village of 700 people just
4 south of Greene County. As a sole practitioner, I have a
5 practice, to a large extent, in criminal litigation,
6 criminal defense. I've had that practice for 21 years.
7 During those 21 years, I've also been the public defender
8 of the County of Greene. It's a position that I get
9 reappointed to every year annually.

10 There are too many problems with the public
11 defense system to enumerate every one of them. I think I
12 would just like to state here today two things.

13 First and foremost, as public defender
14 attorneys, we are not the enemy. We are not in favor of
15 criminals. We are not in favor of crime. We do not
16 commit crimes, for the most part. We do not endorse it.
17 We do not encourage it. We are crime victims ourselves in
18 many instances. And I think there is a general perception
19 of the public that is fostered by government and the
20 current administration, in general, that public defenders
21 are now against everything that's American. We're not.
22 We are in favor of mom and apple pie.

23 We also happen to believe in the

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1 constitution -- far more than some other officials. We
2 believe in the right to a trial, a fair trial, where
3 people have adequate representation and their attorneys
4 are allowed to raise issues without fear of reprisal from
5 judges, without fear of political reprisal in our

6 communities.

7 Just yesterday, I approached my county
8 legislature -- it's budget time again -- and I asked them
9 for a full-time assistant, something that we have needed
10 for many years and something that our district attorney's
11 office has. They have a full-time district attorney and a
12 full-time assistant and four part-time assistants. I'm a
13 part-timer, as are my four assistants. We got close, but
14 close was not good enough. They denied it. I don't know
15 why because they won't explain it to me. It can't be
16 money 'cause money hasn't affected anybody else's budget
17 this year. There seems to be enough money in the pie.
18 There has to be another reason. The only reason I can
19 think of is they don't want us to do a good job, they
20 don't want us to provide our clients with the services we
21 need to do. They don't give us the resources to do that.

22 If anything comes out of these hearings,
23 there really needs to be state mandate direction that

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1 public defense budgets, public defense services are
2 mandated. One example, for instance, is the Stop DWI
3 programs, where all the money raised through the fines is
4 plowed back into the community. It's all kept by the
5 county. And they give out money to the police to set up
6 DWI road patrols and new breathalyzers and new training.
7 They give money to the prosecutors to train their
8 prosecutors and pay salaries for the prosecutors and pay
9 the secretaries. They give training to the courts to try
10 and do those things. They pay money to the probation
11 departments to supervise probationers in DWI cases.

12 Year after year, I request from the DWI
13 committee and then from the legislature which oversees
14 everything -- it has the ability to rewrite their DWI
15 budget -- I request that we get a piece of the pie. We
16 handle a substantial number of the DWI felonies in our
17 county. That takes time. We handle a substantial number
18 of the DWIs county-wide in the justice courts. And yet,
19 despite the fact that some \$40,000 goes to the district
20 attorney's office, we get zero.

21 I'm told that on the filing forms, that the
22 State of New York requires of the DWI program, that
23 there's a space for public defense services. When the

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1 State of New York put that in there, they recognized that
2 there would be a public defense obligation. There's a
3 cost to us for this. And they haven't done anything on a

4 local level. And that's just one example of the
5 situations where, left to their own devices, localities
6 will not adequately and fairly fund public defense
7 services.

8 What you have is a reliance, in many
9 instances, on the political skills, the political
10 connections of the public defender in that particular
11 county. And the fact that I wound up with four votes last
12 night was a testament to my longevity and my skills. But
13 that's the reality.

14 There are two things I would like to leave
15 you with. One is it's simply that we are really not the
16 enemy. And we have a public perception that we are, that
17 we are opposes to all the things that the rest of
18 government is in favor of. The fact that we would rather
19 have a trial before a sentence is imposed sticks in their
20 craw. We must be or I must be one of the more frightful
21 people in the world. Because when you hear about "those
22 defense lawyers" and all the tricks they pull, you would
23 think we are winning ninety-five percent of our cases that

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1 go to trial, and yet, each time we win a case, each time
2 justice is served by an acquittal, we get a backlash and
3 people are telling us, "You are doing too good a job."
4 I've had legislators tell me that, "You do too good a
5 job." I can't do half a job. I wouldn't expect any
6 lawyer I hire to do half a job. We have to change the
7 fact that people think -- and it's a fact -- people think
8 we are the enemy.

9 And next, if there is anything that comes
10 out of this, if you can, get the state government to
11 mandate services because the counties won't.

12 Thank you.

13 MR. NOWAK: In terms of taking
14 responsibility at the state level, in what way do you see
15 that? Do you see it in terms of financial rules and
16 regulations, standards? What do you see having to be done
17 at a state level to achieve support for defense services
18 throughout the state?

19 MR. LUBOW: The DWI field provides the
20 clearest example. They passed legislation, Stop DWI
21 programs, gave them all the money that was generated by
22 DWI fines and said, "Go spend it on DWI programs." We are
23 part of the DWI program. We are a reaction -- for every

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1 action there is a reaction. We are the reaction. The

2 state could have mandated, and should have mandated, that
3 a certain percentage of those funds be allocated to public
4 defense services, recognizing the fact that when you
5 increase the ability of the police to make arrests, when
6 you increase the ability of the prosecutors to prosecute,
7 when you increase the ability of the probation department
8 to supervise, someone has to defend those people, and we
9 are the persons who defend those people. They could have
10 done that.

11 In other areas, they could -- when they
12 provide funds for prosecution they have to recognize that
13 there is a reaction. In my county, for instance, there
14 was a concern about welfare fraud. So what they tried to
15 do, without my seeing it, was the prosecutor went and
16 said, "Look, I don't have someone I can devote to this
17 particular area of welfare fraud." So they took out of
18 the social service budget some money and gave it to the
19 prosecutor and that increased the number of welfare fraud
20 cases in the county. And I predicted, and I think my
21 prediction has come through, that my office now handles
22 close to 70 percent of all the welfare fraud cases in the
23 county. We get no money. When they do these things, when

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1 they put money into one pot, they have to put, if not an
2 equal amount, although it that would be ideal, at least
3 some money into the other pot, our pot, recognizing that
4 we are doing those things.

5 MR. GRADESS: One final question. At the
6 outset, you made mention to having been reappointed 21
7 times, I believe. Tell us, for the record, what it's like
8 to sort of live under the ax on an annual basis for your
9 job.

10 MR. LUBOW: For many years, there was no
11 controversy in my reappointment. I was doing a job that,
12 as many legislators told me, they liked me personally,
13 they heard I was a good lawyer, but they really don't like
14 the job that I have to do. But someone has to do it, and
15 I had the political connection in my county to get
16 reappointed early on and year after year without a
17 problem.

18 Recently, however, it's become far more
19 politicized. We have had a number of high profile cases
20 in our county that involved correction officers. We have
21 two correctional facilities in our county. We had a
22 number of assaults. And it's been told to me that we
23 represent them too well.

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1 We do what I consider to be more than
2 adequate, fair and zealous representation of our clients.
3 As a result, political pressure has been brought to some
4 members of the legislature and political pressure is
5 therefore coming to my county. In many years, it hasn't
6 made a difference, depending upon who happens to be
7 leading the county at a certain point in time. But at
8 this point, two or three years ago, I don't recall, my
9 reappointment was held up until literally December 31st.
10 It's tough. I have a son who will be going
11 to college next year. I think I'm going to get
12 reappointed again, even though last night they did not
13 approve the full-time assistant, changing part-time into
14 full-time. I think I'll get reappointed 'cause I do the
15 job and there's not enough out there against me, I guess.
16 But one day there might be. I might say something they
17 don't like. It's tough. Should there be a statewide
18 office? I don't know. I haven't thought about that.
19 MR. GRADESS: Thank you very much.
20 MR. LUBOW: You're welcome.
21 MR. GRADESS: Manny Vargas.
22 MR. VARGAS: Good afternoon. My name is
23 Manny Vargas and I'm the director of the Criminal Defense

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1 Immigration Project of the New York State Defenders
2 Association. The project attempts to promote or protect
3 the rights of immigrants accused of crimes in New York
4 State.
5 I've submitted written testimony, but I
6 want to summarize two of the points that I address in the
7 written testimony. And those are the difficulties faced
8 by the immigrant sector of the New York criminal defendant
9 population, New York immigrants accused of crimes, in
10 obtaining informed legal counsel in criminal proceedings.
11 And then, secondly, the related issue of the difficulties
12 faced by this sector of New York State's population in
13 obtaining the counsel in later immigration proceedings,
14 the deportation proceedings that often ensue after
15 criminal proceedings have been completed.
16 On the first issue, New York immigrants who
17 have not become U.S. citizens face tremendous risk when
18 they are accused of a crime, primarily deportation from
19 the United States, in many cases, deportation from the
20 only life they have ever really known. Individuals who
21 have lived in this country since a very young age, whose
22 entire families are in the U.S., who live and work here,
23 because of a conviction of often relatively minor crimes,

1 can be deported and moved from the United States and their
2 lives and families here, permanently.

3 The risks faced by these noncitizens
4 accused of crimes were dramatically increased by changes
5 in the federal immigration laws in 1996, two laws in
6 particular, the 1996 so-called anti-terrorism law
7 and the 1996 illegal immigration reform and immigration
8 responsibility act that dramatically increased the
9 harshness of immigration laws with respect to immigrants
10 convicted of crimes. So that in many cases you could have
11 a long-term permanent resident in the United States and in
12 New York State, a long-term permanent resident could be
13 mandatorily deportable from the U.S. based on relatively
14 minor offenses, in some cases, even a misdemeanor. A
15 petit larceny offense or a misdemeanor drug offense could
16 result in the mandatory deportation consequence.

17 Given this risk of deportation for even
18 relatively minor offenses, adequate legal representation
19 of noncitizens accused of crimes requires at least some
20 minimal knowledge of immigration law or the immigration
21 consequences of criminal convictions. And, in fact,
22 ethical standards of both the American Bar Association and
23 the National Legal Aid and Defenders Association recognize

1 that there's an ethical duty of defense lawyers to
2 investigate and to advise their noncitizen criminal
3 clients of the consequences of criminal convictions.

4 The problem is that in many cases, I'm
5 afraid that defense counsel does not do this because of
6 their unfamiliarity with immigration law and because of
7 certain misinformation that's out there. And one of the
8 sources of misinformation right now in New York State is
9 that the New York State Criminal Procedure Law requires
10 judges to give advisals regarding immigration consequences
11 only in felony cases, which I think sends out a message
12 that I hear very often when I go out and do training here
13 in New York State on immigration issues, that only
14 felonies have immigration consequences. This is just not
15 the case. If it ever was the case, it's certainly not
16 true now. Often, as I've already mentioned, even
17 misdemeanor offenses, one time misdemeanor offenses can
18 have the immigration consequences under the new
19 immigration laws.

20 My written testimony includes some case
21 examples of some actual situations where individuals,
22 because of lack of knowledge of the immigration

23 consequences of their guilty pleas, went ahead and pled

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1 guilty under circumstances where it appears they would not
2 have pled guilty had they known of the immigration
3 consequences of those pleas, often consequences that are
4 totally out of proportion to what the penal sentence is
5 for the offense.

6 What can be done in New York State to
7 address this problem? I've listed four items which could
8 be a beginning to addressing this problem.

9 First, the governor and the legislature
10 should work together to amend the New York State Criminal
11 Procedure Law to require that criminal court judges give
12 advisals regarding immigration consequences in all cases,
13 not only felony cases.

14 Secondly, even absent such legislation
15 enacted, the judiciary should take it upon themselves to
16 ensure that all defendants are advised and counseled about
17 the immigration consequences of a criminal conviction.

18 Thirdly, public defense lawyers and other
19 defense counsel should be trained and provided access to
20 information and expert backup regarding the immigration
21 consequences of criminal convictions.

22 And fourth, assigned counsel lawyers should
23 be reimbursed for fees paid with regard to necessary

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1 consultations with immigration experts in cases involving
2 noncitizen defendants.

3 I also want to bring to the panel's
4 attention the second issue I mentioned, the issue of not
5 only lack of informed counsel, but lack of any counsel at
6 all in later immigration proceedings that ensue after
7 convictions in these cases in New York State. Now, most

8 deportations for noncitizens convicted of crimes in
9 New York State occur while the individual is serving a
10 state prison sentence in Upstate New York prisons or while
11 they are in the custody of the Immigration and
12 Naturalization Service in detention facilities such as the
13 Batavia, New York immigration detention facility in
14 Western New York.

15 In October, while preparing to give this
16 testimony today, I obtained the figures from the U.S.
17 Department of Justice on the rates of representation of
18 individuals in immigration proceedings both in the Upstate

19 New York prisons and in INS detention facilities. What
20 those figures showed was that for the last three years,
21 in '96, '97 and '98, approximately 80 percent of
22 individuals going through deportation proceedings in
23 Upstate New York prisons were unrepresented, and

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1 approximately fifty percent of individuals having
2 deportation hearings while in INS detention prisons were
3 unrepresented. I don't have similar figures for the new
4 facility in Batavia, New York which just opened earlier
5 this year but I would imagine they are comparable.

6 What can be done to address this problem?
7 At a minimum, the state should fund legal service
8 providers to enable them to provide the representation to
9 and counsel to indigent noncitizens in New York State
10 prisons or INS detention facilities.

11 And I note that the one not-for-profit in
12 New York State that was providing some representation to
13 noncitizens undergoing their deportation proceedings in
14 Upstate New York prisons was Prisoners' Legal Services.
15 And as you have already heard today, their funding was
16 eliminated by the state.

17 At a minimum, I would encourage the state
18 to provide funding to the Prisoners' Legal Services to
19 enable them to resume the representation that they at
20 least were able to provide to noncitizens in deportation
21 proceedings in Upstate New York prisons.

22 I thank you and I welcome the panel to ask
23 any questions that you may have.

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1 MR. NOISETTE: In terms of your concern
2 about training, are you encountering or do you anticipate
3 encountering significant difficulty in providing training
4 to any particular sectors? In other words, is it easier
5 to provide training to public defender offices throughout
6 jurisdictions or where they have part-time defenders and
7 panel programs? And how are you thinking about going
8 about doing that?

9 MR. VARGAS: I think it certainly is easier
10 to provide training to established defense provider
11 offices, and I am concerned about how one reaches out to
12 assigned counsel panel lawyers. We have, in New York
13 City, done training at courthouses. And those generated
14 quite a bit of interest, particularly after the new laws
15 were enacted in 1996.

16 I'm hopeful now, with the CLE requirement

17 in New York State, that, to the extent that training can
18 be provided in the areas of the state that we are
19 targeting, that with the CLE requirement and with efforts
20 to make this training as accessible as possible to lawyers
21 who work in those particular areas of the state, that we
22 will get a lot of the assigned counsel panel lawyers
23 participating in that.

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1 But certainly, it is easier to reach out to
2 other Legal Aid offices throughout the state, where we can
3 go into the offices and provide in-house training.
4 Perhaps one of the things -- our thought is, in the
5 future, we might be able to develop a corp of experts
6 throughout the state, maybe one or two lawyers in each
7 public defender's office or Legal Aid office in the state
8 that we can particularly target in our training efforts so
9 that they become the experts who can be consulted within
10 their own offices. That would not work as well, I
11 suppose, with the assigned counsel programs. But to the
12 extent that we can get the in-house experts to work
13 together with the assigned counsel programs in those parts
14 of the state, there might be some positive outcome of
15 that.

16 MR. NOWAK: One quick question on the fact
17 that many people are unrepresented at their deportation
18 hearings. Obviously, one solution, as you indicated, is
19 to have some amendment to the law to require counsel. I'm
20 assuming that would take place at the federal level, as
21 opposed to the state level because it's a federal issue?

22 MR. VARGAS: Yes. Well, there's nothing to
23 prevent the state from saying that they will provide

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1 funding to programs that do provide legal services to
2 individuals in prisons or other organizations that can go
3 into the prisons to provide legal representation and
4 counseling.

5 But yes, currently the federal law states
6 they have the right to counsel, but not to counsel paid
7 for by the state. Ideally, what we would like to see is
8 that there's a recognized right to counsel and given the
9 immenseness of these consequences for many noncitizens,
10 that this is an area where it's crucial, just like
11 criminal proceedings, to have the benefit of legal
12 counsel.

13 MR. NOWAK: And the reason for the
14 disparity between those who are unrepresented in New York

15 City and Upstate is due to the fact that there are more
16 maybe not-for-profit entities that are willing to provide
17 those services in the New York City area than there
18 Upstate? Would that be fair? Or is there some other
19 factor at work that I might not be aware of?

20 MR. VARGAS: That's the primary factor.
21 Hearings Upstate are conducted at three different
22 prisons -- at the Downstate Correctional Facilities in
23 Ossining, New York; the Ulster Correctional Facility in

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1 Nappanoch, New York; and the Bedford-Hills Correctional
2 Facility for Women. Those are not easily accessible by
3 the immigration lawyers in New York City, which is where
4 most immigration lawyers are.

5 And there has been a big problem with
6 getting them to provide this on a pro bono basis.
7 Frankly, it's an enormous commitment of time and resources
8 for a lawyer in the City to do even one of these cases in
9 the Upstate New York prisons. So yes, it's primarily the
10 lack of easy access to representation at the Upstate
11 New York prisons which accounts for the difference in the
12 percentage of representation between the prisons in
13 Upstate New York and the INS detention facilities.

14 MS. HATHAWAY: I'm a little curious.
15 Besides the disproportionate access, do you have a problem
16 with language, the language barriers of the immigrants,
17 and how does that play out?

18 MR. VARGAS: Yes. And that plays out in
19 many ways. In criminal proceedings, this is a sub-issue
20 of the problems faced by noncitizens in the criminal
21 justice process that the problems often occur. And closer
22 to the issue than I'm addressing, the right to counsel--
23 is there legal representation that's available that speaks

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1 your language or where there will be a translation service
2 available? This is, you know, a big problem for
3 noncitizens, both in criminal proceedings and in
4 immigration proceedings. I know from personal experience
5 that language difficulties often are one of the biggest
6 problems faced by noncitizens in seeking to give people
7 recourse in immigration proceedings. All I can say to
8 that is you are absolutely right. This is an additional
9 major problem faced by noncitizens in seeking to obtain
10 justice in both the immigration context and the crime
11 context.

12 MR. GRADESS: Let me just pin down a couple

13 things for the record. First of all, in your reference to
14 the three prisons, are you referring to Downstate
15 Correctional Facility or Sing-Sing as the downstate one?
16 MR. VARGAS: Downstate Correctional
17 Facility, that's also known as Fishkill. Maybe that's --
18 MR. GRADESS: You made reference to
19 Ossining but that was just --
20 MR. VARGAS: I meant Fishkill.
21 MR. GRADESS: I wonder if you could
22 characterize for the record -- let me ask you a question
23 about the right to counsel, first of all. Are deportation

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1 cases the only cases -- are there cases other than
2 deportation cases where, if we had our druthers, there
3 would be a right to counsel? It would help us if, for the
4 record, you sort of gave us the picture of the classes of
5 people who are subject to deportation who may have been
6 here for 30 years, paying taxes, raising families, never
7 having left the borders, some of the family members maybe
8 not even knowing that they are not citizens, and what the
9 consequences are. Maybe you could give us classes of
10 people that fit that category.
11 MR. VARGAS: Yeah. Well, as I said, in
12 New York State, the majority of noncitizens caught up in
13 the justice system are lawful permanent residents. These
14 are individuals that have been admitted to live in the
15 United States and to reside and work here permanently. In
16 many cases, they are people who have come here at young
17 ages who have developed family ties and other connections
18 to the country.
19 There are also individuals who are not
20 lawful permanent residents, but who are here as refugees
21 or seeking what's called asylum under U.S. immigration
22 law. They are individuals who have fear of persecution in
23 their countries of nationality who may, in fact, lose

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1 their life or be subject to torture if they were returned
2 to their country, and the immigration laws place bars on
3 their being able to seek such relief. So for that
4 population, as well as the permanent resident population,
5 it's crucial that they receive informed legal counsel both
6 during criminal prosecution and then during immigration
7 proceedings.
8 There are also individuals who are facing
9 in deportation proceedings who are, in fact, actual U.S.

10 citizens, who may not even realize that under operation of
11 law they are U.S. citizens, or who just may not have the
12 documentation that satisfies the government that they are
13 U.S. citizens, even though they are, in fact, U.S.
14 citizens. And in those cases, in particular, a lack of
15 access to counsel may result not only in immigrants being
16 removed from the country, but individuals who are, in
17 fact, U.S. citizens.

18 MR. GRADESS: Thank you very much. Jeff
19 Anderson.

20 MR. ANDERSON: Thank you for giving me the
21 opportunity to speak. I have some topics I would like to
22 discuss with you today.

23 I've spent a long time on the periphery of

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1 corrections, criminal justice and law enforcement. My
2 careers have involved working five years in several
3 prisons, directing an investigative unit, and acting as
4 midwife to alcohol and pretrial jail alternative programs
5 in the early Nineteen Eighties.

6 Since 1997, I've been a criminal justice
7 specialist attached to the Rensselaer County Executive's
8 Office. And my responsibilities include reducing the
9 nonviolent jail population by means that do not compromise
10 public security. In two years, your neighbors across the
11 Hudson River have created a felony level drug court, a
12 misdemeanor drug court, and a day reporting center. These
13 projects and a similar one, the county conditional release
14 commission, substitute specialized supervision for
15 incarceration and represent honest intelligent approaches
16 to crime in a civilized community. This is what I've come
17 to discuss with you.

18 People in jail or prison don't contribute
19 to society. As Langston McKinney, Syracuse's drug court
20 judge, noted one day in conversation, the real tragedy of
21 drug abuse and its attendant crime is that people stop
22 contributing. To be successful in dealing with those who
23 come before courts, we must convert them into responsible

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1 mates, fathers, mothers, employees and neighbors. We must
2 provide a means to have them contribute while they are
3 still within the society, and while they are still under
4 the sentence of the court. We must do more than punish
5 them, we must restore them so they can help the rest of
6 us.

7 American Day Reporting Centers are less

8 than 20 years old, with the first one established in
9 Springfield, Massachusetts. The second one was in Suffolk
10 County. They are patterned after a British system in
11 which offenders would report to centralized locations
12 instead of jail. They are intended to be of short
13 duration and more intense than other forms of community
14 supervision, for example, probation or parole. Once
15 there, the participants receive job counseling, attend
16 education programs and meet and with support groups. In
17 Rensselaer County, they may also encounter drug testing,
18 curfews, substance abuse evaluations and monitoring of
19 their attendance at different programs.

20 Day reporting can be adapted to suit
21 several different groups of nonviolent locally residing
22 clients. It's as appropriate for the jail-confined or the
23 prison-bound as it is with those whose substance abuse

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1 experience or drinking history contributes to their
2 criminality. It can be used with suspects before they are
3 sentenced, with those whose return to the community needs
4 to be graduated and controlled, as well as those who have
5 not responded to traditional criminal justice programs.

6 The operating philosophy of the day
7 reporting centers is to replace jail supervision with
8 community supervision and require participants to either
9 appear daily or spend the entire day, depending on their
10 circumstances. If they fail to respond, they can always
11 go to jail. They are encouraged to keep their jobs or
12 helped to find new ones. They have bills to pay. They
13 certainly wouldn't be paying them while they are in jail.

14 Where day reporting centers are operating,
15 public defenders need to discuss them with criminal
16 defendants and recommend them if they meet the clients'
17 needs. Under some circumstances, day reporting centers
18 can serve both sentenced offenders and unsentenced
19 defendants simultaneously.

20 Conditional release commissions. Despite
21 our best efforts, yours and mine, nonviolent people still
22 go to jail, some for a long time.

23 All New York counties who want flexibility

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1 in housing their prisoners have conditional release
2 commissions. We can call them local parole boards. These
3 commissions determine which inmates serving determinate
4 sentences in a county jail who apply for release can be
5 considered and under what circumstances. Often, inmates

6 are released with daily checks by a probation officer and
7 conditions which require counseling or community service.
8 A year of probation supervision is mandatory. The
9 commission has authority independent of the courts and can
10 grant releases, hold hearings and issue warrants. The
11 commissions can also note behavioral changes in jail
12 inmates that courts would not have an opportunity to see.

13 Jail administrators can use the prospect of
14 a conditional release as a behavioral tool since jail
15 reports are included in the information given to the
16 commission. Jail troublemakers are not recommended for
17 conditional release, but inmates who participate in
18 self-help programs and comply with regulations are
19 encouraged. The message is not lost on them. Conditional
20 releases seek to take advantage of the negative effects of
21 jail to bring about a change in behavior and attitude.
22 After some offenders spend a month in jail, they are very
23 willing to talk about treatment programs, counseling,

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1 intensive supervision, employment, education and other
2 topics.

3 But sadly, many people who are willing to
4 conform to rigorous conditions at the end of one month
5 become institutionalized. Quickly, they get used to being
6 in jail and prefer to serve out their sentence and live
7 thereafter without the benefit of supervision or
8 restrictive conditions. In conditional release, timing is
9 often critical. As an aside, every week, we hear someone
10 say, probation, who needs it, I can do this time standing
11 on my head, or words to that effect.

12 Our commission has evaluated 45 jail
13 inmates during the past year and released five under
14 custom conditions in the care of specialized probation
15 staff. None of the five have reoffended, all are working,
16 and there have been no serious problems. I would suggest
17 you encourage clients who draw determinate local sentences
18 to apply for conditional release.

19 Drug courts, to me, offer the greatest
20 cause for optimism. They are a recent innovation, having
21 begun, I believe, in the Miami, Florida area to handle a
22 crush of nonviolent drug offenders.

23 Drug courts are treatment courts, where the

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1 defendants plead guilty and their sentence is postponed
2 for a year while they undergo drug treatment. They are
3 also court theater. Each month, clients appear before the

4 judge with their record of progress in the preceding
5 month. The presence of the district attorney and defense
6 counsel are pro forma since the participant has already
7 entered a guilty plea, and the actual dialogue is between
8 the judge and the participant. Questions are asked and
9 answered in open court, while in front of a large group of
10 participants. If spectators derive any satisfaction from
11 the discomfort of whomever happens to be standing in front
12 of the bench, they are not free to express that. However,
13 if they wish to provide some encouragement, they may do
14 so. This often happens in the form of applause or genuine
15 praise in response to positive achievements. In
16 California, I've actually seen people hugged by a superior
17 court judge, and tears are not unwelcome at drug court
18 graduations.

19 Those who have done well get
20 encouragement. Those who have not met expectations face
21 stiffer sanctions and are scolded. Those who lie to the
22 judge and get caught go to jail for the week or the
23 weekend and are then welcomed back as full participants.

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1 Those who show positive drug tests are met with tighter
2 treatment schedules. If they show they are really not
3 participating, they are put back on the criminal court
4 calendar and take their chances with a prison sentence,
5 often appearing in front of the same judge they have just
6 finished irritating.

7 Brooklyn's Drug Treatment Court is unique
8 in some respects but it has a policy that typifies the
9 drug court approach. A defendant that reoffends while in
10 a relapse from his or her drug program loses any
11 privileges and is put on a tightened treatment schedule.
12 But a drug court participant who commits a new crime while
13 abstaining is kicked out of drug court and placed
14 immediately on the criminal court calendar. The reason is
15 very simple. Drug courts treat crime that springs out of
16 addiction. It doesn't propose to do anything for people
17 who are life-style criminals who just happen to use
18 drugs. People who are nonaddicted drug dealers, for
19 example, don't even need to apply.

20 We were told recently there are more than
21 550 established and emerging drug courts in the country,
22 roughly a third of which are in California. When I first
23 started talking about drug courts, that figure was 150.

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1 That was only about a year and a half ago. It's growing

2 very rapidly.

3 The federal Department of Justice has
4 become very active in providing planning and start-up
5 money for drug courts and, in New York, the Office of
6 Court Administration has contributed matching funds and
7 provides vital assistance and leadership.

8 Rensselaer County has the only drug courts
9 in our area and they operate at the misdemeanor level in
10 Troy City Police Report and in Rensselaer County Court for
11 felony offenses.

12 At this point, I should point out that
13 Albany County has made application for four drug courts --
14 a county drug court, a city drug court, and two municipal
15 drug courts. We certainly wish them well.

16 The drug courts operate as separate
17 sections of court by the city and county court judges and
18 cases are heard at a specified time each month. Two
19 comments by judges most commonly heard are: how important
20 it is for the defendant to keep treatment commitments; and
21 how much his or her personal appearance has improved over
22 the conduct of the drug court. It's very common for a
23 judge to say, "I hardly know you, you don't look like the

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1 same person who was here six months ago." Both courts are
2 too new for reliable statistics but, nationally, drug
3 courts have reduced the rate of recidivism from
4 approximately 45 percent in a similar population to less
5 than 28 percent for participants and less than four
6 percent for those who complete the program. The same
7 statistics show that participation in drug courts saves
8 approximately \$5,000 per participant in jail bed days.
9 Those statistics are from the Summary of Assessment of the
10 Drug Court Experience. I can provide that reference if
11 you need it.

12 It's also significant that the defenders
13 who appear in drug court are responsible for a tremendous
14 volume of crime. The Department of Justice estimates that
15 felony level drug offenders are responsible for between 50
16 and 100 crimes each before ending their careers.
17 Participants in misdemeanor level drug courts have been
18 represented by public defenders over and over before
19 taking advantage of the drug court option.

20 I was going to use an example and,
21 Mr. Nowak, I believe it was yours, if I'm not mistaken.
22 In Rochester, you had made a comment about public
23 defenders being involved in representation of drug court

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1 people before they had chosen that option. Many drug
2 courts, like ours, are post-plea drug courts. Defendants
3 must plead guilty before taking advantage of them. It can
4 be a tremendous gamble. To participate, your clients must
5 leave the safety of your ability to negotiate with a
6 prosecutor and bet heavily on their sincerity and ability
7 to challenge their addictions.

8 In closing, I'd ask you to become involved
9 in planning new local alternative programs like these and
10 allow your judgment and particular point of view to help
11 shape intelligent effective responses to the challenges
12 that we will face in the future.

13 MR. NOISETTE: I certainly share your
14 encouragement of treatment and your desire that defense
15 attorneys participate in the process. One question I had
16 was: To what extent does your county or the executive in
17 your county acknowledge that this requires additional
18 service of public defenders? I've heard the defense
19 community say that public defenders are being asked to
20 play new roles without additional resources. Is that a
21 topic of discussion in your office, or are you aware of
22 that concern being acknowledged in the drug court
23 process?

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1 MR. ANDERSON: No, sir, I'm not. I have to
2 be honest with you. We are relatively new. I do have to
3 say the public defender has been one of the early planners
4 in our drug court task force. We did get the opportunity
5 to watch mistakes made by other people. I haven't heard,
6 to be quite honest with you, that it has strained any
7 resources, that the public defenders have been asked to do
8 anything out of the ordinary. Although they are asked to
9 do things out of the ordinary every day, as I'm sure you
10 know. But to answer your question very directly, I think
11 the County Executive would welcome that argument. He
12 certainly understands that these things don't happen
13 without resources. And as I say, I think if that became
14 known as being a problem, I think he would be ready to
15 support that.

16 MR. NOISETTE: Thank you.

17 MR. NOWAK: I guess one of my comments
18 would be that in terms of starting the drug court, it's
19 not solely a defense responsibility. And, in fact, it's
20 more the prosecutor's responsibility. And I would hasten
21 to add that if a district attorney in a particular county
22 does not want to support a drug court, I doubt one would
23 start in that county, despite the fact that a public

1 defender may be supportive of the concept. If the D.A.
2 says, I'm not making plea offers and I'm not letting
3 people go to drug court, I don't think the defenders can
4 do much about it.

5 MR. ANDERSON: The I see it, and what I
6 would suggest to a public defender is, in many ways, drug
7 courts can be counter-intuitive -- to say to a defendant,
8 really, what would be in your best interest at this point
9 might very well be to plead guilty and to go through drug
10 court where, of course, there's a risk that later behavior
11 could result in a more severe sentence than that person
12 might have received as part of a plea bargain.

13 But you are absolutely right. I think
14 where a prosecutor will not hear of drug court cases, they
15 are virtually stalled.

16 MR. NOWAK: The other issue that has come
17 up fairly frequently -- you mentioned I did a presentation
18 for the New York State drug court professionals in
19 Albany -- was to discuss in part the public defender's
20 role in this process and the requirement of a plea, again,
21 with jurisdictions taking different positions.

22 And one of the major discussions was, from
23 a defense perspective, if I had a client and I know that

1 on this particular crime -- for the sake of the
2 hypothetical, petit larceny, maybe the third offense --
3 they're gonna get 30 days in jail, but if we go to drug
4 court and my client really tries and we take a plea and we
5 are locked in, and they really do make an effort but after
6 six months of trying they relapse and the judge kicks them
7 out and they are going to jail for a year, did I really do
8 my job for that client? Because the plea is now entered
9 and they are going to jail for a year. And if their don't
10 want to deal with their addiction, they can get 30 days.
11 So what ends up happening is the drug courts that have
12 been designed to take pleas, people who try and fail get
13 longer sentences in jail. Now someone who would have
14 gotten 30 days going through the system is getting a year
15 because they failed drug court. And I think that that's
16 really one of the major issues that we will be discussing
17 in future drug court presentations, as opposed to the
18 basic starter thing we went into.

19 But I think a lot of that has to do with
20 the fact that, in many communities, the public defender is
21 not a part of the planning process. National trainers,
22 Office of Court Administration personnel, county

23 executives get involved, and what happens is the judge,

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1 the D.A., all present what will be that county's drug
2 court to everybody else, once they have designed it. And
3 that's not to say that's happened in your county, but I'm
4 saying that has happened in other parts of the state and
5 that really does create problems. And I think one of the
6 messages we were trying to deliver is everybody needs to
7 be involved at the earlier possible time in the planning
8 of how the drug court will work in that community.

9 MR. ANDERSON: I couldn't agree more. I
10 have to say, in Rensselaer County, we have probably made
11 mistakes which will show up later, but that's not one of
12 them. As a matter of fact Jerome Frost, who is a public
13 defender and was one of our original task force
14 representatives, in fact, traveled with us not only to
15 Rochester, but to San Bernadino, California and was
16 vital.

17 MS. HATHAWAY: A question on day reporting
18 centers because we also had one in Monroe County. My
19 concern has become net widening. Net widening, meaning
20 when I look at the data today on the number of cases
21 coming into our criminal justice system, it is no
22 different than it was exactly two years ago when we opened
23 the day reporting center. We have the same number of

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1 arraignments being done within about a two percent
2 difference. But what we are seeing is that our jail
3 population is going up and our day reporting center is
4 full.

5 And the day reporting center was
6 designed -- we tried to design it to have the judges use
7 it as an alternative to jail. At least what I believe is
8 happening is that the judges are still using jail, but for
9 these people they would have released to pretrial services
10 when we didn't have a day reporting center, they are now
11 saying day reporting center. So all we have done is
12 shifted our ROR population that would have been released
13 to pretrial services to a more restrictive day reporting
14 center, and we really haven't had the impact that I think
15 we should have had on the jail population.

16 Would you care to comment on how -- I mean,
17 the ultimate decision is made by a judge to release them.
18 So how does one try to use a day reporting center as an
19 alternative to a jail overcrowding problem when the judge
20 isn't bound by any parameters in how they use that new

21 program.
22 MR. ANDERSON: Your concern is very
23 authentic. That happens all the time. And since we hire

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1 judges to use their judgment, they look at somebody and
2 say, gee, we really don't know what the probabilities are
3 here but if that person is going to be put in a day
4 reporting center, I think the probabilities are going to
5 be good so they may overuse it.

6 We find people for day reporting center by
7 finding them in jail in the first place. I hope this
8 doesn't strike you as kind of a cheap answer. But to me,
9 it would be like taking people who otherwise would be at
10 liberty or in a less restrictive environment -- it does
11 happen in new programs because people are quite happy to
12 support it -- but we certainly don't want to support it by
13 filling it with people who otherwise would be at home or
14 doing other things, conditional release, for example. Day
15 reporting is kind of the default for conditional release.
16 How do we know that? Because they were in jail when we
17 found them.

18 By the way, we use our probation department
19 to do pretrial screening, so anyone who is virtually in
20 Rensselaer County Jail gets seen by a probation officer.
21 We hope that happens on a very speedy basis. I'm saying
22 that for the purposes of the supervisor sitting behind
23 me. But they get seen very quickly, with the idea being

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1 this person might be a candidate for day reporting.

2 The better answer is that that's something
3 we really have to be very alert to. We also use it for
4 people who are probationers, who are either threatening to
5 violate or they need something more, in which case we use
6 it as a resource for people to stop by for workshops or
7 for a GED test or to get some form of training. We are
8 very aware of that. We have talked about that.

9 MR. GRADESS: I would just like to ask you
10 one question. I think you heard the public defender from
11 Greene County testify about Stop DWI funds.

12 MR. ANDERSON: Yes.

13 MR. GRADESS: And I think I will ask you
14 whether or not in your community a request from the
15 Stop DWI fund would be looked favorably on.

16 MR. ANDERSON: Absolute we have a
17 separate -- we have a Stop DWI department. I would assume

18 so. I'm only entitled, at this point, to make an
19 assumption. But that is an appropriate use of that
20 money. And it's used for non-prosecutorial things. We
21 use it for a variety of things that we think are fairly
22 creative. By the way, there isn't enough of it to really
23 do a lot with. But yeah, I would think so. And as I

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1 answered, I've heard where that pressure has been brought
2 to bear in terms of needing more public defenders. To
3 answer your question, I think that's an appropriate
4 request.

5 MR. GRADESS: Thank you very much.

6 MR. ANDERSON: You're welcome.

7 MR. GRADESS: Jeffrey Richards.

8 MR. RICHARDS: Good afternoon. My name is
9 Jeffrey Richards and I'm a private attorney. The reason I
10 draw this distinction to being a private attorney is that
11 I do not work directly for any particular county or
12 government as a public defender. Rather, I'm assigned
13 criminal cases by the court systems in Albany, Schenectady
14 and Rensselaer counties, to represent individuals who
15 cannot forward to pay for attorney where their specific
16 cases involve a conflict of interest with the public
17 defender's office in any of these counties. Incidentally,
18 I'm paid by the counties pursuant to the Law 18B of the
19 County Laws of the State of New York.

20 These conflicts of interest that a
21 particular public defender's office may have usually arise
22 from situations where more than one individual gets
23 arrested at the same time in respect to essentially the

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1 same crime, for example when the police arrest a group of
2 individuals in a drug raid.

3 The public defender's office has a conflict
4 of interest if they represent more than one of these
5 individual and therefore the remaining defendants are
6 assigned out to private attorneys such as myself. Another
7 frequent example of a conflict of interest that the public
8 defender's office may have is where the victim of a crime
9 in any matter is represented by the public defender's
10 office in another unrelated matter.

11 To put this in perspective, we who are
12 familiar with this process have a saying, "Today's victims
13 are tomorrow's defendants." And I say this not
14 facetiously in any way, but with actually great concern
15 because for many of these individuals who are caught up in

16 the system, it, the system, has largely become largely a
17 revolving door for a lot of these individuals and it has
18 essentially become an vicious cycle of jail time and court
19 appearances that they are simply unable to break. What
20 happens frequently is an individual can be the victim of a
21 crime one day and have to go into court as a complainant
22 against another individual, and often being the case of a
23 boyfriend or ex-boyfriend, a live-in boyfriend or an

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1 ex-boyfriend, and on a subsequent occasion, often closely
2 related in the time, that same individual can be charged
3 with the commission of an unrelated crime, and herein
4 presents the conflict to the public defender's office and,
5 as a remedy, they are required by law to assign
6 independent attorneys such as myself to represent these
7 individuals.

8 I would like to address two general
9 categories, the first being client representation, and the
10 second being improving public defense services in New York
11 State. Additionally, I would also like to address the
12 specific issue of assigned counsel compensation.

13 Regarding client representation, when I was
14 mulling over what to say to the panel today, I decided
15 that I thought it would be the best that I focus on what I
16 believe is the importance of cultivating and maintaining
17 good relationships with the various individuals who are
18 involved in the criminal justice system. I think, in
19 doing so, I hope to give the panel some insight on how it
20 operates and the state of the system's affairs.

21 The beginning of any particular case for me
22 involves a call from the clerk of the court in any of the
23 Tri-City areas, inquiring of me as to whether I'm willing

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1 to take a particular case on a given day.

2 Being an attorney who has been practicing
3 law for approximately three years, three and a half years,
4 and in business for myself for approximately two and a
5 half years, I welcome the call because I need all the
6 business I can get. The assigned counsel program is a
7 great means for relatively new attorneys like myself to
8 develop a criminal law practice and get the much needed
9 experience necessary to provide individuals with
10 competent, effective assistance of counsel, which is, of
11 course, the legal standard an attorney must provide to his
12 client and also the degree of skill that the law expects

13 an attorney to possess and to exercise on behalf of his
14 client.

15 So I welcome the call from the clerk of the
16 court and agree to take the assignment. I would like to
17 note that it is very important for me to maintain a good
18 relationship with these clerks of these courts because my
19 livelihood depends on it. There are a lot of attorneys in
20 the area and competition for these cases is very great.
21 So I'm as nice as I can be to these clerks, keeping in
22 mind my grandmother's saying, "You get more with honey
23 than you do with vinegar."

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1 All ulterior motives aside, the clerks of
2 the courts of this area are competent, hard-working
3 dedicated, highly intelligent individuals who are worthy
4 of great respect. The service they provide to the
5 individuals charged with crimes and the families of
6 victims and defendants is immeasurable and their work goes
7 largely rewarded.

8 After scheduling the appearance, I usually
9 arrive at court early so as to interview my client, as
10 well as to conference a particular matter with the
11 district attorney assigned to handle this particular court
12 on this particular day. Here, there's another
13 relationship that I must cultivate and maintain, that is,
14 the relationship that I have with this particular
15 assistant district attorney. For the benefit of my
16 client, I've learned that a good rapport with a particular
17 assistant district attorney is critical. In my
18 experience, I've had some troubling relationships with
19 some assistant district attorneys, although, thank God,
20 those have been the exception rather than the rule and,
21 for the most part, most assistant district attorneys have
22 treated me with respect and professionalism.

23 I would like to point out that the most

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1 important of all relationships that I must develop and
2 cultivate and maintain from a professional standpoint is
3 the relationship that I have with my clients. So much can
4 be garnered from the discussions that I have with my
5 clients to find out how and why they have gotten
6 themselves into these circumstances. The initial
7 interview with my client is an opportunity for me to begin
8 a trusting relationship with them. I feel that one of the
9 primary characteristics that a criminal defendant looks
10 for in his or her attorney is whether or not he or she can

11 trust their attorney. This is why I work very hard to
12 fulfill each request that a client has of me and to listen
13 to them. Some of these people just want someone to talk
14 to where they can be understood and they feel that their
15 voice is being heard.

16 Many of these individuals are undergoing a
17 tremendous amount of intense psychological pain and they
18 are using drugs and alcohol to attempt to medicate this
19 pain and while under the influence of drugs or alcohol or
20 both, they go out and commit some stupid crime that they
21 may not have committed had they not been under the
22 influence.

23 In any event, I've learned that a good

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1 relationship with my clients make the criminal procedure
2 go a lot smoother. I had the pleasure last summer of
3 attending the New York State Defenders Association basic
4 trial skills program, and one of the instructors there
5 mentioned that in a survey conducted of criminals who were
6 incarcerated, upon asking them what quality did they most
7 value in their attorney, one of the most common responses
8 was that their attorney visited them in jail. This
9 reinforces my belief that a lot of these people want
10 someone who is understanding of their problems to listen
11 to them and to provide them with a means of dealing with
12 their problems.

13 Lastly, I would like to mention the
14 relationship that a criminal defense attorney has with any
15 particular judge in any particular court that he may be
16 practicing in front of. There are those judges -- excuse
17 me. I used to be employed by a judge in his private law
18 firm, so I realized long ago that judges are not
19 necessarily divine individuals, although some of them may
20 or may not think that they are. A prominent attorney
21 friend of mine who passed away a few years ago once told
22 me, "The problem with judges is that some of them really
23 think that they are."

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1 In all due respect, the city court judges
2 that I have the honor of appearing before in the four
3 cities in this area have all been very honorable and
4 passionate persons who have dedicated themselves to the
5 pursuit of fairness and justice. I'm referring to
6 individuals such as Judge Louise Smith, who just left the
7 bench in Schenectady City Court after having practiced
8 there for almost 14 years of service. I cannot say enough

9 about this kind, caring and respectful person and the way
10 she presided over that court during the time I had the
11 privilege of practicing before her. She's a wonderful
12 woman that I have the utmost respect for. I have no idea
13 how that woman handled herself and that entire caseload
14 day after day, five days a week, by herself for the amount
15 of time and as long as she did. And she did it with grace
16 and diligence. She was the only full-time city court
17 judge Schenectady had for that time period.

18 Some of the other area judges which I had
19 the honor of practicing before are: Judge Stephen
20 Herrick, one of the Albany City Court judges, Judge Henry
21 Bauer, in Troy, and Judge Kathleen Leahey-Robichaud, in
22 Rensselaer City Court. These judges, in my mind, are all
23 consummate professionals who dedicate themselves daily to

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1 rendering objective, fair and just resolutions to highly
2 complex situations. These people are all tributes to
3 humanity, and I have been honored by being allowed to
4 practice in their courtrooms and to be given the
5 opportunity to develop my professional skills under their
6 guidance.

7 My point is that it's vital for a criminal
8 defense attorney to nurture and maintain a good
9 relationship with the justices in the community in which
10 he is practicing. These judges can virtually make or
11 break you. I believe that one of the significant problems
12 in our criminal justice system is when a particular judge
13 seemingly has no respect for defense attorneys and
14 functions as though he or she were just another district
15 attorney. In that scenario, in those circumstances, I
16 believe it just becomes a situation where they are
17 undermining our present judicial system and it becomes a
18 two-on-one situation where there are two defense attorneys
19 essentially against one -- excuse me -- two district
20 attorneys against one defense attorney, and it becomes a
21 very unbalanced system.

22 The next category I would like to address
23 is improving the public defense services in New York

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1 State.

2 A year or so ago, I read an article in the
3 New York State Bar Journal authored by the chief justice
4 of the Court of Appeals, Chief Justice Judith Kaye. The
5 article came out right around time certain politicians

6 were bashing certain members of the judiciary for what
7 certain politicians considered to be soft rulings in
8 respect to a few high profile cases. Although the chief
9 justice didn't mention it specifically, the article seemed
10 to be defending the criminal justice system and dedicated
11 public servants that daily hold the fragile system
12 together.

13 I commend the Chief Justice Kaye for coming
14 to the defense of the system. It's popular to condemn the
15 system, but few people offer intelligent effective ideas
16 to improve our justice system.

17 The system is far from perfect, but it is a
18 system that is real and, for the most part, I believe in
19 the vast majority of cases it comes to a reasonably fair
20 resolution to complex situations that have no easy means
21 of resolving.

22 As the chief justice was saying in this
23 article that she had written, anyone who has had the

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1 opportunity to witness the daily disposition ever cases in
2 any of the courts throughout our state would agree that it
3 is, in fact, a highly efficient and effective system of
4 dealing with very difficult problems. It is mind-boggling
5 to see the system function and to resolve the number of
6 issues that come before a court an any particular day. I
7 believe the chief justice made reference to that she would
8 put our system up against any other system in the world
9 known to have been used to provide answers to complicated
10 socioeconomic problems.

11 So I'm not going to put the system
12 down 'cause I feel the system is essentially a good one
13 with room for improvement. The main means for improving
14 the system, I feel, is for people within the system to
15 improve themselves. Let's face it. It's not just a
16 system of law, it's a system of people. I've been saying
17 for quite some time that it takes good police officers,
18 good district attorneys, good defense attorneys for the
19 system to operate as it was designed and thereby equate to
20 something that can be called just and fair.

21 Problems arise when one of the components
22 of the system become corrupt and unlawful. Then the whole
23 system can been corroded and render an unjust outcome.

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1 For example, when a police officer beats and coerces a
2 confession out of an otherwise innocent defendant, this

3 provides illegal evidence to a district attorney, who has
4 no other choice but to use the evidence against the
5 defendant unless he or she has reason to believe the
6 confession was obtained in violation of the defendant's
7 constitutional rights, and then he of, course, has an
8 ethical duty not to use this evidence.

9 Many people have the understanding that
10 police officers do not, in this day and age, beat
11 confessions out of individuals who have been charged with
12 crimes. This is not the case. This type of conduct still
13 takes place, and I believe it takes place a lot more than
14 it should. I had a client call the other day from a local
15 police station and he informed me that an investigator had
16 been hitting him in the head for approximately four
17 straight hours until he was forced to confess to a crime
18 that he told me he did not commit. If this did happen --
19 and I am of the opinion that it did -- this is the type
20 of police conduct that I feel has gone on too long and
21 simply should not be tolerated any longer. This is no
22 longer the Nineteen Thirties, and I feel it's society's
23 duty to put an end to this type of behavior for the next

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1 millennium.

2 One of the things I feel can be done to end
3 police abuse is to provide greater authority to civilian
4 review boards who have the power to review specific
5 instances of alleged police misconduct. Another is to
6 hold police chiefs more accountable to the actions of
7 their subordinates.

8 On behalf of all the good outstanding
9 police officers who daily dedicate themselves to
10 protecting citizens and who risk their lives in doing so,
11 I do not mean to portray all police officers in a bad
12 light. I feel the vast majority of police officers are
13 sincerely good people who conducted themselves in a
14 professional manner, despite the difficulty of their
15 jobs. But I feel that even the good police officers have
16 knowledge of the officers that do break the law and can
17 get away with -- excuse me. But I also feel that they
18 have knowledge of officers that break the law to get what
19 they believe individually is to be a guilty person. I
20 believe that the majority of police officers do not
21 approve of coercing a confession out of a defendant, but I
22 believe that they look the other way when they see this
23 happening.

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1 So my main focal point as to this inquiry
2 into improving our criminal justice system is to hold the
3 individuals who work within the system to a higher
4 standard of conduct. Defense attorneys, district
5 attorneys and judges can be held to higher standards by
6 continuing professional education requirements. These
7 requirements can be more than just academic requirements.
8 Seminars can be held to train legal professionals on how
9 to deal with addicts and alcoholics and victims of sex
10 abuse and domestic abuse.

11 I would also like to take the opportunity
12 to commend Executive Director Jonathan Gradess and the
13 staff at the New York State Defenders Association for
14 providing some of these types of programs. Through these
15 services offered by the association, I have had the
16 opportunity to develop not only my professional criminal
17 defense skills, but also, and maybe more importantly, I've
18 gained the knowledge necessary to relate to and understand
19 individuals who are different from me. Keep up the good
20 work. We defense attorneys need you very much.

21 Lastly, I would like to briefly comment on
22 the assigned counsel fees.

23 The hourly rate at which I am paid, which

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1 is governed by New York State, is \$40 an hour for in-court
2 services and \$25 an hour for out-of-court services, and
3 it's my understanding that this rate has been in effect
4 since 1986. Defense attorneys, including myself, with the
5 aid and assistance of the New York State Defenders
6 Association, have been lobbying the state legislature for
7 an increase of these hourly rates for the past few years
8 and, unfortunately, we have been unsuccessful in doing
9 so.

10 I think the main reason for this lack of
11 success is because most of people think that these
12 amounts, \$40 an hour in-court, \$25 out-of-court do not
13 necessarily seem that unreasonable. My main contention,
14 and what I think most people who are aware of this issue
15 don't realize, is the of unbillable time and effort that
16 an assigned counsel attorney must expend in order to
17 produce these hourly rates. What I mean by this, that is,
18 unbillable time, is that there are functions and
19 expenditures that are required by an assigned attorney
20 that he or she is not allowed to bill for. Examples of
21 these functions and expenditures are the following:

22 The time it takes for an assigned counsel
23 to prepare the following documents necessary to get paid

1 on each case: we assigned counsel attorneys have to --
2 prior to being paid, we have to prepare an order assigning
3 counsel; we have to prepare an order of compensation; an
4 affirmation of services rendered; a schedule of criminal
5 charges and itemization of time; we have to prepare the
6 county voucher; and a letter to the judge of the court
7 seeking approval of the and expenses.

8 A lot of times, the preparation of these
9 documents can take hours and hour and hours -- all time
10 which we are unable to bill for.

11 Also, we are not allowed to bill for travel
12 time. So therefore, any travel time in between
13 courthouses and county jails, we are not allowed to be
14 compensated for.

15 Time expended on a case wherein the judge
16 determines that time expended does not justify the payment
17 of compensation in excess of the statutory limit. It is
18 routine where individuals, assigned counsel attorneys,
19 will submit vouchers totaling \$2,000 and up, and while
20 this time has been meticulously accounted for, it
21 routinely happens that judges just slash these vouchers,
22 sometimes, you know, as much as 30, 40, 50 percent.

23 Other items we are not allowed to bill for

1 are for postage, for photocopy expenses, and also for
2 legal research that is basically necessary in all felony
3 cases.

4 Additionally, a county court judge in this
5 area will also only approve of a limited amount of expense
6 for the compensation of private investors. So therefore,
7 the assigned counsel attorney consequently must go out and
8 do the investigation himself because many of the private
9 investors have refused to take any of these cases on any
10 longer because they, too, have had their time and expenses
11 cut dramatically.

12 So in essence, my point is that because we
13 are actually spending a greatly of extra time per case
14 that is not billable time, we are, in actuality, receiving
15 a great deal less per hour on each case.

16 I have, you know, set forth a case in point
17 in my documents that I have furnished to the panel. And
18 this is a case that I had worked on for approximately a
19 year and a half. I worked on this case almost on a daily
20 basis for a year and a half, wherein the sum total came to
21 \$1,957. The judge in this matter decreased my
22 compensation to \$1,347 or approximately a 31 percent
23 decrease. That being the case, and if you also factor in

1 the additional time that I spent to prepare the documents
2 necessary to get paid for this case, then the actual
3 hourly rate becomes even less. And additionally, if you
4 factor in the unreimbursed out-of-pocket expenses I paid,
5 such as postage and photocopying expenses, then the hourly
6 rate is even further reduced.

7 In conclusion, I would like to thank you
8 for your time and your concern regarding the state of
9 legal representation of individuals in New York State for
10 those who cannot afford to pay for an attorney. I hope
11 that the information I've provided you today will give you
12 some insight into our criminal justice system so as to
13 allow you to form an opinion on how to better improve our
14 system and offer better quality representation for those
15 who need it the most.

16 MR. NOWAK: Approximately how many cases
17 are you assigned to, would you say, a year for three
18 different counties?

19 MR. RICHARDS: Approximately 75.

20 MR. NOWAK: And that would be from all
21 three counties?

22 MR. RICHARDS: Correct.

23 MR. NOWAK: And you just indicated you have

1 had have experienced having your vouchers cut. Is that a
2 majority of cases, a minority of cases?

3 MR. RICHARDS: No. Actually, I only have
4 had that in one instance. So you know, I don't, you know,
5 mean to give the false inference that this happens on a
6 prevalent basis because generally it does not. Although,
7 I think it does happen -- the more severe the cases are, I
8 think the more likely it is that it does happen. And
9 also, I think it happens in certain counties more so than
10 other counties. And from talking to other defense
11 attorneys, it's my understanding it also happens at the
12 appellate level quite often as well.

13 MR. NOWAK: Could you estimate how many
14 cases that you've actually taken to trial and verdict of
15 the, say, 75 that you are assigned to during the course of
16 a year?

17 MR. RICHARDS: Actually, I have not had a
18 case that has gone to trial. I don't know whether that's
19 due to my expertise at negotiating good dispositions for
20 my clients or whether it is for some other reason.

21 MR. GRADESS: Okay. Thank you very much.
22 David Lewis.

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1 board member. And through the National Association of
2 Criminal Defense Lawyers, I served a number of terms as
3 indigent defense chair, studying, in particular, cases
4 involving systemic challenges to court appointed rates.
5 Some of my testimony is principally as a result of that
6 experience.

7 I began as a criminal defense lawyer by
8 opening a practice with a fellow I had gone to college and
9 law school with and showing up on the day to get 18B
10 cases. Under the old system, if you knew the 18B
11 administrator, you would get cases. And because I did
12 know him, I began to do court appointed cases immediately
13 upon being admitted to the bar. In fact, it took a week.
14 Without any training, without any experience and believing
15 that everyone else in the world knew exactly what they
16 were doing, I set out to learn how to do what I wanted to
17 do. At that time, I was also named to the federal
18 panel -- much smarter than I had been the day before.

19 I've never been a public defender. I have
20 been an 18B lawyer up until about five years ago, when,
21 sitting down to do an analysis of the court appointed
22 rates on 18B cases, my partner and I concluded that it
23 cost us more for each hour than we could justify. It also

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1 became clear to us that the 18B rate, as it was,
2 interfered with other elements of our practice, including
3 our pro bono commitments. For example, in doing a
4 homicide case in the Bronx, it was easier to do it
5 pro bono than to get involved in doing it 18B. And the
6 reason was because of issues of bookkeeping, having to get
7 judicial approvals for experts and other matters like
8 that, it became more counterproductive than to just absorb
9 of the costs pro bono.

10 We are sitting here as the legislature is
11 getting ready to take a look at what they call a
12 cost-of-living increase because for roughly the last 12 or
13 ten years, depending on how it's counted, there has been
14 no increase. While it may be fashionable to oppose it,
15 think they should get their increase, just as I think a 38
16 percent rise in the court appointed fees might be a
17 solution, because in fact, our situations are very
18 similar.

19 For example, 18B, we know, is a part-time
20 job, very much like the legislature. Its purpose is

21 public service, as they repeatedly tell us when we seek to
22 get reasonable rates. And not only that, the legislators
23 have made a compelling case that they are paid very little

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1 for the work they do. Additionally, because it's only
2 part-time, they have concluded that this part-time work
3 eats up all their time, with their responsibilities to
4 their communities and the like. We hear that from
5 part-time defenders and also 18B lawyers, that these
6 responsibilities eat up all their time.

7 Like the legislators, we are often ignored
8 by leadership, we are sometimes mistreated by the press
9 and by the public and randomly misunderstood.

10 Not only that, but like most legislators,
11 our attempts to change this law have never gotten full and
12 complete hearing.

13 And finally, every one of the legislators
14 has to be there when authority calls them to work and
15 every one of them seeks the position despite the amount of
16 money paid.

17 Because we are so much alike, it strikes me
18 that they would be the first to stand by us, as we should
19 stand by them. The similarities of our situations are not
20 unique. The fact of the matter is that as they are
21 dependent upon each other for their payment. We assigned
22 lawyers, remarkably, depend upon them for a living wage.
23 This legislature should be willing to lift these court

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1 appointed rate amounts well beyond the current level.

2 The alternative, however, is what we have
3 got in many cases, whether we like it or not, we have
4 created a series of Mississippis on the Hudson -- counties
5 in which the funding goes to one side but not the other.

6 Defender's offices are struggling to
7 survive, not just economically but to handle their growing
8 docket.

9 There's another element. Very often, we
10 hear that 18B cases can be tried, as the expression used
11 to be, "by the seats of one's pants." And depending upon
12 the fabric and the quality of the clothing, that may be
13 possible in some cases. But we have discovered
14 something. We have discovered that the practice of
15 criminal law has become far more complex than it was when
16 18B first started, where Gideon's case about the robbery
17 and burglary of a pool hall is now displaced by the

18 evidence of DNA, displaced by forensics, displaced by
19 every one of those advances in science, each with their
20 own liability -- and none of them guarantees the truth.
21 Further, minor matters such as convictions
22 for misdemeanors, once thought to be the bread and butter,
23 if you will, of the system, the process, the making of

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1 people into legal sages, now carries far more
2 consequence. For example, the old "ten days or fifteen
3 dollar" sentence has certain consequences with regard to
4 federal sentencing guidelines. Where before when you
5 handled the defendant's felony you might be handling that
6 client's predicate also, now, in justice courts, in town
7 courts in the lowest courts -- and I mean that merely
8 structurally -- in the lowest courts, the consequences may
9 end up enlarging federal sentences.

10 And as the federal court prosecutors reach
11 out and the federal courts fail to resist the increased
12 federalization of state crimes, what we are having is
13 defendants going to jail for extensively long periods of
14 time, sometimes predicated on nothing more than a string
15 of "ten days or fifteen dollar" sentences, each of which
16 gets a point under the criminal history category in the
17 sentencing guidelines. Not only do our lawyers not know
18 that, our judges don't know that. And assuming our
19 prosecutors don't know it -- that's the best light it can
20 be put in.

21 So what do we do? Well, first of all, I
22 think some of it is how we speak on these issues. When
23 you come to the bar as a beggar, you rarely get what you

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1 want. We have to demand that the state make the same
2 commitment to defendants as it does, frankly, to itself,
3 and that is that public work is no longer treated as a
4 dumping ground. If anything, public work is considered a
5 contribution resulting in what large scale law firms
6 called blended rates. A blended rate is, in effect, an
7 averaging of rates of these large scale law firms. A
8 blended rate of \$60 an hour would indicate at least some
9 idea that what these lawyers do is worth something.

10 The Public Officers Law in the State of
11 New York talks about incremental experience in keeping and
12 paying lawyers. It's done simply because the state has a
13 vested interest in keeping experienced lawyers as lawyers
14 for the state within the system. So when we talk about it
15 in terms of criminal defense, it has to be treated, first,

16 like an area of expertise, because it is. 'Cause not one
17 of the people you see wandering through the halls here,
18 either elected or staff, is probably capable on their best
19 day of trying a serious felony case. Even the people who
20 make the laws are unable necessarily to defend defendants
21 who are charged with violating these laws.

22 Next, we have a significant problem. The
23 number of criminal cases is growing. The defendants are

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1 principally poor. The criminal defense bar is the only
2 one asked to sacrifice economically, when every other
3 member of the bar has no responsibility, not only the more
4 prominent members of the who can bar can step away from
5 their sacrifice for the principal reason that, frankly,
6 they are doing much better and don't need 18B work.

7 What's really the problem and what we
8 really bemoan in the current structure is that the State
9 of New York has demanded that criminal defense lawyers
10 undermine the state's constitutional obligation under
11 Gideon. The general levy that provides the taxes that
12 provides the 18B resources to lawyers is not generally
13 applied to individuals, it is across-the-board. But we
14 who do this work, we who defend these amendments to the
15 constitution and to the State of New York demanding that
16 we make this sacrifice, we are the only entity that
17 underwrites any of the state's constitutional obligation.

18 On the day they go back to their prime
19 contributors, rather than soliciting contributions for
20 political campaigns but, instead, contributions to the
21 state welfare system, then maybe we will see an equal
22 division of the underwriting obligation. But it's
23 irresponsible to make a small group of lawyers bear that

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1 burden. The fact of the matter is it's not required of
2 anybody else, it's not even thought about to require it of
3 anybody else.

4 I truly believe that the 18B rates
5 themselves are, in effect, a confiscatory taking by the
6 state of individual property and time. If Lincoln's line
7 is true, that the only thing lawyers really have to sell
8 is their time, the State of New York is seizing our time
9 in order to underwrite their constitutional obligation --
10 and without due process since nothing is heard when a
11 voucher is cut -- and with the setting of dollar amounts
12 that have nothing to do with reality or the current state
13 of affairs.

14 One of the defects of the system that is
15 patently obvious is that judges do not belong as gate-
16 keepers. They are not properly gate-keepers with regard
17 to money, and they have no business in determining whether
18 a defendant can or cannot have an expert. And the irony,
19 the catch-22, is you have to establish the need for the
20 expert before you can get them.

21 And I'll tell you, as a private lawyer in
22 some of the well-paid cases that I've been fortunate to be
23 in, we have used experts to find out what we should not do

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1 in a case. We have used experts who have taught us what's
2 wrong with an idea we had. You will never get an expert
3 on that basis under 18B.

4 And assigned lawyers and defendants are led
5 into situations in which they are foregoing experts that
6 could be exculpatory. This is an interference by the
7 state, by use of the public monies. And since it uses
8 public monies to prosecute, where there are no approvals
9 by judges, there seems no reason for these judges to be in
10 any position to challenge defense lawyers. Judges believe
11 and they say repeatedly that they are guardians of the
12 public fisc. The Court of Appeals in Bodek made it clear
13 it did not think the judges are the guardians of the
14 public fisc and they make no attempt to limit the public
15 fisc, it appears to be bottomless.

16 Lastly, one of the ugly factors about 18B
17 work is the issue of triage. A diligent committed counsel
18 cannot be required to starve for his or her belief that
19 the defendant is entitled to representation. But when you
20 have a docket that includes 18B work and CJA work and
21 private work at a billable hourly rate, and you have to
22 wait for to get paid for the 18B work -- hopefully
23 sometime prior to the millennia at least -- the answer is

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1 that the 18B client falls to the bottom of the heap
2 whether they belong there or not.

3 Your greatest commitment, no matter what
4 you are trying to do, still remains being able to survive,
5 and so you make economic decisions on the backs of
6 defendants for the sole purpose that the state has made it
7 impossible for you to make a decent wage.

8 And for those defendants whose 18B lawyers
9 want to make their money quick, it's essential that those
10 lawyers get those defendants to plea because the sooner
11 you get your voucher in, the sooner you get paid. So the

12 system is corrupt, I believe, both in the process and the
13 manner in which it does it.

14 In some of the large scale cases we have
15 begun to see, judges authorize interim payments so that
16 the economic pressure of the case is lifted.

17 In the end, there are two things that
18 should be done, neither of which I imagine are all that
19 quickly gotten to.

20 First, I believe the only way the rates
21 will change is by the power of a lawsuit dealing directly
22 with the confiscatory taking. I believe that in the most
23 recalcitrant states, that has been the manner in which the

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1 problem has been solved. We have treated it legislatively
2 for years and years, but the fact is that because felons
3 don't have the right to vote, we end up with little
4 constituency in the houses of the legislature.

5 The second thing that should happen -- and
6 it's almost unthinkable in the climate we live in -- is
7 that it's time to think about whether we should be, as a
8 society, prosecuting that many cases. It cannot be that
9 there are this many criminals in the state. And it cannot
10 be that we are willing to have an unlimited trust and rely
11 on the use of discretion by prosecutors and, in fact,
12 elected officials in other areas, to determine how much
13 crime exists and how many people will be prosecuted. If
14 the dockets are uncontrolled, then the fact of the matter
15 is we will never be able to catch up with the ideal of
16 equal representation and all we will be able to do is to
17 process people, rather than actually administer justice.

18 For those of us who still believe that the
19 administration of justice is possible, it seems that the
20 level playing field exists only when you bring your own
21 money and level the playing field yourself. But if you
22 are poor and if you've got problems and if you are not
23 well and you come to this system, who your lawyer is and

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1 what happens to you is more of a crapshoot. And it's
2 fatally pathetic -- but it's the way it works, it happens
3 every day -- that they all plea and the processing goes
4 on.

5 I offer this because nobody can answer it,
6 so I like it: The solar system is a means of organizing
7 the planets. But we don't know if it really works, we
8 just figured out how it turns. And that's where we are on
9 18B rates.

10 MR. NOISETTE: In listening to the comments
11 from you, it seems that one of the pressures that exists
12 in the system is the tension of having to take cases at
13 intolerably low rates and the need to have a base of
14 support as you try to build a private practice. I mean,
15 needing to take 18B cases and needing to take 18B cases
16 despite the fact that the rates are low, is that a
17 phenomenon, should we take that to mean that there will
18 always be people willing to take cases at these low
19 rates?

20 MR. LEWIS: For many lawyers starting out,
21 18B is the vehicle to learn the trade. That's how I
22 learned the trade. You cannot develop a private practice
23 unless you come out of a prosecutor's office or some other

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1 office in which you have an ongoing relationship with
2 individuals who might follow your work. The federal
3 courts are now calling that house counsel. That's one
4 situation.

5 There are lawyers in the system who need
6 18B work. There are lawyers who need it because they are
7 unable to make a living in any other way at anything.

8 There's a woman in Manhattan who has been
9 there a hundred years. When Legal Aid went on strike, she
10 showed up and got all of them, all the cases. Just so you
11 understand, she got all of them. We have in the State of
12 New York, especially in the City, what I've considered to
13 be -- and I've said this before and I'm not afraid to say
14 it again -- the bottom feeders, people who scour the
15 bottom in order to feed, who will take anything. I
16 watched this person trying to get a plea from this guy in
17 which she kept asking this guy if he was guilty in front
18 of a full courtroom. That's not unusual. Ten years ago,
19 I watched this guy plead a guy guilty who didn't speak
20 English. We have bottom feeders in private practices.
21 The nature of the practice is that there is no bar to
22 that, if you will, and the criminal defense lawyer -- in
23 fact, there are situations where it turns out that the

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1 lawyers are not really lawyers, as we have seen in federal
2 court and state court. They just showed up, announced
3 they were criminal defense lawyers, poof, they were.

4 We are always going to have people that
5 will take all the work they can get. The problem is that
6 taking the work is different from fulfilling the
7 responsibilities. We don't have a way to look at a case

8 and say, you did a good job, you did a bad job. And so
9 the bottom feeders will always feed. But what that does
10 is make the criminal courts the lowest common denominator,
11 not of representation but of outcome. Every prosecutor
12 knows that when that woman shows up on a case, it's a
13 plea. They don't even have to make a second offer. They
14 just give it to her and where their families don't show up
15 and they are all alone, she takes over and the client
16 takes a stake in the heart. Fortunately, there are not a
17 lot of lawyers like that. There are also excellent
18 lawyers that do excellent work.

19 And the 18B panel in many counties in
20 New York is far better, I'd say, than the private bar
21 because they are in there every day trying cases. The
22 private bar has the luxury of what some people call
23 cherry-picking, so we don't have to be there every day.

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1 When we show up, at least when I do, the two people I talk
2 to are the Legal Aid chief, and the next thing I want to
3 know is who is going to be in that judge's part. We have
4 gone so far as to invite everybody to breakfast who is
5 going to be in that judge's part. You cannot do that if
6 you are 18B, you have to be there and learn. But those

7 are the resources we use, for guys like me who move from
8 jurisdiction to jurisdiction, not appearing in front of
9 the same courts every day.

10 So the answer is there will always be some
11 people who will take it. But that does mean taking it is
12 representing anybody except themselves.

13 MR. NOWAK: My question would be addressed
14 to your statement that potential litigation is the only
15 way that we will see a change in the 18B rates in this
16 state. And the question basically goes to the fact that
17 earlier this morning we heard someone testify that when a
18 special prosecutor has been appointed on a case that they
19 have worked on, they have been compensated at a rate of
20 about \$150 an hour, and when the State of New York bids
21 out its civil work, their law firm is expected to submit a
22 bid at the marketplace rates which well exceed \$150, \$450
23 an hour.

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1 Do you believe that litigation would result
2 in the courts coming to a conclusion that criminal defense
3 lawyers should be put into this similar pattern of special
4 prosecutors and those who bid out for civil work, or will

5 the courts take the position, once again, that as criminal
6 defense lawyers, well, these are the rates, but you have a
7 pro bono obligation and, therefore, something less than
8 that is what the defense could expect through litigation?

9 MR. LEWIS: I don't know necessarily that a
10 number would come up. I would be more interested in
11 litigation, as it's been done successfully, for the
12 purpose of getting a ruling that holds that this system is
13 unconstitutional. Some states accepted that theory. In
14 terms of whether a court will order us to the level of
15 existing Executive Law -- I believe it's Executive Law and
16 the comptroller's regulation -- I don't see those facts as
17 evidentiary in nature as to the manner in which the state
18 handles those matters.

19 And I also think it's rather ridiculous
20 that the state perceives it as a pro bono obligation. The
21 pro bono obligation is something that a number of courts
22 have spoken about. They have spoken about it principally,
23 as I understand it, sua sponte, rather than litigate it.

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1 In federal court, in the Eastern District of Texas, every
2 lawyer licensed by that court has an obligation to do a
3 CJA criminal case. They also have the opportunity to opt
4 out by paying a fee; I think it's a thousand dollars. A
5 thousand dollars is paid by large scale firms for their
6 lawyers. Some of the best criminal defense lawyers, for
7 example, in San Antonio, opt out. They pay it. It's
8 cheaper. It's more reasonable for them to do that.

9 I say that because there are alternative
10 systems. I also say it for another reason. Within the
11 pro bono idea, the essence of pro bono, I believe, is that
12 you, you the lawyer, make your decision to do it or not do
13 it. In this case, the state has made it a pro bono
14 obligation. Pro bono suggests that maybe the need is not
15 there. But in fact, it is.

16 And the difference between pro bono as
17 something one gives, as opposed to one takes -- certainly
18 the king in the administration of property, before the
19 colonists became a nation, believed that it was to be
20 given to the king because the king demand it. So if the
21 king said, that's a very interesting jewel, you would have
22 to give it to the king. That rule is still actually the
23 rule in England. Our belief, going back to the

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1 Declaration, was that the king had no right to do that, to
2 take from us. This is the essence of confiscatory

3 taking. The idea of eminent domain, all these issues
4 about protection of property, is far different than the
5 amount of the schedule.

6 Furthermore, I think that what the state
7 pays its contractors -- and some of those numbers that you
8 are saying seem excessive to me, and even I have to stop
9 and wonder. It's only because of their expertise that
10 they get those rates, such as bond lawyers and people like
11 that. I don't know how the state comes to the conclusion
12 that criminal defense is much easier to do than what bond
13 lawyers do. And I'm willing to take one of the bond
14 lawyers in and let him walk around the criminal court on

15 Centre Street, and I'm sure he's going to think the lions
16 are all up in the seats watching what's going on down in
17 the coliseum below.

18 They don't want to pay this much money for
19 this process for this many people. And the real wisdom
20 would be in attacking the numbers of people they process.
21 But failing that, because we are unable to do that for a
22 lot of political reasons, it seems important that the
23 state should pay lawyers for their part in the process.

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1 MR. NOWAK: Thank you.

2 MR. GRADESS: Let me just ask a couple of
3 quick questions. I would like to put some of your remarks
4 into context by asking you questions just about the nature
5 of your own practice. You reflected upon how courts are
6 now starting to do interim payments. We have had
7 testimony in all of our hearings about the pressure to get
8 rid of cases quickly to effect payment. We have heard
9 reports here in Albany of public defense caseloads as high
10 as 2,000 and 1,000 per attorney. I wonder if you could
11 describe your own caseload and what you do in handling a
12 criminal case as a private practitioner and, in that
13 context, discuss how you would be paid.

14 MR. LEWIS: I handle, in an ordinary year,
15 approximately 15 cases. I have the luxury of deciding
16 what I want to do. And I'm also sought out by clients for
17 more complicated cases. That caseload consists usually of
18 one or two large scale private cases, either a murder case
19 that would go for months, for example, or stock matters in
20 the white collar area. We do grand jury investigation.
21 We get brought in very early. We had a grand jury
22 investigation that went three years, for which we were
23 paid hourly somewhere between \$200 and \$400 an hour. We

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1 have got union matters in which we defend people in union
2 disciplinary cases, in which they are charged with federal
3 crimes as part of that discipline and, therefore, the
4 outcome will often dictate whether the grand jury goes
5 forward or not.

6 Our billing structure is tied to what we
7 think a case will need when we look at it. I will tell
8 you that we have done cases that when we have sat down and
9 figured the hourly rate, you know, each hour couldn't buy
10 a newspaper. But we certainly didn't know that then. So
11 that's one issue. What it does is gives me the luxury of
12 devoting the time to the cases that they need, and I mean
13 time in the sense of not necessarily trial time, but just
14 preparation.

15 Presently, we have a court appointed case
16 from the CJA in the federal system. It's a 1997 case.
17 The judge, in effect, has given us almost 18 months to
18 prepare this case. The fact of the matter is that when we
19 walk in on the 11th, we probably could use another month
20 or so. It's so massive that it's almost impossible to get
21 your hands around it. I could not do that case without
22 the private docket and I couldn't do it as an 18B lawyer.

23 When I was an 18B lawyer, when I finally

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1 worked my way up to doing homicides, I would have a docket
2 of 35 homicides. It became a great effort to get to court
3 to cover all of them because they weren't in one room in
4 Kings County. And I remember telling a rather
5 particularly unhappy judge that, "If they give me a room
6 and they all come to me, I will be there at 9:30. But my
7 system is whoever yells at me loudest gets me first next
8 time and, your Honor, you've won." Just the management of
9 that was enough to -- I don't know how to handle 2,000
10 cases a docket.

11 I don't know how court appointed 18B
12 lawyers function, except they have great support staffs so
13 that they have memos and research and elements done for
14 them, so that the structure provides some sort of
15 support. Certainly, emotionally, they are part of a team,
16 as a rule, and that's very important.

17 When you are a lone wolf working in your
18 own office, if you call around, you are still not gonna
19 get answers. You end up inventing and reinventing the
20 wheel. So I think those folks that handle a large amount
21 of clients are going to lose clients. I also think
22 defendants who are part of that pack, who are either
23 mentally disturbed or emotionally disturbed, get lost in

1 the shuffle, whether they are difficult to deal with or
2 not difficult to deal with. What I think it does is it
3 makes the defense attorney go for the plea. And it does
4 it in the most coercive fashion because it's, well, you
5 can't get to everybody, you have to throw some people off
6 the boat.

7 I think one of the reasons you see public
8 defender burnout is many folks are haunted by the idea
9 that they may have given away somebody that they should
10 have saved. Almost everybody has a story like that. And
11 they eventually burn out. Now, that may be a little more
12 sappy than is expected in this area, but the fact of the
13 matter is that we don't deal with money, we deal with
14 people. And we deal with people who are supposedly to be
15 treated as if they are presumed innocent. Instead, every
16 element -- whether it's the volume, whether it's the
17 system, whether it's the prosecutors because they are so
18 dependent on police, and the police are dependent on the
19 police commissioner and the mayor's approval -- all these
20 things combined don't do anything but eat away at the
21 presumption of innocence. Even dedicated defense counsel
22 find they can't give it to clients and you see them burn
23 out. And they burn out sometimes in the office, from what

1 I hear, right in front of us. Sometimes they burn out in
2 court where, all of a sudden, the lawyer sitting next to
3 you, your co-counsel, suddenly is on another side, not
4 necessarily against you but just somewhere else.

5 We had of case where a lawyer was removed
6 from the federal panel because she was lying to judges and
7 lying about things because it's a lot easier to lie than
8 to deal with the truth. And only after it all got sorted
9 out and the lawyer got caught was she able to get what she
10 needed, which was to get out of the system and get
11 better. Brilliant lawyer, great appellate lawyer -- you
12 would want her on your case -- until, one day, that wasn't
13 her anymore. And it happened because she had a docket of
14 50 or 60 cases, federal cases, and it was too overwhelming
15 to do. And the conscientious lawyer is gonna do them
16 all. Lawyers who aren't conscientious can probably handle
17 a large caseload, but I don't know if the defendants want
18 it.

19 One last thing. There has never been a
20 case where an elected official got in trouble in which
21 they took court appointed counsel. I always find that to
22 be a fascinating element. It seems to me that if they
23 wouldn't want to dive into that pool and take their

1 chances, it seems unreasonable for them to ask everybody
 2 else to dive into it. It's not just their salaries,
 3 sometimes it's their futures. And every politician, every
 4 elected official that I have tried or have represented,
 5 now that I'm sitting here thinking about it, has wanted
 6 private counsel and wanted to pay private counsel top
 7 rates because they wanted to buy the lawyer's attention.
 8 When it comes back the other way, it seems not as
 9 important.

10 And the reason that's even more significant
 11 is if they feel they are entitled to their pay raise
 12 because of so much that's happened and how complex it's
 13 become and because it's no longer just a part-time job, I
 14 certainly wish -- they should follow their lead with our
 15 fees, and then they should follow our lead in terms of
 16 representation when they have problems. And I think they
 17 are a very good role model for us and what we need.

18 MR. GRADESS: Thank you very much. I
 19 think, if there are no other remarks from the panel, we
 20 will declare this hearing closed.

21 (Whereupon, the proceedings held in the above-
 22 entitled matter were concluded at 6:00 p.m.)

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 3 C E R T I F I C A T I O N
 4
 5

6 I, HOLLY A. SANTSPREE, a Court Reporter and
 7 Notary Public in and for the State of New York, do hereby
 8 certify that I attended at the time and place noted in the
 9 heading hereof and took a stenographic report of the
 10 proceedings and testimony in the above-entitled action,
 11 and that the foregoing is a true and correct transcript to
 12 the best of my knowledge and belief.
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