

New York Hearing

1

1 -----x  
2 In the Matter of Fact Finding  
3 Hearings held by the New York State  
4 Defenders Association and the League  
5 of Women Voters of the State of New York

6 -----x  
7  
8 October 14, 1998  
9 9:30 a.m.  
10 Hearing held at the Association of the Bar  
11 of the City of New York, 42 West 44th  
Street, New York, New York, before Chris Te  
Selle, RPR, a Shorthand Reporter and Notary  
Public within and for the State of New York.

2

1 A P P E A R A N C E S  
2  
3 Barbara Barr  
4 League of Women Voters of the  
5 City of New York  
6 Jonathan E. Gradess  
7 Executive Director, NYSDA  
8  
9 Marcia Lorand  
10 League of Women Voters of the  
11 City of New York  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100

3

Hearing

1  
2 MR. GRADESS: I'd like to start these  
3 hearings, and welcome everyone who is  
4 present and allow the members of the dais to  
5 introduce themselves and make a statement if  
6 they'd like very briefly, much more briefly,  
7 since we have a lot more witnesses than we  
8 thought.

9 MS. LORAND: Good morning. I'm  
10 Marcia Lorand, First vice president League  
11 of Women Voters of the City of New York, and  
12 we are very happy to participate in this  
13 event. It fills right in with the things  
14 that we are concerned about which is citizen  
15 education and also public policy.

16 Thank you.

17 MS. BARR: Barbara Barr from League  
18 of Women Voters of New York.

19 MR. GRADESS: I'm Jonathan Gradess of  
20 the New York State Defenders Association.

21 MR. PITTARI: I'm Stephen Pittari, a  
22 board member of New York State Defenders  
23 Association. I'm also the chief attorney of  
24 the criminal division of the Westchester  
25 County Legal Aid Society and an

4

Fahey

1 administrator of the assigned counsel panel  
2 of Westchester County. I've been doing  
3 public defense work since 1969.

4 MR. GRADESS: And our first witness  
5 is Lynn Fahey. Good morning, Ms. Fahey.

6 THE WITNESS: Good morning. My name  
7 is Lynn Fahey. I'm the attorney in charge  
8 of appellate advocates, which is a  
9 not-for-profit organization representing  
10 indigent criminal defendants on appeal in  
11 the Second Department. I've been asked to  
12 speak today, though, as a representative of  
13 the Criminal Advocacy Committee of the  
14 Association of the Bar of the City of New  
15 York.

16  
17 The association has very long taken  
18 an active interest in seeing that indigent  
19 criminal defendants are assured quality  
20 legal representation. In March of 1997, we  
21 issued a report expressing our extreme  
22 concern that the compensation level for  
23 counsel assigned to represent indigent  
24 criminal defendants under 18-b of the County  
25 Law is inadequate to satisfy the

1 Fahey

2 constitutional mandates of quality  
3 representation and the traditionally high  
4 standards of the New York bar.

5 In New York City, as in most other  
6 places, the cost of living and the cost of  
7 maintaining a law office has risen in recent  
8 years, but the compensation rates for 18-b  
9 counsel have remained stagnant at \$25 an  
10 hour for out-of-court time and \$40 an hour  
11 for in-court time.

12 The result is that many very skilled,  
13 very dedicated attorneys have been driven  
14 out of this type of representation. They  
15 have taken fewer and fewer assigned case, or  
16 they have stopped representing indigent  
17 defendants altogether.

18 For those who remain on the 18-b  
19 panel, the unrealistically low compensation  
20 rates and the caps on rates provide a  
21 disincentive to do the thorough kind of job  
22 that the Constitution and quality  
23 representation requires.

24 I want to emphasize that this is not  
25 a question about fairness to lawyers,

1 Fahey

2 though. It's a question about fairness to  
3 indigent criminal defendants who are, by  
4 definition, poor, who are largely people of  
5 color, and they are people who face usually  
6 the loss of their freedom for many, many  
7 years.

8 New York in fact in recent decades  
9 has enacted harsher and harsher sentencing  
10 legislation, making it more important than  
11 ever that people who face criminal charges  
12 be well represented, that they have a fair  
13 chance of countering the resources that the  
14 people have, and that criminal defendants  
15 and their communities perceive that the  
16 criminal justice system is not hopelessly  
17 stacked against them.

18 When attorneys representing indigent  
19 criminal defendants are paid lower rates  
20 than virtually every type of comparable work  
21 you can think of, that has a very negative  
22 impact on the fairness of the system, the  
23 perception of the system, as to whether it's  
24 fair or not, and it has a disproportionate

25 impact upon people of color.

7

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Fahey

Most recent studies show that somewhere between 80 and 90 percent of the people arrested in New York City are either African-American or Hispanic. The population of our prisons in New York State is something like 85 percent or close to that nonwhite.

It's very easy for certain communities in New York City to perceive from this arrest rate that they are not being treated fairly, their members are not being treated fairly, and the low rates that are paid to people to represent them can only reinforce that perception.

Finally, there is an adverse impact on the functioning of the court system. Our committee took a survey of judges in the Bronx, and 83 percent of those who responded believe that indigent criminal defendants would receive better representation if the 18-b rates were increased and 78 percent thought that the present size of the 18-b panel impacted adversely on the efficient administration of the courts and the court

8

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Fahey

calendars.

There are three primary problems that we see with the current 18-b compensation scheme. First is the differential between in-court and out-of-court compensation rates, \$25 for out-of-court, \$40 for in-court.

For a trial attorney out-of-court work can be crucially important. Drafting motions, doing legal research, doing factual research, preparing witnesses and so forth can often make the difference between a person well-represented and a person poorly-represented.

In fact, more than a quarter century ago, the Court of Appeals specifically recognized this and said it's well settled that the defendant's right to representation does entitle him to have counsel conduct appropriate investigations both factual and legal to determine if matters of defense can

23 be developed and to allow himself time for  
24 reflection and preparation for trial.  
25 When out-of-court time is compensated

9

1 Fahey  
2 at a rate so much lower than in-court time  
3 the signal sent to attorneys is precisely  
4 the opposite. The signal is that New York  
5 thinks it's sufficient if a criminal  
6 defendant who is poor has seat-of-the-pants  
7 representation, has someone who walked into  
8 court and essentially guts it out as the  
9 facts are developed and the issues are  
10 developed as he or she goes along.

11 This is not what indigent defendants  
12 are entitled to. They are entitled to more.  
13 They are entitled to a well-prepared  
14 attorney.

15 There are many states in other  
16 systems, particularly the federal system,  
17 which recognize there is a real danger in  
18 compensating differently for in-court and  
19 out-of-court time.

20 And it's particularly ironic in a way  
21 because in New York, compensation for  
22 in-court time may mean time just sitting  
23 around in a courtroom waiting for a case to  
24 be called, something that does nothing  
25 really to advance the defense of the case.

10

1 Fahey  
2 On the other hand, out-of-court time, doing  
3 legal research or factual investigation,  
4 which may be crucial to the case, is paid  
5 less, paid at a lower rate.

6 The second problem is the rate of  
7 compensation. By every meaningful  
8 comparison, it falls far short of what it  
9 should be. Bear in mind that we're talking  
10 now about only \$25 an hour for out-of-court  
11 time, compare that to representing indigents  
12 in federal court, \$75 an hour.

13 The vast majority of other states pay  
14 better, although I would bet that very few  
15 of them have as high a cost of maintaining  
16 an office as New York City does.

17 And perhaps most telling, counsel  
18 retained to represent New York City and its  
19 agencies in civil cases, partners, \$150 an  
20 hour, now most of this is going to be

21 out-of-court time, compare \$150 with \$25 an  
22 hour. Counsel retained by New York State  
23 under public officers law section 17 to  
24 represent state employees, \$100 an hour in  
25 court and 75 out of court. Out-of-court

11

1 Fahey  
2 time is three times the amount paid for  
3 representing some poor person who has years  
4 of his life or her life at stake.  
5 And the comparison even suffers if we  
6 look at other components of the indigent  
7 defense system. Bear in mind now that most  
8 of these people are going to be doing most  
9 of their work out of court rather than in  
10 court, so think about the comparison being  
11 to \$25 an hour for an attorney: Certified  
12 psychologists, \$90 an hour; forensic experts  
13 \$75 an hour; chemists and pharmacologists,  
14 75 to \$100 an hour; accountants, 75 to \$100  
15 an hour; social workers, \$45 an hour, and so  
16 forth.  
17 This is a very serious problem.  
18 Finally, the problem, the third problem is  
19 the caps on compensation: \$800 for  
20 misdemeanors, \$1,200 for felony. These are  
21 wholly unrealistic.  
22 What they do is to dramatically lower  
23 the already too low hourly rates if someone  
24 does a quality job.  
25 For example, an appeal, if an

12

1 Fahey  
2 attorney is experienced and is working very  
3 efficiently, perhaps 80 hours, 80 or 90  
4 hours is the amount of time that would be  
5 spent on an average appeal. If the attorney  
6 spends 80 hours on an appeal, there is a  
7 \$1,200 cap. The attorney ends up being paid  
8 \$15 an hour.  
9 Again, the caps furnish a  
10 disincentive to do quality work. The cap  
11 for an appeal, for example, \$1,200 cap  
12 suggests that we should be talking about 30  
13 hours. It's simply not an adequate amount  
14 of time to read a transcript, on average,  
15 these days, close to a thousand pages, if  
16 the conviction was at trial, think about the  
17 case, do the legal research, write a brief,  
18 prepare for oral argument, orally argue the

19 case. You can't do it in 30 hours if you  
20 are doing anything approaching a quality  
21 job.  
22 So the incentive is to cut corners.  
23 It simply sends the wrong message, because  
24 there is now a presumptive period of time in  
25 which to do an appeal, or in which to

13

1 Fahey  
2 represent someone at trial. The  
3 compensation rate discourages preparation at  
4 the trial level in particular and  
5 discourages doing appeals with a  
6 thoroughness that they require.  
7 So we have several recommendations.  
8 One is to eliminate the differential between  
9 in-court and out-of-court time; second, to  
10 raise the hourly compensation rates, and we  
11 recommend that \$75 for all felonies and for  
12 all appeals, to provide for compensation  
13 paid for other people who render assistance,  
14 for example, a second less experienced  
15 attorney who may do some work on the case or  
16 a paralegal at some fraction of the rate  
17 that the attorney would be paid, and we  
18 believe that the compensation caps should be  
19 eliminated.  
20 Are there any questions? I'd be  
21 happy to respond.  
22 MS. LORAND: No.  
23 MR. PITTARI: Just to maybe even one,  
24 that \$75 rate you recommend, that's what the  
25 federal courts pay?

14

1 Fahey  
2 THE WITNESS: Yes, that's what the  
3 federal courts pay.  
4 MR. PITTARI: Is it true, I've heard,  
5 when you say some of the attorneys have been  
6 driven out of the 18-b panel that many of  
7 them have gone over to the federal court  
8 panel because of the differential?  
9 THE WITNESS: Yes, that is very  
10 common for attorneys to do less and less  
11 state work as time goes by and more and more  
12 CJA assignment work, federal work, because  
13 the pay is so much better.  
14 If I might add, this is speaking  
15 personally rather than as a representative  
16 of the Association of the Bar, I have a very

17 small office. We started out with 12  
18 attorneys. Two of those were attorneys,  
19 very, very experienced, talented people who  
20 had been doing 18-b work and were driven out  
21 and had to seek a job with a regular  
22 paycheck, because they couldn't make a go of  
23 it, and possibly a third attorney who is in  
24 that position, also very, very talented, I  
25 suspect is going to be joining our office

15

1 Fahey  
2 soon. People just can't make a go of it if  
3 they do the quality job that they should be  
4 doing.  
5 MR. GRADESS: Could you describe for  
6 us the practice in your experience of going  
7 above the cap in appellate work.  
8 THE WITNESS: Well, my understanding  
9 is that in New York City that the Second  
10 Department has long cut vouchers. The First  
11 Department currently cuts vouchers, so an  
12 attorney may say, I spent so many hours and  
13 that the compensation rate would be a  
14 certain amount. That amount is cut. The  
15 Court of Appeals regularly cuts the voucher  
16 down to the \$1,200 cap.  
17 That happened in one assigned case  
18 that I did in the Court of Appeals that I  
19 did as an independent 18-b attorney, and  
20 friends of mine who appeared in the Court of  
21 Appeals have had the same experience. So  
22 you are talking about if you do a quality  
23 job, you are talking about being paid 10 or  
24 \$15 an hour, which is enough to discourage  
25 anyone from continuing in that work. You

16

1 Fahey  
2 can't support yourself or your family.  
3 MR. GRADESS: Starting with the Court  
4 of Appeals, it's your understanding that  
5 they hold firmly to the \$1,200 cap as a  
6 matter of routine?  
7 THE WITNESS: I believe they do, yes.  
8 MR. PITTARI: Is the cut within the  
9 Second Department a cut of a request from  
10 more than the cap? In other words, cases  
11 are filed for what their hours are worked  
12 and cut down to 1,200, or --  
13 THE WITNESS: There might be some cut  
14 below 1,200. I can't be certain of an

15 answer of that. Obviously, if you do a  
16 quality job, you are going to be putting in  
17 for hours that way exceed \$1,200 limit. I  
18 should make clear that for appeals where  
19 most of the work is out-of-court time of  
20 necessity, the \$40 rate applies across the  
21 board. There is no a differential for  
22 in-court, out-of-court time, because there  
23 is hardly any in-court time in appeal, but  
24 even at that rate, it's people who are doing  
25 a quality job are getting their vouchers cut

17

1 Fahey  
2 I think typically down to the 1,200,  
3 although I think it's certainly possible  
4 that some are being cut below that.  
5 MR. GRADESS: Is it correct to state  
6 that the previous practice in the First  
7 Department until of late was to pay the full  
8 vouchers that were submitted, and they are  
9 now being cut?  
10 THE WITNESS: I believe that's  
11 correct.  
12 MR. GRADESS: Thank you very much.  
13 (Discussion held off the record.)  
14 THE WITNESS: I've been invited if  
15 I'd like to make some remarks in a more  
16 personal capacity, so, speaking solely as an  
17 independent person, and as the head of an  
18 appellate indigent defense office, we see  
19 appeals with records from all different  
20 trial counsel, a lot of 18-b attorneys, some  
21 retained attorneys, and all of the  
22 institutional providers in the Second  
23 Department, the Legal Aid Society, Brooklyn  
24 Defenders Association, and Queens Law  
25 Associates.

18

1 Fahey  
2 By and large, all of the  
3 institutional providers, and we are all very  
4 adequately funded. It's a pleasure to  
5 practice in New York City as an  
6 institutional provider as opposed to many  
7 other areas of New York State.  
8 The quality of representation we see  
9 from all the institutional providers is very  
10 high. It's very good. People are well  
11 represented. From the 18-b panel, some  
12 people are very well represented. There are

13 some very talented 18-b attorneys, but there  
14 are also quite a number who do not preserve  
15 a record well and who do practice somewhat  
16 seat-of-the-pants representation.

17 The difference in quality we see, I  
18 think, has to stem in large part from the  
19 difference in pay and the very low pay scale  
20 for 18-b attorneys. It simply drives out  
21 many of the best, and encourages the ones  
22 who are still on the panel to do things in  
23 as quick and cursory a manner as possible,  
24 even though their instincts may be to do  
25 much, much more. They simply can't afford

19

1 Fahey

2 to.

3 MR. GRADESS: Could you amplify for  
4 the record the finding that was expressed in  
5 your previous testimony on behalf of the  
6 Association of the Bar regarding the size of  
7 the assigned counsel panel. Could you go  
8 into that a little bit.

9 THE WITNESS: We didn't specifically  
10 investigate the size of the panel. We did,  
11 in our survey of Bronx judges, we did ask  
12 about whether an increase in the rates that  
13 are paid would increase the size of the  
14 panel, and they overwhelmingly, something  
15 like 94 percent said yes, it would, and that  
16 the basic message was they would welcome an  
17 enlarged 18-b panel.

18 I can't tell you exactly what the  
19 size of any panel is. I just know from  
20 knowing and speaking with people who do this  
21 kind of work that they are leaving the 18-b  
22 panel. They are going to the federal CJA  
23 and doing the bulk of their work there if  
24 they possibly can, or they are leaving the  
25 field entirely.

20

1 Fahey

2 Many of the trial groups that started  
3 up within the last two or three years have  
4 been peopled primarily by attorneys who were  
5 18-b attorneys and simply could not make a  
6 go of it or had trouble making a go of it  
7 and went to institutional providers because  
8 they would have the backup and the  
9 wherewithal to do the kind of quality work  
10 that they wanted to do.

11           And they could do that, and get a  
12 regular paycheck and not worry about, gee,  
13 am I now spending my time at a few dollars  
14 an hour instead of getting, at an  
15 institutional provider you get a regular  
16 paycheck, you have support, you have  
17 investigators, you have all sorts of backup.  
18 You can do research, you can take the time  
19 that you need to work on a case and do a  
20 thorough job, and you don't have to balance  
21 the thoroughness of the work against your  
22 ability to support yourself.

23           I think, if the rates were raised to  
24 a reasonable amount, 18-b attorneys would  
25 not have that rate problem of trying to

21

1   Fahey  
2 juggle their livelihood and the quality of  
3 their representation.  
4           But, at the very low rates that there  
5 are now, they do.  
6           MR. GRADESS: One last question,  
7 unless there are more.  
8           Do you have questions?  
9           MS. LORAND: No.  
10          MR. GRADESS: Tell us how we could  
11 get lawyers to preserve records better.  
12 What do you think? Have you given any  
13 thought to this?  
14          THE WITNESS: Oh, boy.  
15          MR. GRADESS: I'm sure you've been  
16 thinking about this your entire career.  
17          THE WITNESS: Actually, my husband  
18 and I, my husband is head of a similar small  
19 appellate office. We started writing a  
20 column that appears every three months or so  
21 about preserving records which is aimed  
22 toward primarily 18-b trial attorneys,  
23 because so many of the records we see are  
24 unpreserved. It's a tragedy as an appeals  
25 attorney to see a wonderful, wonderful issue

22

1   Fahey  
2 not preserved, which means you can only  
3 raise it in the interest of justice, you  
4 have no hope of getting it to the Court of  
5 Appeals, and this happens in many, many  
6 cases.  
7           So we started this column in the hope  
8 that we will educate 18-b attorneys in

9 preserving the record and make it easy for  
10 them, so our columns have included a list of  
11 tips or a list of objections that they can  
12 make to a certain type of error.

13 It's very difficult. With the  
14 continuing legal education requirements now,  
15 whether this will improve the situation or  
16 not is very hard to say. Certainly,  
17 continuing legal education should help.

18 On the other hand, if you are an 18-b  
19 attorney and you have to have pay a  
20 substantial amount of money for every two or  
21 three hour session of continuing legal  
22 education you go to, that is further  
23 disincentive to continue on the 18-b panel,  
24 because you now are, you now have an  
25 additional expense beyond the expense of

23

1 Chanin  
2 maintaining your office and all your other  
3 expenses that you have to cope with. So  
4 continuing legal education should be a move  
5 in the right direction.

6 On the other hand, with the low  
7 rates, it sort of adds to the balancing act  
8 which is not in the long run desirable  
9 unless you have some raise in compensation  
10 rates.

11 MR. GRADESS: Thank you very much.  
12 Good morning, Mr. Chanin.

13 THE WITNESS: Good morning.

14 MR. GRADESS: Welcome. We're glad  
15 you came and glad that you could come at  
16 this particular moment.

17 THE WITNESS: Thank you. I'm glad  
18 the panel is addressing this issue. It  
19 happens to be an issue which is important to  
20 Orange County right now. You may have heard  
21 that the Orange County legislature  
22 commissioned a study of public defense in  
23 Orange County last year by the Rockefeller  
24 Institute of Government. Certainly copies  
25 of that are available if anyone on the panel

24

1 Chanin  
2 wants it.

3 I will address a number of issues,  
4 hopefully, quickly, and I will tell you  
5 which issues I'm addressing. First one I  
6 want to address is the issue of assigned

7 counsel fees. These fees have not been  
8 amended in some years. The current rate is  
9 \$25 for out of court, \$40 for in-court time.

10 Those numbers I think by general  
11 agreement are unrealistic. They need to be  
12 revised upwards. Of course whenever the  
13 assigned counsel fees are revised upwards,  
14 that becomes a public charge, and it's  
15 important that we balance the taxpayers'  
16 burden with the need to attract the  
17 appropriate talent to provide appropriate  
18 indigent representation.

19 I think that the fees need to be  
20 raised, however, because, if they are not  
21 raised, they are per force going to limit  
22 the variety and availability of talent in  
23 the legal community which is necessary to  
24 provide adequate representation.

25 I think that the additional burden

25

1 Chanin

2 placed on the taxpayers by raising the fees  
3 can more than be compensated for by greater  
4 efficiency in the process by which indigent  
5 defense is provided, and I will elucidate on  
6 that in a moment.

7 Another area that definitely needs  
8 addressing, probably more importantly to me  
9 than any other issue is the lack of  
10 universal standards in a number of areas,  
11 and, therefore, without these universal  
12 standards, there is the currently reigning  
13 chaos which exists in many areas.

14 Among the areas that need more  
15 definition is the area of determining  
16 eligibility and the qualification for  
17 indigents.

18 Another place where standards are  
19 needed would be in the certification,  
20 training and qualification of attorneys.  
21 Another area would be, very important one in  
22 Orange County, is to define more precisely  
23 exactly what a conflict of interest is,  
24 because that very often is the reason why  
25 either the public defender's office or the

26

1 Chanin

2 Legal Aid Society or the Bar Association  
3 plan whichever is in effect in any given  
4 county does not apply, because the provider

5 claims a conflict of interest, and that  
6 results in the assignment of an 18-b  
7 attorney.

8 But the term, conflict of interest,  
9 varies from county to county and from case  
10 to case, and, without a consistent standard,  
11 there is no way to control the additional  
12 cost to the public when an 18-b attorney is  
13 assigned, so that's a very important  
14 definition which we now lack.

15 We also need, I think, to remind the  
16 state that every provider, whether it be one  
17 of the three I mentioned or a private  
18 attorney, is required by state regulation to  
19 provide reports annually. Last time I  
20 checked, many counties have failed to  
21 provide these reports to the state, and I'm  
22 not aware that the state is doing anything  
23 about making sure that the reports are  
24 filed, so it's very difficult to keep  
25 statistics and track what's going on in the

27

1 Chanin

2 various counties if they are not being  
3 required to file their reports by the state.

4 Of course, the standard of what  
5 exactly is adequate legal representation is  
6 a difficult one, but I think that's a  
7 necessary definition as well that needs to  
8 be addressed because of the basic issue of  
9 justice and fairness in providing  
10 representation to the people who need it.

11 Another issue is the fact that in  
12 many counties, there are no panels, review  
13 panels, whatever you want to call it,  
14 advisory groups. In Orange County, we are  
15 proceeding now to form what will eventually  
16 be such a panel. We will include on our  
17 panel judges from the various courts in  
18 Orange County, the supreme, the county  
19 court, the family court and the local  
20 justice courts.

21 We will also have representation on  
22 the panel from the County Bar Association,  
23 the county legislature. Now, the  
24 legislature, of course, is an important  
25 branch of government here because it's the

28

1 Chanin

2 county legislature that has to come up with

3 a way for paying for this, and under Section  
4 722 of the county law, as you know, it's the  
5 county legislature that ultimately has the  
6 deciding power as to what kind of system  
7 exists in the county to provide this kind of  
8 representation.

9 We will also have representation on  
10 our panel from the district attorney's  
11 office and the county attorney's office,  
12 since those two offices are mandated to  
13 assume the prosecutorial role in the various  
14 county courts.

15 But we also in Orange County want to  
16 include on our panel community-based  
17 organizations and not-for-profit agencies,  
18 since very, very often they are both  
19 involved in the legal cases and, I believe,  
20 have a very much more direct link to the  
21 community which representation we're talking  
22 about beyond the standard elected officials  
23 in the county.

24 Of course, we will also include the  
25 defense group in Orange County which happens

29

1 Chanin

2 to be the Legal Aid Society, but, whether  
3 it's a private provider or public defender,  
4 they need to be included on such panels, and  
5 we also want court staff and staff from the  
6 various agencies which are necessarily  
7 involved in these kinds of cases, such as  
8 probation.

9 In many counties, there is a mental  
10 health assessment team and perhaps  
11 representation from the sheriff depending on  
12 what role the sheriff plays in each local  
13 county, so a review panel would be a  
14 constructive thing. We are going to set one  
15 up in Orange County. That is just a  
16 recommendation I bring with me for you  
17 today.

18 Another issue that needs to be  
19 discussed is the financing of these systems.  
20 We know that the taxpayers foot the bill for  
21 much of the cost of this. In many counties,  
22 there is not now a system, and this is  
23 another thing we're looking at in Orange  
24 County, there is not now a system to  
25 determine to what extent those people who

30

Chanin

1  
2 are receiving defense at public expense have  
3 the ability to contribute copayments or  
4 schedule of payments to repay.

5 I think that one of the ways you  
6 balance the need to provide expensive but  
7 appropriate legal services with the cost to  
8 the public is to have some sort of a  
9 template that can be adopted by each county  
10 to provide some sort of a repayment.

11 I think this is very much in harmony  
12 with the modern philosophy of government  
13 where people are not going to be seeking  
14 entitlements any longer but are going to  
15 participate in their own benefits, so I  
16 think this is an appropriate issue to look  
17 at.

18 I also think that we need to take a  
19 new look at issues that have been spoken  
20 about by so-called authorities without  
21 really being explored fully. For example,  
22 there is no real good reason why public  
23 bidding cannot be used to lower the cost to  
24 counties. It is a county mandate.

25 I'm not suggesting that needs to be

31

Chanin

1  
2 changed, but I am suggesting that we need to  
3 make the responsibility of counties balanced  
4 by the ability of counties to fund the cost  
5 of these programs in a fair and competitive  
6 way.

7 I also think we need to think a  
8 little bit more creatively about different  
9 ways of financing these systems. For  
10 example, in state law, there are things  
11 called special benefit districts, so if we  
12 want to create new parking spaces or public  
13 parks or lighting or any other kind of  
14 public benefit in a specific area, it's  
15 possible to create a special district.

16 It doesn't immediately come to mind  
17 how the provision of legal defense services  
18 can lend itself to public districts, but I  
19 would like to point out to you that we have  
20 social services districts, we have districts  
21 that provide other services to the public,  
22 and I think that some creative thinking,  
23 whether it's using a district, special ad  
24 valorem district model or some other model,  
25 should be explored to find new ways of

Chanin

1 financing this so that the cost is spread  
2 appropriately.

3  
4 I'm just suggesting that there should  
5 be some creative thinking. There are many  
6 ways of financing government services, a  
7 huge number, and certainly we can adopt some  
8 qualities from some of the other models in  
9 this case. I don't think that there is any  
10 ethical or pragmatic reason why those other  
11 alternatives cannot be explored.

12 There are other areas in the law that  
13 seem perhaps tangential to this subject, but  
14 I think are involved more closely on a  
15 second look. For example, there are  
16 programs going on in the state right now in  
17 terms of the Corrections Commission and the  
18 Probation Department, alternatives to  
19 incarceration which seek to cut the cost of  
20 incarceration, but they can also be used in  
21 court proceedings in order to cut the cost  
22 of these services.

23 And when I say, cut the cost, I don't  
24 mean cut the bottom out of it. I mean use  
25 the money more efficiently to provide more

Chanin

1 and better legal services at less cost and  
2 less waste. So I think that we need to get  
3 involved with the area of corrections and  
4 alternatives so that we can make our money  
5 more efficient.  
6

7 One example of this is technology. I  
8 can tell you after many, many years of  
9 experience in family court that there are  
10 prisoners who must appear for paternity  
11 proceedings and support proceedings which,  
12 and these prisoners view their day in court  
13 as a day out of their cell.

14 They get to take a nice ride around  
15 in the country just because they have to  
16 appear in court, maybe they can get an  
17 adjournment, and therefore it's two days out  
18 of the cell. I think we can use remote  
19 television, we can use magnetic media to  
20 provide their appearance in court. It will  
21 make the court proceedings more efficient,  
22 it will save money, it will not be used  
23 improperly by the parties, and I think that  
24 we need to explore the ability of technology

25 to save this money that we really need to

34

1 Chanin  
2 provide these important legal services.  
3 I think that in Orange County and  
4 perhaps in other counties, the one area  
5 where there is the least amount of  
6 organization and the most amount of disarray  
7 is at the local level at the justice courts.  
8 I do not now suggest or might I ever suggest  
9 that the same kinds of requirements that are  
10 imposed on supreme and county court judges  
11 be imposed on local justice court justices.  
12 There is something American about the  
13 fact that people select their own local  
14 judge from the community, and I'm not  
15 suggesting that should be changed.  
16 However, when you have justice courts  
17 in one town which assign 18-b counsels at  
18 random almost without any inquiry as to the  
19 eligibility of the party for the  
20 representation, and in other towns it's  
21 impossible to get representation because the  
22 judge doesn't happen to believe in it, I  
23 think that shows a crying need for some  
24 organization to be imposed from above, and  
25 that of course also will save the counties

35

1 Chanin  
2 money and also provide more and better  
3 representation in a more uniform manner  
4 throughout the area.  
5 And lastly, I will talk about an  
6 issue from a different perspective, and I  
7 think most of you here today might have  
8 heard of it, this is the issue of  
9 independence from politics. Although we can  
10 easily imagine that the parties providing  
11 the representation may have a different  
12 political philosophy from the  
13 administration, the governmental  
14 administration at large, let's say, for  
15 example, I'm only using this as an example,  
16 that the Legal Aid Society in Orange County,  
17 for example, might have a decidedly, and I  
18 use these words with small letters, liberal  
19 or democratic bent, and we can assume that a  
20 majority of the elected officials at the  
21 county level are of a decidedly conservative  
22 and Republican bent.

23           The labels don't mean anything. I'm  
24 just using them as an example. I think it  
25 would be highly unlikely that any elected

36

1                                   Chanin  
2 officials could negatively influence the  
3 quality and the degree of representation  
4 that the indigent received by being under  
5 the influence of the elected officials for  
6 very long.  
7           If that ever happened, what it would  
8 really show is that the judiciary is not  
9 doing its job, because that would be an  
10 outrageous infringement on what we believe  
11 to be our responsibility as attorneys in the  
12 community.  
13           What is probably not looked at too  
14 often is the opposite of that effect. What  
15 I find as a municipal attorney is that  
16 whenever a government provides a mandated  
17 service not in-house but by contracting with  
18 an outside provider, the government actually  
19 loses oversight.  
20           The executive and legislative  
21 branches are subject to the open meetings  
22 law, the freedom of information law, and  
23 just about every other kind of open  
24 governmental law that we can imagine.  
25           It is impossible for very long for

37

1                                   Chanin  
2 elected officials to have a hidden political  
3 agenda which can't be easily discovered and  
4 exposed to public light and also controlled  
5 by the third branch of government, which is  
6 the judiciary.  
7           But what I do find often happens, and  
8 I'm not specifically limiting my comments to  
9 the provision of indigent defense services,  
10 although it applies there, but what happens  
11 much more frequently, especially when one  
12 retains an outside engineering firm or an  
13 outside law firm or outside environmental  
14 consultant or any sort of outside provider  
15 is that what happens is by virtue of that  
16 contract, the government cloaks the private  
17 company with the aura of governmental  
18 authority, especially in the case of legal  
19 representation.  
20           For example, in Orange County we sign

21 a contract with the Legal Aid Society, and  
22 we give them their budget every year. It's  
23 a contractual negotiation. Once that  
24 contract is signed, if they choose to  
25 redirect the contractual moneys into

38

1 Chanin  
2 salaries rather than into investigators, or  
3 if they choose to redirect that contractual  
4 money into other decisions, those decisions  
5 are theirs to make.

6 There is absolutely no oversight by  
7 the legislature on a month-to-month basis as  
8 there is over independent contractors or as  
9 there is over department heads, or as there  
10 would be over a public defender, and yet  
11 because they are under contract to the  
12 government, many of the decisions that are  
13 made have this aura of being supported by  
14 the taxpayer and have the at least implicit  
15 consent of the government because they are  
16 retained to provide those services.

17 I think in real life, and there were  
18 many articles in various governing magazines  
19 about this as well, that when a provider,  
20 and it's not necessarily the Legal Aid  
21 Society, but when any private provider then  
22 has labor issues or political issues or  
23 other issues such as that, the government  
24 involuntarily has been co-opted into those  
25 issues by virtue of the fact we have awarded

39

1 Chanin  
2 that contract.

3 And I think when you look at the  
4 issue of independence from politics, you  
5 need to look at both sides, not just the big  
6 bad government corrupting the provider of  
7 the service, but also the other way around,  
8 the provider of the service co-opting the  
9 government into its private policies.

10 MR. GRADESS: Excuse me. We have to  
11 call time.

12 MS. LORAND: I have a question.  
13 Could you restate the degree to which you  
14 see conflict of interest reducing the  
15 availability.

16 THE WITNESS: Yes. When a provider,  
17 whether it be a public defender or  
18 contractual provider, such as the Legal Aid

19 Society, appears and determines that it has  
20 a conflict of interest with the parties  
21 representing, then of course the county has  
22 to pay additionally for an 18-b attorney to  
23 substitute for them. I think that you have  
24 a very great inconsistency from county to  
25 county as to how many cases are referred to

40

1 Chanin  
2 18-b because of a conflict of interest.  
3 I think that definition of conflict  
4 of interest needs to be defined and  
5 standardized so you don't have this  
6 unevenness from county to county about how  
7 much extra 18-b money the county will be  
8 forced to pay.  
9 MS. LORAND: You also suggested  
10 using, as a possibility, TV appearances.  
11 What percentage roughly do you  
12 envision that we would be able to use TV  
13 appearances where the prisoners actually are  
14 vis-a-vis going into the courtroom?  
15 THE WITNESS: I think it's an  
16 important question. At the moment, it's  
17 very difficult for me to give you a  
18 percentage, but even a percentage as low as  
19 20 percent would be a significant savings,  
20 and again, with a lot of courtroom  
21 experience as a municipal attorney, I would  
22 tell you that there are many preliminary  
23 appearances, arraignments, admissions, and  
24 other proceedings that remote technology  
25 could provide at a huge savings, not only to

41

1 Chanin  
2 the courts but also in the context of the  
3 subject we're discussing this morning.  
4 MS. LORAND: Thank you.  
5 MR. PITTARI: You raised many issues,  
6 but I have just a few questions. I will  
7 follow up on the last question about this  
8 court appearance matter by video, et cetera.  
9 You indicated that in your experience  
10 a lot of defendants just like to have a day  
11 out of jail.  
12 THE WITNESS: Yes, sir.  
13 MR. PITTARI: And when they get to  
14 the courthouse they sit in nice plush  
15 surroundings?  
16 THE WITNESS: No.

17 MR. PITTARI: I know in our county,  
18 Westchester County, they sit in the  
19 basement, in a cold unheated basement, so  
20 most would not like to, just don't view it  
21 as a day out of jail, and I'm wondering if  
22 the experience in the county court  
23 facilities in Orange are so different.

24 THE WITNESS: It's not so much the  
25 luxury of the accommodations which await

42

1 Chanin  
2 them at the end of their journey. It's the  
3 journey itself. It's the day away from  
4 state prison or county jail. It's a day to  
5 appear in court and perhaps have a meeting  
6 with family who knows you are showing up  
7 that day. It's a way to manipulate the  
8 system and people in your life.

9 I'm not saying that everyone who  
10 makes a court appearance does that, but I  
11 can tell you I've experienced it many times  
12 myself.

13 MR. PITTARI: The journey to court,  
14 once again, in our county, they are very  
15 security-conscious, so people who make that  
16 journey are making it in a closed van. They  
17 are cuffed, often at the waist. Strikes me  
18 as being a very unpleasant journey.

19 THE WITNESS: The change of scene is  
20 the appeal.

21 MR. PITTARI: More important question  
22 on the same issue is this concept, I'm not  
23 talking about state prisoners who have been  
24 sentenced, but detainees who are still  
25 awaiting court appearances, many of them

43

1 Chanin  
2 feel as it is, based on my experience in  
3 talking to people in that situation and  
4 based on community experience, that one of  
5 the prime factors in the sense of that there  
6 are two systems of justice, and they are  
7 unequal systems of justice is that some  
8 people, poor people, which often translates  
9 into minority people, have to await their  
10 adjudication sitting in a cell at a county  
11 jail only because they are poor and they  
12 can't afford to make bail.

13 Doesn't the saying to these type of  
14 people, not only are we going to incarcerate

15 you, but we are not even going to let you,  
16 unlike a bail client, come into court to be  
17 personally present at the proceedings that  
18 are affecting your liberty, doesn't that  
19 even drive in to a much more, harder basis  
20 this unequal treatment between the rich and  
21 the poor, and isn't this something that both  
22 the attorneys who provide defense services  
23 and that the government that has an  
24 obligation to fund this, shouldn't the  
25 government be concerned about this more than

44

1 Chanin  
2 just on a cost-efficiency basis?  
3 THE WITNESS: The government,  
4 certainly, absolutely 100 percent needs to  
5 be concerned about the difference of access  
6 among the privileged and the  
7 underprivileged. No question about it.  
8 With all due respect, I don't think that has  
9 anything to do whatsoever with the use of  
10 technology to promote efficiency in court  
11 proceedings.  
12 First of all, I think that technology  
13 can be made available to everyone equally,  
14 not just to the poor. It may help the poor  
15 more simply because if money doesn't have as  
16 much significance to a wealthy person, then  
17 they can afford the inconvenience more than  
18 a poor person can. But I'm advocating the  
19 use of technology for everyone, not just for  
20 the poor. That's number 1.  
21 Number 2, I think again getting back  
22 to the definitional part of the discussion,  
23 if you have some sort of a standard that can  
24 define the difference between a contested  
25 issue in a court and a mere perfunctory

45

1 Chanin  
2 appearance for an arraignment or an  
3 admission, or a preliminary appearance or an  
4 evidentiary proceeding in which the party  
5 comes into court, sits there all day, says  
6 nothing, and, at the end of the proceeding,  
7 gets up and goes home, I think the  
8 efficiencies of technology will be very much  
9 helpful in reducing the gap between  
10 privileged and the underprivileged. So,  
11 with standards I think that problem can be  
12 avoided.

13 MR. GRADESS: Let me ask you one  
14 question to clarify the record. At the  
15 outset of your testimony you made reference  
16 to the difficulty of retrieving on account  
17 statewide basis reports.

18 Is your reference to the reports that  
19 should be filed under 722-F of the County  
20 Law?

21 THE WITNESS: Yes, and the  
22 regulations attendant thereon.

23 MR. GRADESS: Richard Greenberg next.

24 THE WITNESS: Good morning. Thank  
25 you for permitting me to appear before you

46

1 Richard Greenberg  
2 at this fact finding hearing. My name is  
3 Richard Greenberg, and I'm the attorney in  
4 charge of the Office of the Appellate  
5 Defender, a not-for-profit law firm  
6 dedicated to providing committed,  
7 high-quality post-conviction representation  
8 to indigent defendants in the First  
9 Department.

10 As an attorney who has been involved  
11 in indigent criminal defense work for more  
12 than 20 years, I am intimately familiar with  
13 the criminal justice system in this state.  
14 Today, I would like to address briefly just  
15 two issues both related to the work in which  
16 I am presently engaged, and that I believe  
17 are of vital importance: One, the excessive  
18 delays commonly countered in obtaining trial  
19 records for appeal purposes in New York  
20 City, and, two, the critical need for legal  
21 services for incarcerated persons in the  
22 wake of the State's defunding of prisoners'  
23 legal services.

24 One of the greatest sources of  
25 frustration for convicted defendants is the

47

1 Richard Greenberg  
2 delay in having their appeals prepared and  
3 heard. There are several reasons for  
4 appellate delay. Indigent defense  
5 organizations and 18-b lawyers are often  
6 overwhelmed with too many cases, causing  
7 some to be backburnered for some time.

8 Even when an attorney is able to turn  
9 his or her attention to a case, additional  
10 investigation may be required in order to

11 fully flesh out potentially meritorious  
12 appellate claims. Sometimes,  
13 post-conviction collateral litigation will  
14 be needed to be pursued before an appeal can  
15 be properly perfected. However, most often,  
16 the initial and most egregious delay is  
17 attributable to the inordinate time that has  
18 elapsed before the trial transcript is  
19 prepared.

20       Until the appellate record is  
21 prepared and is available to the assigned  
22 attorney, work cannot be commenced on the  
23 appeal. The delays that follow the  
24 preparation of the record may sometimes  
25 exacerbate that initial time lag, but the

48

1                   Richard Greenberg  
2 delays related to the initial record  
3 preparation are consistently the most  
4 troubling.

5       Consider this scenario: An  
6 individual is convicted after trial and  
7 sentenced to a state prison term. He files  
8 a timely notice of appeal and a prompt  
9 motion in the Appellate Division for poor  
10 person relief and for the assignment of  
11 counsel. The Appellate Division issues an  
12 order assigning counsel and directing the  
13 court reporter to prepare transcripts of the  
14 voir dire, trial, and sentence proceedings.

15       Perhaps two to three months have  
16 elapsed since sentencing. Now the wait  
17 begins. Our experience is that unless daily  
18 copy was provided during trial, it usually  
19 takes well over a year, and sometimes two  
20 years or more, before the trial transcripts  
21 will be prepared.

22       And even where daily copy does exist,  
23 it may still take several months before the  
24 requisite papers are located and filed with  
25 the Appellate Division and then turned over

49

1                   Richard Greenberg  
2 to counsel. Indeed, even where a defendant  
3 appeals after just a hearing and guilty  
4 plea, many months, sometimes more than a  
5 year often elapse before these very short  
6 transcripts are prepared.

7       Because the delays in record  
8 preparation are so commonplace in New York

9 City and because backlogs have often  
10 developed in cases in which records have  
11 been prepared, it is sometimes easy to  
12 overlook the delays in record preparation.  
13 Indeed, these delays are now essentially  
14 built into the system and are taken for  
15 granted. While efforts may be made by  
16 assigned counsel to track the progress of  
17 the record transcription, the fact remains  
18 that no one -- neither the courts, the court  
19 reporters, nor the defense attorneys --  
20 expect the records to be prepared in less  
21 than what has become the customary time  
22 frame.

23 Nor are these delays in the  
24 transcription of the record limited to just  
25 the initial record preparation. Often,

50

1 Richard Greenberg  
2 assigned counsel discovers that although a  
3 transcript has been provided, close  
4 inspection discloses that some portion is  
5 missing.

6 This missing record material might  
7 consist of the Sandoval hearing, voir dire  
8 proceedings or some other substantive part  
9 of the trial. Or, it may develop that upon  
10 analysis of the record and the potential  
11 appellate issues, counsel determines that it  
12 is necessary to obtain calendar call minutes  
13 for purposes of litigating a speedy trial  
14 issue on appeal. It is not at all uncommon  
15 in these circumstances to encounter further  
16 delays of many, many months, and even more  
17 than a year before these additional  
18 transcripts are provided.

19 These delays frustrate the  
20 fundamental rights of indigent defendants to  
21 appeal their convictions. The assignment of  
22 counsel is of little value if counsel is not  
23 provided with the tools necessary to  
24 prosecute the appeal in a timely manner.

25 Sadly, even where a defendant

51

1 Richard Greenberg  
2 prevails on appeal he or she may lose the  
3 benefit of the appropriate relief because of  
4 the lapse of time.

5 All of us in the appellate defense  
6 community have represented clients whose

7 convictions were reversed and indictments  
8 dismissed only after they had served a  
9 considerable, and, as it turned out,  
10 unjustified, amount of time behind bars.  
11 Just recently, for example, my office was  
12 successful in arguing on appeal that our  
13 client was improperly sentenced as a second  
14 felony offender.

15 Unfortunately, however, by the time  
16 of that decision, our client had already  
17 completed serving his sentence of 1 1/2 to 3  
18 years. Ironically, in that case, the trial  
19 judge had indicated that he would have  
20 imposed a non-incarceration sentence had he  
21 not believed himself constrained, albeit  
22 erroneously as it turned out, to adjudicate  
23 our client a second felony offender.

24 Stories such as these abound.  
25 Moreover, even in appeals that are

52

1 Richard Greenberg  
2 ultimately unsuccessful, the inordinate and  
3 unfair delays take their toll on  
4 incarcerated litigants whose futures remain  
5 in limbo during the pendency of their  
6 appeals.

7 What are the reasons for these  
8 delays? Anecdotal information suggests the  
9 delays are attributable to court reporters  
10 being backed up with transcript orders they  
11 are unable to fill in a timely manner.  
12 Because most court stenographers are in  
13 court most of each day, they are compelled  
14 to fill their orders in the evenings or on  
15 weekends, as a result of which they fall  
16 behind in their transcription work.

17 Yet, those of us who recall the days  
18 prior to computerized word processed  
19 stenographic equipment have not seen any  
20 significant improvement in delivery time,  
21 despite these technological advances. The  
22 entrenched and pervasive nature of the  
23 delays is therefore as puzzling as it is  
24 troubling.

25 How can these delays be reduced or

53

1 Richard Greenberg  
2 eliminated? On rare occasions, the  
3 Appellate Divisions have flexed their  
4 muscles by holding reporters in contempt for

5 failing to comply with the court's orders to  
6 transcribe the trial minutes. From a  
7 practitioner's perspective, badgering  
8 stenographers or threatening them with  
9 contempt motions is obviously not conducive  
10 to the fostering of positive relationships.

11 Because we so often rely on these  
12 reporters, we strive to remain on good terms  
13 with them. Moreover, it is not at all clear  
14 that the delays are caused by negligence or  
15 recalcitrance any more than by the sheer  
16 volume of work required of stenographers.

17 I therefore recommend that the Office  
18 of Court Administration undertake a study to  
19 determine the average time it takes for  
20 assigned appellate counsel to receive the  
21 fully transcribed appellate record, as well  
22 as the reasons for any excessive delays  
23 found to exist, and to take decisive action  
24 to eliminate or reduce such delays so that  
25 the right to an appeal will be meaningful

54

1 Richard Greenberg  
2 for all defendants.

3 Turning to the second point I wanted  
4 to make, and very briefly, all of us in the  
5 criminal defense world know of the great  
6 work performed by the Prisoners' Legal  
7 Services over past 20-plus years. All of us  
8 in the criminal defense world are also aware  
9 that the budget process this year left PLS  
10 without any funding.

11 All of us in the criminal defense  
12 world, as should all people of good will  
13 mourn the hopefully temporary loss of this  
14 excellent organization. The devastating  
15 effects of the closure of PLS cannot be  
16 overstated.

17 As an office specializing in  
18 post-conviction criminal representation, we  
19 at OAD, and, I assume, other appellate  
20 offices as well, are not equipped to  
21 comprehensively handle the wide array of  
22 legal problems that arise in an incarcerated  
23 population. Such legal problems, for which  
24 we receive constant requests for assistance,  
25 include immigration issues, prison

55

1 Richard Greenberg  
2 disciplinary proceedings, sentence

3 computation questions, issues related to  
4 merit time and earned eligibility  
5 certificates, temporary release issues, sex  
6 offender classifications, parole release  
7 appeals, medical malpractice, and an array  
8 of civil rights and due process issues  
9 arising out of the conditions of confinement  
10 and allegations of brutality against  
11 inmates.

12 While we attempt to serve our clients  
13 in as many of these areas as feasible, given  
14 our resources and areas of expertise, we are  
15 simply not able to address all these  
16 legitimate legal concerns of our clients.  
17 In eliminating funding for PLS, the state  
18 has committed a grievous error.

19 The absence of any supportive legal  
20 services to assist inmates in addressing the  
21 array of legal issues arising from their  
22 confinement is unfair and, as has been amply  
23 articulated by others, counterproductive.

24 I therefore add my voice to the many  
25 calling for restoration of funding to

56

1 Richard Greenberg  
2 Prisoners' Legal Services. The need is  
3 critical, consequences of not doing so are  
4 likely to prove catastrophic, and it is so  
5 clearly the right thing to do.

6 Thank you.

7 MR. GRADESS: Questions?

8 MS. BARR: I have a question. On the  
9 transcripts, I gather that the court  
10 stenographer who took the original trial  
11 record is also the one who has to  
12 transcribe.

13 THE WITNESS: That is correct.

14 MS. BARR: Wouldn't it be clear  
15 enough for somebody else to do the  
16 transcription besides the original court  
17 stenographer and just have people who are  
18 dedicated to do that do it?

19 THE WITNESS: That may be one system.  
20 As I understand it, the stenographer him or  
21 herself theoretically is in charge of that  
22 particular transcript and owns it,  
23 essentially, and in rare cases where the  
24 stenographer is either ill, deceased or  
25 retired, it is sometimes possible to still

57

1 Richard Greenberg  
2 get the transcript prepared by someone else  
3 if they can locate the actual stenographic  
4 tape or computer disk, and, oftentimes,  
5 those things are lost as well.

6 Seems to me, however, that what's  
7 most surprising to me, as somebody who has  
8 been practicing for some time, is that there  
9 really has not been a noticeable improvement  
10 since the advent of the computerized  
11 equipment. I can recall several years ago  
12 when stenographic equipment became  
13 computerized for the first time, it was  
14 quite a novel thing, and only those lucky  
15 court stenographers who could afford it  
16 would get the equipment, but now it's become  
17 quite standard, and seems to make the job a  
18 lot easier.

19 In the old days, someone would  
20 transcribe court proceedings and it would go  
21 on some tape with some kind of  
22 hieroglyphics, and they would have to then  
23 dictate that into some kind of dictation  
24 machine, give it to a typist who'd then type  
25 it up and have it edited.

58

1 Richard Greenberg  
2 Now days, they just take a computer  
3 disk, as I understand it, and with word  
4 processing software it comes up on the  
5 screen and just needs minor editing, so it  
6 should speed the process up, but it seems  
7 that it has not.

8 MR. PITTARI: Just one question in  
9 regard to the assignment of counsel, and the  
10 assigning order from the appellate courts.  
11 When counsel is assigned on appeal and the  
12 court reporter gets the order to produce a  
13 transcript, does the assigning order make a  
14 difference between jail cases, sentenced  
15 people who are in jail and people who are  
16 out on bail pending appeal? Does it give  
17 any priority to jail cases?

18 THE WITNESS: No, it doesn't. In  
19 fact, the only difference in those two  
20 situations is that appellate counsel is  
21 under greater pressure to perfect the appeal  
22 when the defendant is out, not when the  
23 defendant is incarcerated. It seems the  
24 priorities are skewed there.

25 They are so concerned that somebody

1 Richard Greenberg  
2 might be out on bail pending appeal that  
3 they want to speed up that process. But the  
4 orders themselves make no distinction  
5 between whether the appellant is  
6 incarcerated or not, and in most cases the  
7 convicted defendant who is appealing is  
8 incarcerated.

9 MR. PITTARI: One somewhat related  
10 question. In the past, at least, and I'm  
11 not as familiar with it in current time, but  
12 in the past, when we were doing appeals in  
13 our particular office, and we could not get  
14 a transcript, this did not prevent us from  
15 getting a computerized, computer-generated  
16 notice from the Appellate Division telling  
17 us that we were late, or a motion from the  
18 prosecutor to dismiss the appeal because it  
19 hadn't been filed in a certain time.

20 Does that still happen?

21 THE WITNESS: Not in the First  
22 Department. The Court is actually quite  
23 good at pretty much tracking the record  
24 preparation itself, and in rare cases there  
25 will be some kind of mixup and we may get

1 Klein  
2 put on dismissal calendar for a case or an  
3 angry letter, where is your appeal, when in  
4 fact the record has not been completed, and  
5 that can usually be cleared up relatively  
6 simply. The district attorneys offices  
7 almost never make motions to dismiss an  
8 appeal for nonperfection since they are so  
9 backed up themselves. They are happy when  
10 we take more time.

11 MR. PITTARI: That's the district  
12 attorney's offices in New York City?

13 THE WITNESS: At least in my  
14 experience in the First Department in New  
15 York in Bronx County.

16 MR. GRADESS: Thank you.

17 Professor Richard Klein.

18 THE WITNESS: I'd like to thank you  
19 for giving me the opportunity to talk this  
20 morning. My familiarity with the criminal  
21 justice system in New York goes back for  
22 about 26 years when I first upon finishing  
23 law school worked for the Legal Aid Society  
24 in New York for about 10 years, and then I

25 went to Hofstra Law School where I set up

61

1 Klein  
2 the criminal justice program, and then I've  
3 been at Touro Law School where the focus of  
4 my research has been indigent defense  
5 representation. And when I worked at the  
6 Legal Aid Society, it was during the heyday  
7 of criminal defense I think in New York when  
8 there were the fewest cases per attorney,  
9 when there was the most money that was  
10 available for representation of indigent  
11 defendants.

12 But even then the caseload problem  
13 was so great as I thought at the time to  
14 seriously infringe upon the defendant's  
15 rights. So when I became a law professor, I  
16 started using my time to look into just what  
17 could be done with the caseload problem.

18 I'd like to start initially by saying  
19 that of course the right to counsel is  
20 perhaps the most basic right given to  
21 someone who's charged with a crime, because  
22 the other constitutional rights simply don't  
23 get enforced if you don't have a lawyer  
24 there pretrial to raise Fourth Amendment,  
25 Fifth Amendment issues and then during the

62

1 Klein  
2 course of the trial to watch the defendant's  
3 rights and make sure there is effective  
4 assistance of counsel given to the defendant  
5 during the trial.

6 The adversarial system that we have  
7 assumes that there is going to be a  
8 effective assistance of counsel where a  
9 lawyer has had enough time to prepare the  
10 case in every way that's meant by that, and  
11 if the defense lawyer does not have the  
12 tools that are necessary, then the adversary  
13 system itself really just simply is not  
14 working.

15 When we're talking about assistance  
16 of counsel, we are talking about effective  
17 assistance of counsel. I think that's a  
18 very important distinction. The Supreme  
19 Court going back in 1970 first declared that  
20 when the Constitution refers to assistance  
21 of counsel, it means indeed the effective  
22 assistance of counsel, not just a warm body

23 standing up next to a defendant when that  
24 lawyer has not met that defendant, has not  
25 done research and preparation on that

63

1 Klein  
2 client's case.  
3 Cases these days if anything are more  
4 complex than they were years ago. There is  
5 scientific testimony, there is DNA  
6 testimony, there are the mandatory laws that  
7 require incarceration, so therefore the  
8 defendant's risk is greater than it had been  
9 in previous years. There are the  
10 Rockefeller drug laws which still are  
11 existing which call for mandatory time so  
12 often.

13 And what happens when you have a  
14 lawyer who just has so many cases that they  
15 can't do the work that they need to on every  
16 case, is that they don't search out the  
17 witnesses, they don't research motions that  
18 must be done. They don't go to the prison  
19 to communicate with the defendant as is  
20 mandated and to learn from the client facts  
21 and information and the availability of  
22 possible witnesses that they must then  
23 contact.

24 Discovery isn't pursued. Alibi  
25 witnesses are rarely contacted because the

64

1 Klein  
2 lawyer doesn't have the time to do that.  
3 It's amazing how few defense lawyers go to  
4 the scene of the crime. I think if we were  
5 to poll most lay people and ask them what a  
6 defense lawyer should do, right away they  
7 would say to go to the scene of the crime  
8 and locate and try to ferret out possible  
9 witnesses.

10 And it's amazing how lawyers who have  
11 so many cases in New York because of the  
12 inadequate funding just don't have time to  
13 take a trip to the jail where the defendant  
14 is being held.

15 Thorough preparation is perhaps the  
16 most important component of effective  
17 advocacy. The best lawyer with insufficient  
18 time to prepare the case is just not going  
19 to give that client the constitutionally  
20 mandated representation.

21           The ABA standards relating to  
22 criminal justice state, put an emphasis on  
23 investigation and preparation as the crucial  
24 components of effective assistance, and it's  
25 clear that that effective preparation and

65

1                           Klein  
2 investigation must occur pre-plea, before  
3 there is any plea taken.  
4           The criminal justice standard 4-6.1  
5 says under no circumstances should a lawyer  
6 recommend to a defendant acceptance of a  
7 plea unless a full investigation and study  
8 of the case has been completed. The irony  
9 is that in New York State, I think, lawyers  
10 are forced to look upon pleas as the way to  
11 get out of having to prepare for a case,  
12 that the lawyer has so many cases that the  
13 only way they can deal with getting rid of  
14 some of those cases is to recommend to their  
15 client that they take a plea, even though  
16 that lawyer simply has not done the  
17 preparation and investigation of the case  
18 that really is mandated to be done.

19           It's just common sense, it's inherent  
20 in a lawyer's recommendation to a defendant  
21 whether they should take a plea, that the  
22 lawyer has carefully considered the  
23 likelihood of a conviction, and that can't  
24 be done unless witnesses have been spoken  
25 to. It can't be done unless the DA's

66

1                           Klein  
2 witnesses have been spoken to, unless there  
3 has been research regarding possible police  
4 misconduct, unless there has been  
5 consultation with experts who might be  
6 relevant on a particular case.

7           The effect I think on the lawyer  
8 having so many cases that they simply can't  
9 provide the time necessary to each client is  
10 that the defendants develop a bitterness  
11 towards the criminal justice system itself,  
12 as well towards, they get the feeling that  
13 they have been disadvantaged because they  
14 know that if someone had money, they would  
15 have a lawyer who's spending much more time  
16 on the preparation and work on that case  
17 than their lawyer can indeed do.

18           But the problem isn't just for the

19 defendant; it's for the lawyer as well. And  
20 I think it goes beyond just the defense  
21 lawyer. It goes to the bar as a whole.  
22 It's an embarrassment to the profession to  
23 have the lawyer meet his or her client for  
24 the first time at arraignment and then have  
25 to stand up and make a bail application when

67

1 Klein  
2 that lawyer has found out very little about  
3 the nature of the case, the facts of the  
4 case or the background of that defendant.  
5 It's an embarrassment for the profession  
6 when the lawyer quickly grabs witnesses in  
7 the hallroom of the courthouse in order to  
8 ask them in two minutes what it is that they  
9 might have that can help the defendant's  
10 case.

11 The standards relating to ethical  
12 conduct of lawyers, both the Model Code of  
13 Professional Responsibility and the Rules of  
14 Professional Conduct both mandate that a  
15 lawyer act competently and not neglect the  
16 client's case. Disciplinary rule 6-101 of  
17 the Model Codes says that the lawyer cannot  
18 neglect a legal matter entrusted to him and  
19 must handle a legal matter with adequate  
20 preparation.

21 What we have I think in New York  
22 that's highlighted by the recent cutbacks in  
23 funding for indigent defense work is that  
24 you have lawyers who really are forced to be  
25 in a position where they have to neglect

68

1 Klein  
2 their client and therefore the lawyers are  
3 subjecting themselves not just to  
4 disciplinary action for violating the code  
5 or the rules, but also to possible  
6 malpractice actions.

7 The Rules of Professional Conduct  
8 similarly state in the very first rule,  
9 because of the import of it, it says,  
10 competence requires that a lawyer provide  
11 competent representation which requires the  
12 thoroughness and preparation necessary for  
13 the representation, and, if that's not done,  
14 again, the lawyer is subjected to possible  
15 disciplinary action.

16 That completes the testimony I'm

17 available for.  
18 MS. LORAND: No questions.  
19 MR. PITTARI: Yes, if I could, two  
20 questions, somewhat related. In the  
21 preparation stage, in terms of visiting the  
22 scene and things like that, is it somewhat a  
23 natural conclusion of what you are saying  
24 that the fees provided by statute with a cap  
25 of \$300 for investigative and expert

69

1 Klein  
2 services, which haven't changed since the  
3 1960s, are grossly inadequate? Would that  
4 be a fair statement?  
5 THE WITNESS: Absolutely. Not just  
6 fees for investigative services, but it's  
7 the fees that are provided for 18-b counsel,  
8 which haven't changed in some years as well.  
9 I think, like all of us, if someone who's  
10 doing work feels that they are underpaid,  
11 they are just simply not going to do all  
12 that they should do.  
13 And I think when you are talking here  
14 about someone's liberty, you can't have that  
15 person's lawyer feel that they are not  
16 getting a fair deal from the state in  
17 representing someone and the compensation  
18 for representing someone so they are not  
19 doing to do what is necessary to do.  
20 MR. PITTARI: One other question, if  
21 I might. This is a more, calling for an  
22 opinion almost on a philosophical type thing  
23 or asking you if you've noticed something  
24 that I've noticed. You spoke about the  
25 disciplinary rules and the ABA standards for

70

1 Klein  
2 thorough preparation and things such as  
3 that.  
4 I've read a lot of Appellate Division  
5 cases where certain assigned cases, lawyers  
6 have been asleep during the trial, major  
7 witnesses, lawyers have been alcoholics,  
8 drug addicts, et cetera, lawyers have had  
9 varied conflict problems, and the appellate  
10 courts don't overturn the conviction; they  
11 hold the individual has received adequate  
12 counsel.  
13 Do you have any way of harmonizing  
14 those two things that seem to be happening,

15 the standards versus what the courts say  
16 about them?

17 THE WITNESS: In line with what you  
18 are saying, there was a recent case where in  
19 Texas the death penalty was upheld where a  
20 lawyer actually fell asleep during part of  
21 the proceedings. I think that everyone has  
22 bought into the idea that there is just not  
23 enough money that's going to be given to the  
24 representation of indigents. Therefore,  
25 inadequate representation is almost accepted

71

1 Lindenauer  
2 as the norm, so you don't have appellate  
3 courts which no doubt a particular case  
4 before them, even though the lawyer wasn't  
5 fully prepared is not an egregious violation  
6 because so many lawyers just have too many  
7 cases to be able to be adequately prepared,  
8 so you don't have the kind of interjection  
9 and the kind of aggressive action taken by  
10 the appeals courts, which I think makes it  
11 all the more incumbent upon funding sources  
12 to make sure that there is not going to be  
13 such a shortage of funding, that they know  
14 that there is going to be an adequate  
15 representation. One can't rely upon a  
16 reversal of a conviction because of  
17 ineffective assistance of counsel being  
18 given by an appellate court.

19 MR. GRADESS: We're going to take  
20 five minutes.

21 (Recess: 11:45 a.m. to 11:50 a.m.)

22 MR. GRADESS: Susan Lindenauer.

23 THE WITNESS: Good morning. My name  
24 is Susan Lindenauer. I am the Chair of the  
25 Criminal Justice Section of the New York

72

1 Lindenauer  
2 State Bar Association. I speak today on  
3 behalf of both that section and the New York  
4 State Bar Association. I come before you as  
5 chair of a section representing a broad  
6 cross-section of the criminal justice  
7 community: public defenders, Legal Aid  
8 attorneys, private defense attorneys,  
9 prosecutors, judges, academics and others  
10 interested in criminal justice issues.

11 As you may be aware, and I know that  
12 some of you certainly are, achieving

13 consensus in the criminal justice community  
14 often is not an easy task. One topic upon  
15 which consensus has been achieved is the  
16 need for a substantial increase in the  
17 grossly inadequate rates paid to assigned  
18 counsel under the provisions of 18-b of the  
19 County Law.

20 I come before you as well as the  
21 representative of the New York State Bar  
22 Association, the largest voluntary bar  
23 association in the country. The New York  
24 State Bar has long recognized the organized  
25 bar has an obligation to ensure that

73

1 Lindenauer  
2 effective, competent representation is  
3 available to all who are charged with  
4 criminal acts, whatever their economic  
5 condition.

6 The defense of the indigent is a  
7 fundamental responsibility of the bar and  
8 society. Indeed, there can be no more  
9 fundamental obligation of the bar than to  
10 safeguard the Constitutional rights of the  
11 accused and most especially the right to  
12 competent, effective assistance of counsel.

13 The New York State Bar Association as  
14 part of its stated policy supports adequate  
15 funding for indigent defense representation  
16 whether provided by public defenders, Legal  
17 Aid Society's private counsel compensated by  
18 government under the 18-b rate structure.  
19 Both the section and state bar have  
20 repeatedly urged that the current rates of  
21 \$40 an hour for in-court and \$25 an hour for  
22 out-of-court time be raised to rates that  
23 would better ensure that qualified counsel  
24 will undertake court appointments.

25 It is shameful that the hourly rates

74

1 Lindenauer  
2 for indigent defense in this state rank in  
3 the lowest third of hourly rates found in  
4 states across the nation. Our commitment to  
5 the mandate of Gideon requires we renew our  
6 efforts to secure passage of legislation  
7 that raises those rates.

8 During the past several sessions of  
9 the state legislature, the criminal justice  
10 section in the state bar have joined with

11 other county and municipal bar associations  
12 as well as with a diverse assortment of  
13 other groups, including New York State  
14 Defenders Association, New York Association  
15 of Criminal Defense Lawyers, New York State  
16 District Attorneys Association and large  
17 segments of trial judges in seeking  
18 legislative support for the needed  
19 increases.

20 But events did not turn out as we  
21 hoped. If the criminal justice system is to  
22 function effectively, all segments of the  
23 system must receive adequate funding and  
24 attract competent professionals. All too  
25 often lawyers, law enforcement and the

75

1 Lindenauer  
2 correctional segments of the criminal  
3 justice system receive the overwhelming  
4 share of resources the government devotes to  
5 criminal justice.

6 The courts, prosecution and defense  
7 are often not given needed resources until  
8 crises result. Of these, the most  
9 endangered part of the system today is the  
10 provision of indigent defense services.

11 On behalf of the state, of a section  
12 and the state bar, I want to express  
13 appreciation to the League of Women Voters  
14 and the Defenders Association for initiating  
15 these hearings throughout the state. I hope  
16 the spotlight focused on indigent defense as  
17 a result of these hearings will produce a  
18 more favorable response.

19 Under the statutory scheme adopted in  
20 New York following the United States Supreme  
21 Court decision in Gideon, primary  
22 responsibility for provision of counsel to  
23 individuals charged with criminal activity  
24 has been placed on the counties, with the  
25 exception of the Counties in New York City,

76

1 Lindenauer  
2 where the municipality has this  
3 responsibility.

4 While the state has provided some  
5 funding for indigent defense, the primary  
6 responsibility has remained local. The  
7 localities were also given the right to  
8 choose whether indigent defense will be

9 provided by the establishment of public  
10 defender offices by contracting with legal  
11 aid societies, by assigned counsel at the  
12 statutory fixed rate or by mixed scheme.

13 Thus, along with the need to raise  
14 18-b rates, there is a need to monitor  
15 county and municipal funding of public  
16 defender offices and Legal Aid programs to  
17 ensure the localities meet the  
18 constitutional obligation delegated to them.

19 Unfortunately, often the localities  
20 fall short. It is and should be the  
21 obligation of the legal community and  
22 particularly the organized bar to serve as  
23 the champion of and the advocates for all  
24 who provide indigent defense representation.

25 The courts have an important role to

77

1 Lindenauer  
2 play as well, not only through judicial  
3 oversight of the representation provided to  
4 individual cases, but also through the  
5 oversight of the overall quality of 18-b  
6 panels and of the work of institutional  
7 providers. I note and commend the  
8 establishment of oversight committees in the  
9 First and Second Departments and the  
10 comprehensive review of institutional  
11 providers conducted by the First  
12 Department's oversight committee.

13 In any discussion of indigent  
14 defense, it is essential that the newly  
15 revived death penalty also be considered.  
16 As many have said, death is different. For  
17 this reason, the 1995 death penalty  
18 legislation provided that the cost of  
19 defense in a capital case would be a state  
20 charge, delegated the rate setting to an  
21 independent body supposedly removed from the  
22 political arena and required the rate be  
23 sufficient to attract qualified counsel to  
24 defend these difficult and time-consuming  
25 cases.

78

1 Lindenauer  
2 While the rates adopted in 1996 by  
3 the Court of Appeals were considerably  
4 higher than the inadequate 18-b rates, they  
5 were far below what qualified lawyers could  
6 earn in other matters. Barely two years

7 have passed since these rates were set, and  
8 yet serious consideration is being given to  
9 lowering the compensation in capital cases.

10 The criminal justice section and the  
11 New York State Bar Association have  
12 submitted comments urging retention of the  
13 current schedule of rates for experienced  
14 counsel and the full implementation of the  
15 rates including rates for less experienced  
16 associates, paralegals and law clerks.

17 On behalf of the New York State Bar  
18 Association and the criminal justice  
19 section, I thank you for the opportunity to  
20 address these important issues. I hope that  
21 your hearings will aid in the effort to  
22 increase 18-b rates, to monitor the  
23 provision of adequate resources to public  
24 defender offices and legal aid societies and  
25 to maintain current rates in death penalty

79

1 Lindenauer  
2 cases.

3 Thank you.

4 MR. GRADESS: There seems to be one  
5 question that I think would be worth  
6 addressing for the record. In terms of the  
7 tension that comes up each time the bar and  
8 others raise the what seems to be a simple  
9 and necessary increase in assigned counsel  
10 fees, the question of absorbing these costs  
11 by localities raises its head. I wonder if  
12 the bar has struggled with this and looked  
13 at the question of how that might be dealt  
14 with.

15 THE WITNESS: Well, I think that the  
16 house of delegates of the New York State Bar  
17 has recommended but not in fact stated as a  
18 matter of policy that consideration should  
19 be given to having the increase in rates  
20 absorbed by the state as a state legislative  
21 cost.

22 In my own lobbying efforts over the  
23 past several years in the Assembly and  
24 Senate, and the Senate particularly, every  
25 time I raised that issue with Senator Lach

80

1 Lindenauer  
2 or others in the leadership, I was greeted  
3 with something akin to, over my dead body.

4 At the same time, those

5 representatives of various localities did  
6 state that the localities were in fact  
7 resistant to increasing the rates because  
8 they were in fact obligations imposed upon  
9 the localities. I think one of the things  
10 that we as a community have to do is to see  
11 what we can accomplish in getting the state  
12 to pick up some portion of the increase.

13 As you know, Jonathan, this was a  
14 year that we were quite optimistic about  
15 getting some relief for people who were on  
16 assigned counsel panels because there was so  
17 much money as a result of, I think, in the  
18 state, and even in the City of New York, and  
19 we hope that the result would be one where  
20 the legislature would respond.

21 They did not. I don't have my  
22 crystal ball on, so I don't know what the  
23 future holds in terms of tax receipts. I  
24 would suspect that with the stock market  
25 off, there may be some downward turn in

81

1 Lindenauer  
2 those receipts, so that this may have been  
3 the best year. But that doesn't mean that  
4 you give up.

5 I will tell you that one of the  
6 comments that has been made to me was that  
7 the bulk of the 18-b costs occur in large  
8 municipalities, and that the likelihood of  
9 removing some of these costs and making them  
10 state costs is not that great, because, at  
11 least on the Senate side, they don't see the  
12 linkage there, the benefit to leadership in  
13 the Senate.

14 MR. GRADESS: Thank you.

15 MS. BARR: Since you brought the  
16 political aspect into it, which you didn't  
17 before, don't you think that if there were  
18 any groundswells to these state legislatures  
19 from the municipalities from which they  
20 come, rather than the opposite, because most  
21 people don't seem to want to fund legal care  
22 for indigents, they just say throw them in  
23 and throw away the key, which is the general  
24 temper of the population, it would seem to  
25 me, anyhow, that it might be good to start

82

1 Hirsch  
2 some sort of a program not with the

3 legislatures, but their constituents to try  
4 and change attitudes, because, without  
5 changing attitudes, nothing is ever going to  
6 happen.

7 THE WITNESS: I certainly think  
8 that's the case, and that's why I personally  
9 am so delighted that the League of Women  
10 Voters is involved in this effort. I can  
11 think of no better way to get that  
12 groundswell going than to involve the  
13 professional and concerned members of the  
14 League of Women Voters. I was really  
15 delighted to see that you are participating  
16 and that you are participating not only here  
17 in New York, but throughout the state. To  
18 me, that is one of the most hopeful signs  
19 that a change may occur.

20 MR. GRADESS: Thank you, Susan.

21 Andrea Hirsch, good morning.

22 THE WITNESS: Hello. My name is  
23 Andrea Hirsch, and I'm an attorney in  
24 private solo practice. Before opening my  
25 practice 3 1/2 years ago, I worked for 11

83

1 Hirsch  
2 years at the Legal Aid Society's Criminal  
3 Appeals Bureau where I was a senior  
4 supervising attorney. My practice involved  
5 handling criminal appeals and post-judgment  
6 proceedings in the state and federal courts.  
7 I am also Cochair of the New York County  
8 Lawyers Criminal Justice Section, although I  
9 am testifying here as a private  
10 practitioner.

11 As you well know by now, the 18-b  
12 rates are a disgrace. Although Manhattan,  
13 especially, must have some of the highest  
14 commercial overhead costs in the country,  
15 New York ranks close to the bottom of the  
16 nation in terms of the rates paid assigned  
17 lawyers in criminal cases.

18 The result has been to drive many  
19 talented, dedicated lawyers out of state  
20 indigent defense practice altogether, or to  
21 cause them to sharply reduce the number of  
22 assigned cases they take. Much as they  
23 would like to represent indigent defendants,  
24 they simply cannot afford to practice at  
25 those rates.

84

1 Hirsch

2 I want to address here, though, a  
3 more narrow and even exacerbated aspect of  
4 the problem, the fact that the New York  
5 Court of Appeals, the state's highest court,  
6 and the Appellate Division First and Second  
7 Departments do not even pay the statutory  
8 \$40 per hour rate.

9 To understand this, a little bit of  
10 background is necessary. County Law article  
11 18-b, section 722-b sets the level of  
12 compensation to be paid assigned counsel.  
13 As you know, at the time of the last rate  
14 increase in 1985, the hourly rates set for  
15 trial attorneys was \$40 for in-court time  
16 and \$25 for out-of-court time, and for  
17 appellate attorneys \$40 for time spent both  
18 in and out of court.

19 In addition, article 18-b creates  
20 statutory ceilings. In both trial level  
21 felonies and felony appeals, compensation is  
22 not to exceed \$1,200, except in, quote  
23 unquote, extraordinary circumstances.

24 The problem is this: The time  
25 expended by 18-b lawyers on both trials and

85

1 Hirsch

2 appeals often exceeds 30 hours, the number  
3 of hours which, if compensated at the \$40 an  
4 hour rate, equals \$1,200. For instance, a  
5 one-week trial, an average length or less  
6 than average length as criminal trials go,  
7 will eat up that time alone without even  
8 considering time spent in preparation.

9 As for appeals, the Legal Aid Society  
10 Criminal Appeals Bureau roughly estimates  
11 that the minimum time required for handling  
12 the appeal of a felony trial is three weeks,  
13 and it can be as much as double that,  
14 depending on the length of the record and  
15 the complexity of the issues researched and  
16 raised.

17 Given the necessity of often spending  
18 so much more than 30 hours on a case, both  
19 18-b trial and appeals lawyers regularly put  
20 in vouchers requesting payment of more than  
21 \$1,200.

22 And whether they deem all such cases,  
23 quote unquote, extraordinary, or simply  
24 overlook the statutory ceilings, both the  
25 trial courts and the Appellate Divisions

Hirsch

1  
2 except as discussed below routinely pay  
3 lawyers for the amount of time they say they  
4 worked.

5 The Court of Appeals, however, has a  
6 different policy. It rigidly enforces the  
7 \$1,200 statutory ceiling, only rarely paying  
8 lawyers more than that amount.

9 I have had considerable experience  
10 with this policy. Since entering private  
11 practice, I have had three cases in the  
12 Court of Appeals. A fourth is pending. On  
13 the three completed cases, I worked 98  
14 hours, 161 hours and 98 hours respectively.

15 These amounts of time are  
16 commensurate with the three weeks the Legal  
17 Aid Society calculates a Court of Appeals  
18 case requires and with the time I had spent  
19 previously on Court of Appeals cases while  
20 at Legal Aid.

21 In each case, although I requested  
22 payment for my full time, the court paid me  
23 \$1,200. I could not claim that it was the  
24 first, either the first or third case  
25 involved, quote unquote, extraordinary

Hirsch

1  
2 circumstances. As indicated, Court of  
3 Appeals cases normally require more than 30  
4 hours.

5 But I did believe that that phrase  
6 fairly described the second case and  
7 necessitated the amount of time I had  
8 worked.

9 Hence, I made a motion for payment  
10 above the statutory ceiling. I pointed out  
11 that the case was unlike most Court of  
12 Appeals cases in which the issues had  
13 already been briefed once in the appellate  
14 division since in that case, a people's  
15 appeal, the people were raising an issue  
16 never addressed below.

17 Moreover, it was an issue of  
18 statewide importance that would affect many  
19 defendants in later cases, and consequently  
20 I had done extensive legislative research.  
21 I also noted that the people's briefs were  
22 very lengthy, that the record entailed four  
23 volumes, and that in addition to addressing  
24 the main issue, I had raised two alternative

25 grounds for averment.

88

1 Hirsch

2 The court denied my motion. By  
3 phone, the clerk, Stuart M. Cohen, told me  
4 the court viewed representing 18-b  
5 defendants in the Court of Appeals as in  
6 effect pro bono work, believing that the \$40  
7 per hour rates so far below market pay,  
8 already effect a, quote unquote, quasi pro  
9 bono philosophy, and I cite a case here  
10 which says that People versus Brisman, 173  
11 Miscellaneous Second 573, Supreme Court New  
12 York County 1996 case.

13 I moved for reconsideration and  
14 challenged the court's policy. Among other  
15 things, I argued that until the state  
16 mandated pro bono work, it should be  
17 voluntary, as it is in every other legal  
18 context, that while I could have asked to  
19 have been relieved when the case reached the  
20 Court of Appeals, that would have disserved  
21 my client whom I had represented for six  
22 years beginning at the Legal Aid Society,  
23 that criminal defense attorneys doing 18-b  
24 work were hardly the high earners in the  
25 private bar, and that no other members of

89

1 Hirsch

2 the criminal justice team -- prosecutors,  
3 judges or court personnel -- were asked to  
4 work on Court of Appeals cases pro bono.

5 I also pointed out that calculated  
6 out, the \$1,200 fee the court had awarded me  
7 amounted to less \$7.50 an hour. The other  
8 two cases I worked on netted \$12 an hour,  
9 this for a full month's work in which my  
10 overhead far exceeded my fee.

11 Without comment, the court again  
12 denied my motion. I would note that these  
13 three cases fell in a 15-month period,  
14 causing me real financial difficulty.  
15 Ironically, the Court of Appeals is the  
16 worst offender in this area. I have heard  
17 of attorneys in no other New York State  
18 court being paid so little for time they  
19 spent representing 18-b defendants.

20 But, as I said earlier, the Appellate  
21 Division's First and Second Departments also  
22 do not even pay the statutory hourly rate.

23 While these courts do not apply the \$1,200  
24 statutory ceilings, they, too, do not pay  
25 attorneys for their full time. The

90

1 Hirsch  
2 Appellate Division's Second Department  
3 routinely reduces attorneys' vouchers  
4 without explanation.  
5 Some attorneys estimate that their  
6 vouchers are regularly cut 15 percent,  
7 making the effective rate \$34 per hour.  
8 Others say it is random. Until recently,  
9 the Appellate Division First Department paid  
10 attorneys for the time they submitted.

11 But, also without explanation, it has  
12 begun to round off its voucher payments,  
13 cutting a couple of hundred dollars there, a  
14 few hundred dollars here.

15 Capable attorneys cannot and will not  
16 work at these rates and subjected to these  
17 indignities. If able to work for the  
18 federal criminal justice act panel which  
19 pays attorneys \$75 an hour, and for their  
20 full time, they will, and, if able to get  
21 private cases in which they can set their  
22 own fees, they will.

23 It is a shame. Many of us enjoy  
24 representing indigent defendants and get a  
25 thrill from providing quality representation

91

1 Hirsch  
2 for nothing to those without means. It is  
3 living out the constitutional guarantee.  
4 And we also enjoy working in the state  
5 system, where there are the greatest number  
6 of defendants, where cases are often more  
7 related to defendants' poverty than in  
8 federal court, where, because of the sheer  
9 number of defendants, injustices that want  
10 correction occur regularly, and where the  
11 combination of state constitutional law and  
12 common law often allow us to do most for  
13 those we represent.

14 But lawyers also have lives, and  
15 livelihoods are a real concern. Unless  
16 something changes, the guarantee of adequate  
17 representation to state defendants will be a  
18 shadow of its former self, a mere reflection  
19 of the real thing.

20 MR. PITTARI: Just one clarification,

21 because I know some district attorneys'  
22 offices are part time. I assume on that  
23 case that you handled where your fee was  
24 held to the cap in the Court of Appeals, you  
25 were opposing a fulltime district attorney's

92

1 Hirsch  
2 office?  
3 THE WITNESS: Yes.  
4 MR. PITTARI: That had an appeals  
5 bureau?  
6 THE WITNESS: Yes.  
7 MR. PITTARI: Could have been many  
8 lawyers working on the case?  
9 THE WITNESS: There were three or  
10 possibly four lawyers as I recall whose  
11 names were printed on the cover of the  
12 brief, and there were three cases in the  
13 Court of Appeals where I was held to the  
14 cap.  
15 MR. GRADESS: I did quick math. It  
16 looks like you lost more than \$10,000 even  
17 at the lower rates in the last year.  
18 THE WITNESS: At least that amount.  
19 In fact, I had to go out-of-pocket on  
20 printing the brief. The Court of Appeals  
21 did not cover my printing costs. I spent at  
22 least \$400 on each case above what they  
23 reimbursed me for printing the briefs.  
24 MR. GRADESS: So in the end you lost  
25 closer to \$11,000.

93

1 Hirsch  
2 THE WITNESS: Yes.  
3 MR. GRADESS: More than that.  
4 Let me ask you a question. At the  
5 outset of your testimony you alluded to  
6 people quitting the panel because of these  
7 circumstances. Can you amplify that a  
8 little.  
9 THE WITNESS: Either quitting or  
10 staying on the panel, but not taking cases.  
11 Coincidentally, I have to report, and I  
12 thought it was ironic that the call came  
13 last night, the woman in the First  
14 Department who hands out 18-b appeals called  
15 me up shortly before I was leaving my office  
16 yesterday and asked me if I would take on a  
17 murder appeal, and I said, no, I wouldn't.  
18 And, frankly, right now, as long as I

19 have, as I said, one pending case in the  
20 Court of Appeals, I know how much time I  
21 already put in, I expect the same thing to  
22 happen. I have another case where leave is  
23 pending where I think there is a good chance  
24 leave will be granted, and I've taken those  
25 cases because I thought they involved real

94

1 Hirsch  
2 obvious injustices to many, many defendants.  
3 In one, for example, it was a people's  
4 appeal in which there was no counsel for the  
5 defendant, and that's a recurring practice  
6 in the Appellate Division First Department.

7 So I took that case to the Court of  
8 Appeals knowing I would be paid so little,  
9 but because I felt it involved an issue of  
10 such great importance, but going back to  
11 this call last night, as long as I have  
12 private work coming in, as long as I can get  
13 CJA cases, I'm on the CJA panel and there  
14 are these other occasional cases where I  
15 feel despite the inadequate pay that I want  
16 to take those cases, I just can't accept  
17 18-b cases right now.

18 MR. GRADESS: Let me try and ask this  
19 question delicately. What is the likelihood  
20 that with your turning that case down,  
21 someone with less appellate experience will  
22 be assigned to that case?

23 THE WITNESS: I have a great deal of  
24 appellate experience, so it's quite likely  
25 that someone will. The issue isn't really

95

1 Hirsch  
2 someone with less experience. I think, I'm  
3 also on the screening panel of the assigned  
4 counsel plan, so I see complaints about  
5 attorneys. I see some of the briefs that  
6 are submitted, and some of them are below  
7 standard quality. They just don't come up  
8 to par, and I think that those are the  
9 attorneys now who rely on 18-b work as their  
10 livelihood because they can't get work  
11 elsewhere.

12 It's becoming a form of payment for  
13 those who can't get work elsewhere, I can't  
14 say it any other way, as opposed to more  
15 talented attorneys who can. And that's the  
16 situation.

17 MR. GRADESS: Could you describe for  
18 the record the screening committee that you  
19 serve on and what its function is.

20 THE WITNESS: Yeah. In fact, I  
21 wanted to mention that. I wanted to mention  
22 a couple of things. One person I think  
23 that, I apologize. I should have mentioned  
24 this to either you or Wendy earlier that I  
25 think it would be very helpful for you to

96

1 Hirsch  
2 hear from would be Norman Greenberg, who is  
3 the chair of the First Department screening  
4 committee. The screening committee is the  
5 organization that screens applicants for the  
6 18-b panel, there is one in each department,  
7 and which also handles recertification.

8 Every so often, they try to make sure  
9 that those attorneys already on the panel  
10 are still qualified to be on the panel, or  
11 perhaps if attorneys got on when the  
12 qualifications were less than they are now,  
13 that all attorneys on the panel meet present  
14 standards. And they also handle complaints.  
15 Those complaints can come from judges, they  
16 can come from clients. Sometimes, they're  
17 complaints having to do with lawyers  
18 overbilling, and sometimes they have to do  
19 with the quality of their work.

20 MR. GRADESS: I wonder, if you could,  
21 could you describe what a bad appellate  
22 brief looks like.

23 THE WITNESS: I'm thinking of a  
24 particular instance of somebody who came  
25 before the screening committee who, I say

97

1 Hirsch  
2 this without being certain, but almost  
3 certainly copied points from elsewhere.  
4 They were sort of like law review articles,  
5 but they bore no relation to the actual  
6 facts of this attorney's cases.

7 And what was interesting was I saw  
8 briefs he had done in three cases. He used  
9 the same points in each regardless of what  
10 had occurred in those cases, in other words,  
11 claiming ineffectiveness of counsel where  
12 there was no ineffectiveness, claiming that  
13 the police shouldn't have shown, or the  
14 district attorney shouldn't have shown a

15 copy of the defendant to some  
16 investigators -- no, the police, excuse me,  
17 to investigators before they went out and  
18 made some drug buys.

19 There was no law he cited for these  
20 assertions. In some case, the assertions  
21 the attorney made were actually contrary to  
22 existing Court of Appeals cases, in other  
23 words, and in one case, what was, I thought,  
24 most upsetting was that it could be  
25 discerned from the brief that the client had

98

1 Hirsch  
2 a real serious issue. In that case, the  
3 client had really fallen out with his trial  
4 attorney. They had actually come to blows  
5 in the court, and there was a real issue as  
6 to, the client was begging the trial judge  
7 to relieve this attorney and assign him  
8 another lawyer.

9 And the court did not do so, and  
10 ultimately threw the client in the slammer,  
11 didn't even allow him to be present during  
12 the trial, and the attorney never raised  
13 this issue as involving the defendants.  
14 There is a whole line of cases involving  
15 defendant's right to choice of counsel.

16 So that's an example of the worst  
17 that we see, and there are others that maybe  
18 aren't quite so bad, but are egregious.  
19 Often lawyers take pieces of one brief and  
20 they paste it into another where it really  
21 has no bearing, and sometimes you actually  
22 see the wrong client's name, the wrong  
23 witness's name in the new brief because they  
24 haven't even bothered to proofread it.

25 MR. GRADESS: Is it fair to state

99

1 Hirsch  
2 that these are not isolated examples?

3 THE WITNESS: No, these are not  
4 isolated instances, and, in fact, I think on  
5 the appellate level, because appeals lawyers  
6 only if they come to court to argue their  
7 case, and often these lawyers don't, you  
8 have the option of submitting your case,  
9 appeals lawyers really work in private and  
10 in isolation, and only the court sees their  
11 briefs, and the district attorney and the  
12 client, of course, the client doesn't know

13 what a good brief looks like. The district  
14 attorney is not going to claim  
15 ineffectiveness on behalf of the defendant,  
16 and, unfortunately, in most instances, the  
17 court doesn't do anything about it either.  
18 But it's not the same, I think, as where  
19 trial lawyers stand up in court, and they  
20 are more readily in the public eye and if  
21 they are really incompetent, I think it's  
22 more obvious, it's more seen, and it's more  
23 likely to be reported.

24 There were a couple of other things I  
25 would like to mention if I could. One other

100

1 Hirsch  
2 person that I think would be very helpful to  
3 speak with would be Emily Olshansky, who is  
4 the outgoing administrator of the assigned  
5 counsel plan in the First Department.

6 And another thing, if I may, I'd like  
7 to hand up a report that, as I said, I'm  
8 presently Cochair of the Criminal Justice  
9 Section of the New York County Lawyers  
10 Association. My predecessor, Norman  
11 Greenberg, was also involved in something  
12 called the Task Force in the Representation  
13 of the Indigent, which is a group of people  
14 that the New York County Lawyers  
15 Association, a committee that New York  
16 County Lawyers Association initiated, and  
17 they published a report last year that  
18 addressed chiefly the rate issue across the  
19 board, and they also did some surveys of CJA  
20 lawyers and the fact these lawyers were no  
21 longer taking 18-b cases because the rates  
22 had driven them out of state work. I only  
23 have one copy of the report. I got it at  
24 the last minute this morning.

25 MR. GRADESS: We'd like that. Thank

101

1 Rochelson  
2 you very much.

3 Myra Rochelson.

4 THE WITNESS: My name is Myra  
5 Rochelson. I'm an attorney in New York  
6 State. I was admitted in 1983, and I've  
7 been focusing mostly on criminal defense and  
8 specifically criminal defense appeals since  
9 approximately 1989. I do a large number of  
10 assigned and retained cases, both on my own,

11 on occasion with other people on cases.  
12 I've experienced a lot of frustration  
13 in doing assigned cases, and, as I said, I  
14 just walked in. I'm not exactly sure what  
15 we are addressing today, but if you'd like  
16 to hear the kind of problems that I've  
17 experienced, I understand that's the focus  
18 of this meeting; is that correct?

19 MR. GRADESS: That's correct.

20 THE WITNESS: Well, a short list of  
21 my problems on the 18-b panel, I recently  
22 wrote a letter to the administrator of the  
23 panel, and I made copies of it which I  
24 brought with me today. Part of my problems  
25 are physical. I live two hours from New

102

1 Rochelson  
2 York, which is why it took me so long to get  
3 here today. They insist you go in person to  
4 pick up the transcript, and I find that  
5 rather an antiquated and a little bit of a  
6 waste of my time and resources as an  
7 attorney. Why they can't have a messenger  
8 do this, I don't know.

9 Many times I've asked the clerks,  
10 can't they just send it to me, and they  
11 said, no, then I have to find a box. I  
12 don't know if they are trying to be funny,  
13 but the effect is that I spend an entire  
14 day, basically, acting as a messenger. I  
15 believe that that's a waste of time and a  
16 waste of my efforts. So I really don't want  
17 to be on the panel to serve as a messenger.

18 The other thing I find on the panel  
19 is that I'm serving as an underwriter of the  
20 criminal justice system, and by that I mean  
21 that a lot of work I do is not reimbursed.  
22 I submit a voucher. I'm very diligent. I'm  
23 very professional, I'm very careful about  
24 keeping track of my time. I work solo. I  
25 believe, as the previous speaker said,

103

1 Rochelson  
2 appeals attorneys often work solo.  
3 I've been doing this a long time, and  
4 I don't believe I know everything, but I  
5 believe I'm quite professional about it.  
6 And then when I get my voucher back, and my  
7 most recent voucher was cut by a third, so  
8 not only is the rate of reimbursement rather

9 minimal, I don't think it's been changed for  
10 many years, but it's not even that. It's  
11 basically not even that, because my number  
12 of hours has been cut so instead of \$40 an  
13 hour it's something like \$22 an hour.

14 I cannot afford to underwrite the  
15 criminal justice system, and that's what I  
16 feel I'm doing. I make a great effort to  
17 communicate with my clients. I write to  
18 them frequently. They write back to me.  
19 The court will not allow more than I think  
20 it's .25 portion of an hour for each  
21 communication.

22 My clients sometimes write me long  
23 letters. I can't possibly read them and  
24 analyze them. And they ask me legal  
25 questions, and I have to respond to them. I

104

1 Rochelson  
2 can't do that in .25 of an hour.

3 Again, I'm underwriting the system if  
4 I spend more time than that on a letter.  
5 Plus I get frequent letters from the  
6 Appellate Division asking me what's taking  
7 me so long on a case. The time I spend  
8 answering those letters has to be accounted  
9 for.

10 I don't mean to sound petty, but,  
11 like I said, I'm a solo practitioner. I  
12 don't have a secretary. I do everything  
13 myself. These things take time. Who is  
14 going to pay me for that time? I am the one  
15 paying for it. I cannot afford to continue  
16 to do this. I care deeply about fairness in  
17 the criminal justice system. I want very  
18 much to continue on the panel. I'm proud to  
19 be on the panel, but I don't think I'm  
20 handled fairly.

21 I'm not a gambler. I'm not a gambler  
22 by nature. Again, I don't mean to seem  
23 facetious, but I cannot invest hours of my  
24 time and be told, we are cutting your hours.  
25 Tell me in advance. If the court feels they

105

1 Rochelson  
2 can look at a transcript and by eyeballing  
3 it tell me how many hours I should spend on  
4 a case, then maybe that's the way they  
5 should do it. Maybe they should say, we  
6 believe this case is worth this amount of

7 hours; if you want to spend your time on it,  
8 go ahead, rather than have me spend my time  
9 and then have it reduced. I don't want to  
10 repeat.

11 My other suggestion is to perhaps  
12 have people on a regular basis, almost like  
13 a subsidiary of Legal Aid who are paid on a  
14 regular basis. I think it's unreasonable to  
15 expect people to wait months and months to  
16 be paid. I wait months to get a transcript,  
17 and, like I said, I'm the messenger, I'm the  
18 underwriter, and then I get treated like I'm  
19 a liar when I submit my voucher.

20 So it's a very frustrating  
21 experience. I'm honored to do it. I think  
22 it's a privilege to do it. I communicate  
23 regularly with my clients, and I care very  
24 much about doing it, but I simply can't  
25 afford to do it much longer. And that's

106

1 Rochelson  
2 what I have to say. That's why I came here  
3 today.

4 I do have one other thing to add, if  
5 you don't mind. Also picking up on  
6 something the previous speaker said, we do  
7 work in isolation, appeals attorneys, and it  
8 is sometimes frustrating to me, especially  
9 since they think I'm spending too much time  
10 on it. When I get the attorney district  
11 attorney's brief, there are three, four five  
12 names on it.

13 Surely, I'm not expected to do the  
14 work of five people, and yet my opponent is,  
15 so I'd like to see a little equity in that  
16 regard, too. I'd like to see not only  
17 recompense for my efforts, but also I  
18 wouldn't mind a little more efforts to make  
19 it easy to talk to people about the issues  
20 and about the briefs.

21 MR. PITTARI: I don't have a  
22 question. I just have a comment based on  
23 what I've heard from you and from the prior  
24 speaker, and I just wonder if at some  
25 juncture it might be interesting if we

107

1 Rochelson  
2 surveyed, and I'm sure biographies are  
3 published somewhere, to find out how many  
4 Appellate Division judges and how many Court

5 of Appeals judges ever were solo criminal  
6 defense practitioners.

7 THE WITNESS: How about how many  
8 Supreme Court judges?

9 MR. GRADESS: I'm going to commend  
10 that.

11 Let me ask you some specifics. This  
12 voucher that was cut by a third you made  
13 reference to, I wonder if I could for the  
14 record amplify a little bit, if you know  
15 offhand the total number of hours, the  
16 amount.

17 THE WITNESS: Yes. I submitted a  
18 voucher for I think 69 hours, plus for the  
19 fee for the appellate printer which of  
20 course I paid out-of-pocket up front,  
21 because he's not waiting to be paid. Then  
22 it was cut by a little over \$1,000, so  
23 instead of getting approximately 2,800, I  
24 believe I got \$1,700 for the case, a 17-year  
25 old facing six years in jail with no priors.

108

1 Rochelson

2 I don't know how you can say, don't spend  
3 this amount of time on a case. I researched  
4 and diligently edited everything I thought  
5 was an important point to make.

6 I'm currently of counsel on one of  
7 the first death penalty cases in Suffolk  
8 County. I do all the trial briefs and  
9 memorandums. I'm very professional about  
10 what I do. I'm not just going to do a  
11 slipshod job. I can't do that. I don't  
12 handle this any differently than my retained  
13 clients, and I've handled many of those,  
14 too.

15 MR. GRADESS: Did you make reference  
16 as to which department we're talking about?

17 THE WITNESS: Second Department.  
18 I've only ever worked in the Second  
19 Department.

20 MR. GRADESS: Could you give a sense  
21 for the record of the number of cases during  
22 the course of the last year where you had  
23 voucher cuts of this kind.

24 THE WITNESS: This is just one, but I  
25 have four other cases that I'm in the midst

109

1 Rochelson

2 of. One is a lot. It's \$1,000. It's a lot

3 of money.

4 MR. GRADESS: I'm not contesting  
5 that. I just want to make sure we have in  
6 the record the damage done, so let me ask  
7 you this question.

8 When the court communicates with you  
9 and suggests the amount of time appropriate  
10 to correspond with your client, how do they  
11 do that, by a mathematical cut on the  
12 voucher or do they specifically tell you  
13 it's too much, or what do they do?

14 THE WITNESS: I only learned because  
15 I called to see the progress of the voucher.  
16 It had been several weeks. Not a great  
17 amount of time. I was curious how it was  
18 coming along. And I spoke to the secretary  
19 of Justice Mandell in the Second Department,  
20 and she said, oh, yes, you have a check  
21 coming, and she told me how much it was for.

22 And I said, that's a lot less than I  
23 was expecting. And she said, let me see the  
24 voucher. Yes, he cut your time on this. He  
25 cut your time on research or writing, I

110

1 Rochelson  
2 don't recall, he cut your time on  
3 correspondence, because there were times  
4 when you spent 20 minutes to a half hour on  
5 a letter, and he believes only a quarter of  
6 an hour is appropriate, 15 minutes. So  
7 that's how I was told. The secretary told  
8 me. I don't get a copy back of the voucher.  
9 I just get the check.

10 MR. GRADESS: What is the role of the  
11 administrator in that process?

12 THE WITNESS: I did call the  
13 administrator, and I spoke to him and he was  
14 sympathetic, and he said it's not just you,  
15 they are cutting many people's vouchers,  
16 many people complain about it, and then I  
17 have trouble finding people to handle the  
18 cases, and what can I do.

19 That's not his exact words, of  
20 course, what can I do, but he said,  
21 basically, he said it's a shame. That was  
22 it. I wrote a letter. I wrote a letter  
23 which I made copies for you today expressing  
24 my feelings about serving on the panel and  
25 the frustrations we experience.

111

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Rochelson

And I don't know what else to do. I'm in the middle of four other cases. I wouldn't just not handle a case. I have to go through with it.

But it's not easy, and it's not nice being treated that way.

MR. GRADESS: Two more quick questions. The first is, you made reference to the idea of the court eyeballing a transcript.

THE WITNESS: Yes.

MR. GRADESS: I just want to check, are you actually suggesting that, or is that sort of a facetious remark?

THE WITNESS: I'm sorry. That was something the administrator told me. I said to him, how can the Justice Mangano possibly know how many hours it was appropriate to spend on this case. He said, well, he looks at the number of pages in the transcript.

I said, a short transcript can have many issues, and a long transcript can have few.

He said I think that's how he does

112

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Rochelson

it: He just guesses from the length of the transcript.

MR. GRADESS: Just for the record, the months that you currently wait for the transcript as a lawyer assigned in the Second Department is currently what?

THE WITNESS: It varies. I have waited, I was assigned a case in February, February 23, I did not get the complete transcript until I was told it was available in May. I did not have a day for about three weeks to drive in and pick it up. I had to drive to Queens. I live in Suffolk County, way out east, and it's not always convenient to take most of a day to go pick it up.

And I asked the clerk to mail it to me, and he refused. They won't provide for messengers. I went to pick it up, and actually part of it was missing, which was not readily apparent, because it turned out to be some interior pages of the trial transcript, say pages 300 to 400, and I didn't realize until I got back to my office

1 O'Brien

2 and I called the clerk, he said another  
3 stenographer must have done it, and in fact  
4 when he found them he did mail them to me,  
5 so it can be done.

6 That was an unusual example of a  
7 length of time. I would say more typically,  
8 four to five weeks to get a full transcript.  
9 Sometimes there are co-defendants and a copy  
10 has to be made.

11 MR. GRADESS: We're very grateful for  
12 your driving in here this morning.

13 Any other questions?

14 Thank you.

15 Henry O'Brien.

16 THE WITNESS: I appreciate the last  
17 witness driving in from Suffolk County. In  
18 the middle of the night I had to get up and  
19 it still took from Center Ridge, which is in  
20 mid-Suffolk, to get here two and a half  
21 hours. And it's exhausting. When it's  
22 raining out, it's worse, the trucks -- it is  
23 a very difficult commute to get in here.

24 I was going to talk about certain  
25 things in the substance area of the law, but

1 O'Brien

2 I would like to comment on my work as an  
3 18 B attorney. I was a former district  
4 attorney, Suffolk County, and I only say  
5 that because I'm very concerned about  
6 vouchers. I have a paranoia about them and  
7 concern about them, so, uniformly, maybe I'm  
8 a timid soul, I don't put vouchers in on  
9 simple plea bargains. I don't know even  
10 know what amount of time to put in. Judges  
11 like me very much because I'm very  
12 philanthropic and willing to do pro bono  
13 work.

14 Court needs and a lawyer because of  
15 the Legal Aid Society having a conflict of  
16 interest, or the Legal Aid Society having a  
17 problem with one of their clients. I'm  
18 willing to cooperate and help. My practice  
19 is devoted pretty much entirely to criminal  
20 defense work, so I'm there, and, if it's a  
21 fairly simple plea bargain, many times they  
22 are not, you are dealing with mothers and  
23 they are difficult situations, I still fear  
24 putting in vouchers, and I never put them

1 O'Brien  
2 I put them in on trials, but don't  
3 put them in on pleas because I don't know  
4 how much time to put down, and I do know  
5 there is a law that can be a felony if you  
6 file a false instrument and claim something.  
7 It's paranoia. I really think it  
8 should be simplified somehow or other. How  
9 one works on these plea bargain cases I  
10 don't know. So I figure, I feel the better  
11 part of valor is not even doing it at all.  
12 I do get assigned a quite a few  
13 trials, and I do do the best I can to get  
14 vouchers in correctly on that, but that is a  
15 concern to me as well. It's very  
16 complicated for me sometimes. Maybe I'm  
17 working on the case and now I got to figure  
18 out exactly how much time, recesses and so  
19 on, or what criteria should be used for the  
20 lawyer to help them fill out these vouchers  
21 so they are not worried sick over the  
22 possibility of making a statement that might  
23 be false.  
24 They say they cut vouchers. If you  
25 cut a voucher that means the person is not

1 O'Brien  
2 telling the truth. That's a concern. That  
3 could be a crime, and that worries me quite  
4 a bit. But, having said all that about  
5 these vouchers, and I do a tremendous amount  
6 of 18-b work, and, as I say, I never, never  
7 put in vouchers for the numerous cases that  
8 I have that do not result in a trial.  
9 Having said that, I would like to  
10 talk about the law in general, and the  
11 concerns that I have. I mentioned it to  
12 you, Jonathan, about a real concern that I  
13 have for people who are being essentially,  
14 in my opinion, denied their Sixth Amendment  
15 right to a trial by jury. This is such an  
16 enshrined concept, trial by jury, that you  
17 wouldn't think you would have to even talk  
18 about it. It's part of our fundamental  
19 rights that we have.  
20 How are people being denied their  
21 right to have a trial by jury? Very simply.  
22 The district attorney evaluates a case and

23 determines what the district attorney feels  
24 is an appropriate punishment for the  
25 individual and also for deterrence and

117

1 O'Brien  
2 community example. Well and good. They are  
3 supposed to do that. I did that when I was  
4 district attorney: What is this case worth,  
5 what should the individual receive as  
6 punishment for the good of the community,  
7 and to possibly, hopefully, maybe do  
8 something for him as well in prison.

9 Now, if somebody is evaluated for,  
10 let's say, a sentence of four to eight  
11 years, I'm just hypothetically talking, and  
12 I'm not guilty, I didn't do it, I want a  
13 trial, then you have to point out to that  
14 person that this judge or that judge is  
15 going to give you the maximum sentence, and  
16 you are going to get like possibly 12 1/2 to  
17 25 years. Far more than the plea offer.

18 I don't want to become specific. The  
19 judges and I have a wonderful relationship,  
20 I wouldn't ever mention any particular, I'm  
21 talking about a systemic problem. Recently  
22 I had a case where the offer was I think six  
23 to 12, series of robberies by passing notes.  
24 The person was, had five of these note bank  
25 type things, and he was only convicted of

118

1 O'Brien  
2 three and his sentence was 31 to 62 years.  
3 And the original was far less. This happens  
4 quite a bit.

5 So, as a result of this, people do  
6 not want to take their case to trial. Many  
7 people don't. Some do. Maybe they become  
8 institutionalized almost. Maybe they are  
9 individuals that just don't care anymore and  
10 they do it, but they are very reckless when  
11 they do it, and they wind up losing these  
12 cases. They get tremendous imprisonment  
13 amount of time for it, far greater than the  
14 amount of time that was originally suggested  
15 as the appropriate amount of time.

16 And, again, I want to emphasize, what  
17 does that do? It repeals their right to  
18 have a jury trial very effectively, and I  
19 wanted to make that point. Some of our  
20 laws, the second felony offender laws are

21 very serious also in terms of basically  
22 frightening people out of going to trial.  
23 I have a case now in which the  
24 individual maybe nine years ago committed a  
25 burglary. That makes him a violent felony

119

1 O'Brien  
2 offender. He was working in a topless bar  
3 along with his brother, and the contention  
4 is that he stole \$700 from the barmaid at  
5 night, after the place closed up. He had a  
6 very legitimate defense. Nobody was there  
7 from the management, he felt that taking  
8 this money was the correct thing to do, it  
9 was turned in two days later to the owner of  
10 this bar.

11 But, because he's a second felony  
12 offender, according to our law, he cannot  
13 receive any kind of leniency if he should  
14 possibly be convicted of this robbery second  
15 degree, and his plea offer is two to four.  
16 He's frightened because if he goes to trial  
17 as a second felony offender with a violent  
18 felony, robbery second degree, he faces a  
19 determinate sentence of anywhere between  
20 seven and 15 years.

21 Now he's scared. He wants to plead  
22 guilty. I was looking forward to trying  
23 this case. I think he would have been  
24 acquitted. I think. But I can't be sure.  
25 I'm giving you a desultory review of this.

120

1 O'Brien  
2 This requires some in-depth analysis of it.

3 And I am not in any way, shape or  
4 form antipunishment. I think a great deal  
5 of our crime has gone down because people  
6 are being incarcerated, and it's a good  
7 thing in many respects, but I don't think  
8 they should be denied their right to have a  
9 trial because of a fear of some enormous  
10 penalty that's going to be imposed simply  
11 because they went to trial and lost the  
12 case.

13 Maybe there should be a law passed or  
14 review or something where the plea bargain  
15 becomes a rather significant thing and then  
16 the judge shouldn't be able to sentence any  
17 more than 15 to 10 percent more. Maybe  
18 juries should sentence.

19           Maybe the whole thing shouldn't be  
20 allowed, I never thought about the variety  
21 of alternatives. I just thought about the  
22 problem, but maybe there should be some  
23 consideration the jury itself pass sentence,  
24 let them know what the person's background  
25 is, and not have these mandatory sentences

121

1                           O'Brien  
2 that are really, as I say, denying people  
3 the right to have a trial.  
4           People are being incarcerated  
5 tremendously in Suffolk County, and it's all  
6 right in many regards. But, like I say,  
7 what concerns me, and why I wanted to come  
8 here, Jonathan, I mentioned it to you, was  
9 this particular problem. Incidentally, that  
10 case that I talked about was a case in which  
11 plea bargaining was completely restricted,  
12 because, amazingly, the law allows what they  
13 call a secret indictment. It allows, I'm  
14 not going to say there is anything wrong  
15 with it. Normally when people rob  
16 something, the police arrest them, they come  
17 to local criminal court and you can evaluate  
18 the case, and there can be plea bargaining.  
19           In this particular instance, for  
20 whatever reason, the district attorney chose  
21 to bypass the local police or maybe the  
22 local police didn't even want the case and  
23 went directly to a grand jury with it. And  
24 when they do that an indictment comes out,  
25 then plea bargaining is completely

122

1                           O'Brien  
2 restricted, and the person is really locked  
3 into a very serious decision that he has to  
4 make.  
5           So, basically, in conclusion, I  
6 appreciate the problems of 18-b lawyers. I  
7 certainly have got, as I say, an unnatural  
8 fear of making a false voucher. I work hard  
9 to get the ones on trial accurate, and  
10 sometimes you worry about that, too. I'm  
11 certainly not going to work for free.  
12           But on the plea bargains, I don't  
13 really know. Judge assigns me, I go up,  
14 waive reading of the indictment, enter a  
15 plea of not guilty. What do I put down?  
16 Five minutes? I was there anyway, you know,

17 on another case, not necessarily an 18-b  
18 case. I don't know what to put down, so I  
19 don't put anything down. I don't bother  
20 with it.

21 And then if I come back, I can talk  
22 to the person in a little cubicle and a lot  
23 of these things can be done somewhat simply,  
24 some can't. You meet the mother in the  
25 hallway, what am I going to do, have a

123

1 O'Brien  
2 stopwatch there checking everything out?  
3 It's very difficult.

4 As I say, I have chosen the course of  
5 extreme discretion, maybe cowardice, but I  
6 will not put these vouchers in, because I am  
7 frightened of making a false voucher, so  
8 maybe there could be something done to help  
9 us.

10 MR. GRADESS: How many cases in a  
11 year do you do that?

12 THE WITNESS: I guess 50, 60 cases,  
13 plea bargains. Huge number.

14 MR. GRADESS: That you file a  
15 voucher?

16 THE WITNESS: No voucher. No money  
17 at all for it. I only put in money for the  
18 trials. Maybe I exaggerated. Could be 20.  
19 It's a lot, a lot of cases.

20 MR. PITTARI: Is that at the district  
21 court level or superior court?

22 THE WITNESS: Superior court level.  
23 I have one assigned district court case  
24 which I'm not going to put in a voucher for  
25 either.

124

1 O'Brien

2 MR. PITTARI: Are you normally  
3 getting assigned and then doing that plea  
4 bargain the same day on those cases?

5 THE WITNESS: Definitely not.

6 MR. PITTARI: It sounded that way.

7 THE WITNESS: It's not as simple as  
8 that. I get assigned, arraignment, come  
9 back for a conference -- some go on for a  
10 long, long time.

11 MR. PITTARI: I know. It didn't  
12 sound that way when you said it, and I  
13 wanted you to have the opportunity to  
14 clarify it.

15 THE WITNESS: No. This is not done  
16 in one single day, no. Doesn't happen that  
17 way.

18 MS. LORAND: You mentioned about the  
19 plea bargain and the downside of it in that  
20 the defendant's rights are to some degree  
21 compromised.

22 My question to you is, if we  
23 significantly reduce plea bargaining, could  
24 this result in indigent defendants spending  
25 more time in jail awaiting trial as the

125

1 O'Brien  
2 courts get clogged up, more than they are  
3 right now?

4 THE WITNESS: If there was no plea  
5 bargaining at all, I suppose that would be  
6 true, because these trials do take quite a  
7 while to handle them.

8 But I don't think that people should  
9 lose their right to have a trial. Most  
10 people are willing to take plea bargains.  
11 It's only the rare person, not that many,  
12 who say I didn't do it, or they say, this is  
13 ridiculous, I want to fight this case.

14 I don't think it would hurt the  
15 system to continue the way it is. I don't  
16 think there is so much pressure on judges  
17 they have to get rid of all these cases by  
18 Draconian punishments to make sure the  
19 person does not take a case to trial.

20 I don't want to be critical of any  
21 judge. This is a systematic problem. There  
22 are some judges that could abuse it and are  
23 so harsh that they just want to get out at  
24 noon. In other words, if you can get the  
25 case settled before noon, you can go home

126

1 O'Brien  
2 and do whatever you want to do. I think  
3 that creeps in.

4 I'm just saying there is something  
5 wrong with this. It should be looked at in  
6 some way, addressed in some way. And, as I  
7 say, I'm not here to give you, I'm not  
8 capable of giving a solution. One person  
9 suggested, if you have a certain plea  
10 bargain of four years, or maybe a person  
11 goes to trial, he couldn't get more than  
12 let's say, six years, instead of an enormous

13 amount of time above that which was  
14 recommended or suggested by the district  
15 attorney. There could be some looking into  
16 this situation.

17 And, again, I also talk about the  
18 second felony offenders. There are  
19 tremendous numbers of them. Tremendous  
20 numbers of them. It's mostly drugs. A lot  
21 of it is drug-related, and we're talking  
22 about people going to jail, and again I  
23 don't want you to think I'm soft on crime.  
24 I believe it's a problem.

25 But it's something a little sick when

127

1 Neufeld  
2 people going for 12 1/2 to 25 years because  
3 they have a prior drug conviction, they  
4 decided to take it to trial and they sold a  
5 speck of crack for \$5, and now they get 12  
6 1/2 to 25 years.

7 And I had one like this. And this  
8 goes on all the time. I just think there  
9 should be some kind of analysis of the very  
10 important proposition that people have a  
11 Sixth Amendment right to a trial by jury,  
12 and we're taking it effectively away from  
13 them in many cases by telling them  
14 implicitly, you take this to trial, that  
15 plea bargain for three years, forget it.  
16 You are looking at 15 years. That type of  
17 thing. That's all I really have to talk  
18 about.

19 Thank you.

20 MR. GRADESS: We will take a  
21 five-minute break.

22 (Recess: 12:00 p.m. to 12:05 p.m.)

23 MR. GRADESS: Russell Neufeld,  
24 please.

25 THE WITNESS: Good afternoon. I'm

128

1 Neufeld  
2 Russell Neufeld. I'm director of the  
3 Capital Defense Unit of the Legal Aid  
4 Society in New York City. We represent  
5 clients who are facing the death penalty in  
6 the five boroughs of the City, and I want to  
7 talk today about the rates of compensation  
8 for capital attorneys, not capital attorneys  
9 in my office or the Capital Defender's  
10 Office, but what are known as the 35 B

11 attorneys, the assigned counsel attorneys in  
12 capital cases.

13 Judiciary law 35 B mandates that pay  
14 for assigned counsel in capital cases be  
15 set, and I'm quoting, after reviewing the  
16 rates of compensation generally paid to  
17 attorneys with substantial experience in the  
18 representation of defendants charged with  
19 murder or other serious felonies and shall  
20 be adequate to ensure that qualified  
21 attorneys are available.

22 The reason that the law reads like  
23 that is that when it was being drafted,  
24 people in the legislature who were drafting  
25 it were aware that in the rest of the

129

1 Neufeld

2 country where there was the death penalty,  
3 there was a huge and there remains to be a  
4 crisis in capital representation.

5 The people that have been in favor of  
6 lowering the rates in capital cases have  
7 shown statistics that show quite rightly  
8 that New York's pay for capital work is  
9 higher than the other states. That's true.

10 The other states are in the middle of  
11 a nightmare. The other states that have the  
12 death penalty don't have enough lawyers to  
13 represent the people on death row. The  
14 rates in the other states have proven  
15 woefully inadequate to attract competent  
16 counsel to enter an area of practice that  
17 requires specialized knowledge and skills  
18 beyond what you have to know to do other  
19 criminal cases.

20 It requires a concentration of so  
21 much energy and time that sustaining the  
22 rest of one's practice can become  
23 impossible, and the stakes of which result  
24 in a tremendous emotional drain on the  
25 attorneys that do this work.

130

1 Neufeld

2 The experience of California, a state  
3 whose population, demographics, urbanization  
4 closely resembles our own, is instructive.  
5 California has had the death penalty back  
6 for the last 20 years, and they have about  
7 now 170 death row prisoners with no lawyer  
8 to handle their direct appeal.

9 California pays a minimum of \$125 an  
10 hour for capital appeals counsel and up to  
11 150 an hour for capital trial counsel, and  
12 they can't find enough lawyers in California  
13 to handle these cases. So they have 170  
14 people sitting on death row without a  
15 lawyer. Fees for capital counsel in New  
16 York, following the statutory mandate that I  
17 quoted a moment ago was set at 175 an hour  
18 for lead counsel, and 150 an hour for  
19 associate counsel.

20 The Court of Appeals is now  
21 considering reducing those rates to \$100 for  
22 work done before death notice and 125  
23 post-notice for lead counsel and \$75  
24 pre-notice and \$100 post-notice for  
25 associate counsel, that is rates lower than

131

1 Neufeld  
2 the California rates, where California can't  
3 find lawyers to represent the people on  
4 death row.

5 Capital Defender Office has conducted  
6 a survey of attorneys on or pending  
7 acceptance by the assigned counsel panel to  
8 determine what pay rates would result in  
9 retaining or losing the trained and  
10 qualified private capital lawyers. There  
11 are currently in New York State 139 lawyers  
12 who are trained and certified to take  
13 capital cases or whose certification is  
14 pending. 63 of those responded to the  
15 survey. 80 percent of the respondents said  
16 current capital rates are adequate for them.  
17 73 percent say reducing the rates to the  
18 proposed levels would negatively affect  
19 their ability to take cases.

20 Private attorneys, people from this  
21 panel, are assigned no more than one  
22 potential capital case at a time and have  
23 already handled 230 or more than half of all  
24 the potential capital cases in the three  
25 years since the law took effect.

132

1 Neufeld  
2 Therefore, losing anywhere near  
3 73 percent of this capital bar would place  
4 New York exactly where California is in just  
5 a few short years.

6 Beyond the loss of the necessary

7 numbers of qualified lawyers that would  
8 result in the fee reduction, the proposal  
9 for an even lower fee prior to a  
10 prosecutor's decision to seek death also  
11 reflects a serious misunderstanding of a  
12 death penalty lawyer's job.

13 Under the New York statute a  
14 prosecutor has 120 days from Supreme Court  
15 arraignment on an indictment for murder in  
16 the first degree to decide whether or not to  
17 seek the death penalty. During this time,  
18 because of the way the statute is framed, we  
19 put a tremendous amount of energy and  
20 resources and time, legal energy,  
21 investigatory energy, litigation experts'  
22 energy and time into trying to create a  
23 report in most cases to convince a district  
24 attorney why it would not be appropriate to  
25 seek the death penalty in a particular case.

133

1 Neufeld

2 My office, which is not affected  
3 directly by these rate proposals, has had 27  
4 potential capital cases so far. Of those  
5 three are still pending decision by the DAs,  
6 one decision was made to seek the death  
7 penalty and in fact the death penalty was  
8 sought and the client was sentenced to  
9 death, but in every other case we were able  
10 to convince the DAs the death penalty was  
11 inappropriate.

12 This front-loading of the process is  
13 not only in the interest of the defendant,  
14 whose life is spared, clearly in the  
15 defendant's interest, but it's also in the  
16 interest of the efficient use of scarce  
17 judicial and prosecutorial resources. If we  
18 can quickly provide information that  
19 convinces the district attorney that the  
20 death penalty would be inappropriate in a  
21 specific case, the entire system saves  
22 literally millions of dollars on a  
23 prosecution where that inappropriateness  
24 might otherwise only become apparent years  
25 down the road, or, even worse, never

134

1 Neufeld

2 discovered, and the person is executed.  
3 The Legal Aid Society and I  
4 personally am against the death penalty, but

5 even for those people who think the death  
6 penalty is appropriate in some cases, the  
7 idea that someone would be executed in a  
8 case where the death penalty is  
9 inappropriate should be even more troubling.

10 For instance, New York statute  
11 prohibits the death penalty for mentally  
12 retarded defendants. In one of our cases,  
13 our client was 33 years old when he was  
14 arrested. We got his school records from  
15 when he was, started in elementary school  
16 going to high school.

17 When he was 15, he was referred to a  
18 hospital for intelligence testing because of  
19 the teacher's concerns about how poorly he  
20 was doing. Then we obtained hospital  
21 records which were also 18 years old and  
22 they showed he had an IQ of 53, and we hired  
23 a psychologist to test him now, and we  
24 showed he had an IQ of 59, and we went to  
25 the DA with that information, and they were

135

1 Neufeld

2 quickly able to decide this was not an  
3 appropriate case for the death penalty, in a  
4 case where they might have gone well down  
5 the road to seeking the death penalty.

6 If you just look at what it meant to  
7 be able to put that work and energy into  
8 those cases at the beginning, we both took  
9 the burden of the death penalty off of this  
10 client's shoulder, but we also probably  
11 saved 3, 4, \$5 million to the criminal  
12 justice system as a whole by doing that work  
13 up front, and, therefore, the value of such  
14 pre-death decision work should not be  
15 diminished, nor should a financial  
16 disincentive be created for frontloading  
17 resources in capital defense work.

18 Thank you.

19 MS. BARR: I happen to be against the  
20 death penalty, and when the whole debate was  
21 going on in the '80s, my assemblyperson was  
22 for it. And he and I used to argue back and  
23 forth, and he would tell me about all the  
24 safeguards and everything that you would  
25 have to go through before the person, if he

136

1 Neufeld

2 was found guilty and was sentenced to the

3 death penalty, all the safeguards that would  
4 be built into the system.

5 From what you are saying now, some of  
6 those safeguards may just vanish, and nobody  
7 would ever really know that they had gone,  
8 but the law wouldn't be changed.

9 So what can be done about it?

10 THE WITNESS: I think that's exactly  
11 right. I think that in order to get the  
12 death penalty passed in New York, you had  
13 some people who were completely against the  
14 death penalty, you had some legislators who  
15 are completely in favor and didn't care what  
16 happened just so long as they could kill  
17 some people, and you had a huge group in the  
18 middle who were very concerned that innocent  
19 people might be sentenced to death, that  
20 people might be unfairly selected for the  
21 death penalty, might be unfairly sentenced  
22 to death.

23 And they did put in a lot of  
24 safeguards into this statute, and one of  
25 those was that there would be competent

137

1 Neufeld

2 counsel, and that money would be available  
3 to make sure there was competent counsel.  
4 All of those things had to get in in order  
5 to get the statute passed.

6 Now it's been passed for three years,  
7 and we are beginning to see a whittling away  
8 of some of those safeguards, and I think it  
9 is very troubling.

10 MS. LORAND: The question I have has  
11 to do with the length of time that it seems  
12 to take for the entire process to go forward  
13 with the various appeals.

14 Are there any avenues that you can  
15 see where we would not be talking about a  
16 process that takes 12 and 14 years? Do you  
17 see any possible avenues whereby something  
18 could be done where the decision can be made  
19 one way or another? Not quickly, but 12 to  
20 14 years is a long time.

21 THE WITNESS: Well, one of the things  
22 that's changed in the last few years is that  
23 Congress passed and the president signed a  
24 bill to shorten the amount of time that the  
25 cases are, that the death penalty cases are

138

1 Neufeld

2 in federal courts, so I believe that what  
3 you will start to see over the next few  
4 years is fewer cases that take 12 to 14  
5 years and more cases that take four to seven  
6 years.

7 I don't think that's necessarily  
8 good. I don't, I never quite understood  
9 what the hurry was to kill somebody. If it  
10 takes 14 years to find out you made a  
11 mistake, it should take 14 years. If you  
12 find it out after 14 years, but you killed  
13 the fellow after seven years, it's a little  
14 late. It's too bad. I don't actually quite  
15 appreciate the need for speeding this stuff  
16 up.

17 MR. PITTARI: A question in that  
18 regard. Haven't some studies shown that in  
19 some states, the reason it takes so long to  
20 bring a case to a final appellate decision  
21 is that it took years just to get counsel to  
22 represent an individual because of the poor  
23 rates, and sometimes one lawyer would just  
24 pro bono do one little aspect of a case,  
25 then, after a few years, another lawyer

139

1 Neufeld

2 would volunteer some time and find another  
3 aspect of the case, so I think a lot of the  
4 delay in the appellate court system had to  
5 do with the inadequate funding of counsel.

6 From what you've read and heard about  
7 the death penalty, does that jibe with what  
8 you've heard?

9 THE WITNESS: That's exactly right,  
10 and another wrinkle on that, for instance,  
11 in California, their Supreme Court is backed  
12 up with hearing these appeals. The death  
13 penalty appeal for the court takes a  
14 tremendous amount of time and resources.  
15 They can't hear them all.

16 If people had adequate counsel up  
17 front, if, for instance, in the retardation  
18 case I was talking about, if things like  
19 that are able to be brought to a  
20 prosecutor's attention and the court's  
21 attention, a lot of these cases might never  
22 have gone down that path in the first place,  
23 and then the courts wouldn't be backed up.

24 So, in part, the court backup is also  
25 a function of inadequate counsel.

1 Neufeld

2 MR. PITTARI: If I can make one other  
3 comment, since campaigning was mentioned,  
4 and money, I too recall the last election  
5 for the governorship, and I believe one  
6 candidate who ultimately won and was for the  
7 death penalty went around this state, I  
8 heard him once even in person talking about  
9 there would be an open pocketbook or an open  
10 purse with regard to the defense of people  
11 who might be subject to the death penalty,  
12 and I know that did convince several  
13 legislators to vote for it when otherwise  
14 they may not have. And I gather from your  
15 testimony you are telling us that there are  
16 really some attempts to close that  
17 pocketbook or purse.

18 THE WITNESS: It may still be open,  
19 but there is going to be less money in it, I  
20 guess.

21 MR. GRADESS: I take it in the  
22 experience of your unit, there have been  
23 cases that didn't get a death penalty, that  
24 have resolved themselves with a penalty less  
25 than death?

1 Neufeld

2 THE WITNESS: Yes. All but one.

3 MR. GRADESS: How long do those cases  
4 take?

5 THE WITNESS: All different amounts  
6 of time, and I'm not sure, anywhere from, I  
7 would say, eight months is probably the  
8 fastest disposition I've had in a case to a  
9 year and a half, a year and three quarters.  
10 And some cases where, that went to trial,  
11 Staten Island is probably the most backed  
12 up, cases have taken two years to go to  
13 trial.

14 MR. GRADESS: I wonder if, could you  
15 for the record, let me tie a couple of  
16 things together. In the debate about  
17 capital fees, there seems to be some lack of  
18 sensitivity in those who are debating the  
19 question as to the amount of hours that are  
20 actually involved in handling a capital  
21 case, and the intensity of the experience.

22 And I wonder if it would not be  
23 asking too much for you to share for the  
24 record some response to both those issues,

25 the amount of time you put in the Harris

142

1 Neufeld  
2 case and the kind of experience that was for  
3 you and how it might compare to your past  
4 experience.

5 THE WITNESS: The Daryl Harris case  
6 was the first death penalty case that was  
7 tried, and we started jury selection  
8 beginning of March, he was sentenced to  
9 death in July. We were basically on trial  
10 for three months.

11 We had five attorneys from the office  
12 working on the case pretty much fulltime  
13 during those three months, and three  
14 attorneys working on that case probably  
15 70 percent of their time, for the six months  
16 or a year prior to that.

17 And fulltime on these cases was 70  
18 hours a week, I would guess, for all those  
19 lawyers, for all that time. And that's a  
20 lot more than, I have said, repeatedly, that  
21 nothing would make me happier than if either  
22 the courts or legislature put us out of  
23 business and I could go back to representing  
24 people on token stuffing cases, and it  
25 didn't take that much time and energy.

143

1 Coleman

2 MR. GRADESS: Thank you.  
3 Michael Coleman.

4 THE WITNESS: My name is Michael  
5 Coleman. I'm Director of the New York  
6 County Defender Services, currently handling  
7 12,500 cases for indigent defendants here in  
8 Manhattan.

9 I want to address three problems, all  
10 very briefly, one statutory, one budgetary,  
11 and one administrative.

12 The statutory problem, I came from  
13 Brooklyn where I was at the Legal Aid  
14 Society for 23 years, and when I came to  
15 Manhattan, I first realized that our state  
16 is in the Stone Age of discovery. In this  
17 jurisdiction, in Manhattan, the district  
18 attorney has seized upon the statute to  
19 withhold relevant evidence and discovery  
20 until the jury walks through the door.

21 It was shocking to me when we did our  
22 first trial here to see the jury empaneled

23 and the district attorney walk in with 350  
24 pages of discovery material, plop it on the  
25 desk and have the judge say, can't you read

144

1 Coleman  
2 a little more quickly, while our attorney  
3 prepared for trial.  
4 The result was that defense was  
5 deprived of a proper opportunity to  
6 investigate material that the DA had in  
7 their possession for months. And it's been  
8 like that for the 35 trials we've done in  
9 the last year here. This trial by ambush is  
10 meant to deprive the defendant of a fair  
11 trial, and a change in legislation is  
12 needed. If we are going to have prosecutors  
13 seizing upon the statute, the only thing we  
14 can do is change the statute.  
15 Jurisdictions from Mississippi,  
16 Alabama, to Massachusetts, all have more  
17 enlightened discovery statutes than we do.  
18 Whether we go to open, mandatory open file  
19 discovery or forcing the prosecutors to turn  
20 over discovery 30 days, 20 days, 10 days  
21 before trial just to give us an opportunity  
22 to see it would enable us to more properly  
23 prepare for trial.  
24 Also, early discovery would enhance  
25 all of these new parts that are being

145

1 Coleman  
2 created to lure our clients to pleading  
3 guilty more quickly. They are called felony  
4 waiver parts. They all sound good on paper,  
5 but what you have is a situation where  
6 defendants are being asked to waive very  
7 substantial constitutional rights in order  
8 to plead guilty early in the proceedings,  
9 but, because of a lack of discovery, what  
10 you have is defense attorneys and defendants  
11 making these decisions in a vacuum. These  
12 parts are not going to work without early  
13 discovery, so they can spend all the money  
14 they want creating these -- we have two more  
15 in Manhattan -- these parts to induce the  
16 defendant to plead guilty early, they are  
17 not going to work unless we know what we're  
18 talking about.  
19 Second issue I'd like to discuss is  
20 budgetary. As technology increases it looks

21 like prosecutors are starting to use DNA  
22 testimony more often. Although we don't  
23 have some of the budgetary problems that  
24 some of the other organizations do at this  
25 time, we still don't have the money to start

146

1 Coleman  
2 performing DNA tests on our own for our  
3 clients.  
4 We are going to have to get access to  
5 state labs, or at least get separate funding  
6 if that's not going to happen for DNA tests,  
7 especially in cases where we have clients  
8 who passed polygraph tests, and a DNA test  
9 might be something that would result in an  
10 innocent person not being convicted.  
11 Third issue is administrative. It's  
12 very simple. We have no access to the OCA  
13 computer in the state. When I worked for  
14 the Legal Aid Society, we did, and it was a  
15 wonderful thing, but I don't know if it's  
16 just us or the rest of the organizations in  
17 the state don't have access to it, but it's  
18 a very simple thing.  
19 Right now we are wasting lots of time  
20 and money handling people with conflicts  
21 because we don't find out about them until  
22 later in the proceedings. I have clients  
23 that other organizations are representing  
24 and we don't find that out until later, and  
25 simple access to the OCA computer would

147

1 Abramson  
2 solve that problem. That's all I have to  
3 say.  
4 MR. GRADESS: Thank you very much.  
5 Gary Abramson.  
6 THE WITNESS: Good morning. I'm Gary  
7 Abramson. I am the Chief Attorney of the  
8 Legal Aid Society in Orange County, New  
9 York. That's in Goshen, about 60 miles from  
10 here. We have a caseload of about 7,000  
11 criminal cases a year. We are also the  
12 primary provider of family court services to  
13 adult litigants in the Orange County family  
14 court.  
15 This morning I would like to talk  
16 about two topics that were suggested by the  
17 materials I was sent. They are improving  
18 public defense in New York and the financing

19 of public defense in New York.  
20 It would seem that those two topics  
21 are dependent, because the first thought  
22 about improving any public service is  
23 usually how much it would cost. But my  
24 remarks about improving public defense in  
25 New York are to suggest that it can be

148

1 Abramson  
2 accomplished through spending less money.  
3 There are two main ways to do that.  
4 The first is by the abolition of capital  
5 punishment, and the second is by the  
6 decriminalization of narcotics.  
7 I propose both, not only because of  
8 the savings but because justice calls for  
9 both. First, the death penalty. The death  
10 penalty is expensive in an obvious way and  
11 an insidious one. The obvious is in the  
12 litigation cost that Mr. Neufeld addressed a  
13 few minutes ago.  
14 Since George Pataki signed the  
15 capital punishment bill, taxpayers have had  
16 to spend millions of dollars on funding the  
17 Capital Defender Office, paying for fees of  
18 assigned counsel and for all the extra time  
19 prosecutors must devote in the effort to  
20 kill accused persons.  
21 The moral expense of the death  
22 penalty is greater but harder to quantify.  
23 Before the death penalty became law,  
24 attorneys and judges in the state had the  
25 right to be proud of practicing their

149

1 Abramson  
2 profession in one of the few enlightened  
3 states in the United States, states that  
4 were entitled to a membership in most of  
5 western civilization as we know it today.  
6 The state's presumption of the power  
7 to take life, codified, disgraces that  
8 civilization, and the law, and thus those  
9 who practice it, and now obviously not every  
10 attorney is against the death penalty and  
11 not every attorney against it believes  
12 practicing law is any less noble because of  
13 the death penalty, but, for those of us who  
14 oppose the death penalty, because we know it  
15 mocks the law's basic purpose, which is the  
16 nonviolent resolution of conflict, we must

17 acknowledge that our profession in New York  
18 has become absurd in some respect at its  
19 foundation, and we really have trouble  
20 quantifying what bad faith costs.

21 As to decriminalization of narcotics,  
22 public defense services would improve  
23 without any additional funding with  
24 decriminalization. At least a third of the  
25 average public defense attorney's time is

150

1 Abramson

2 devoted to representing people accused of  
3 the sale and possession of drugs.

4 Given that time to devote to cases  
5 that are not drug related that truly have  
6 victims -- assaults, burglaries, homicides,  
7 rapes -- where people are in danger and  
8 where serious cases requiring serious  
9 attention of defense attorneys, public  
10 defenders will be that much more effective.

11 Locking up someone is a violent act  
12 even when it's sanctioned by the state, so  
13 in that sense the penal approach to drug  
14 abuse is wronger than the sale of the drug  
15 itself, and it's certainly failed to deter  
16 people from the sale or use of narcotics.

17 Enforcing a law that we have been  
18 shown does not work becomes the imposition  
19 of state power for its own sake, which is  
20 always called authoritarian and sometimes  
21 can be called much worse. For democracy's  
22 sake we should end the imposition of a law  
23 that has only benefited those who profit  
24 from taking the risk that that law involves,  
25 and those, like us, public defense lawyers,

151

1 Abramson

2 prosecutors, cops, whose wages are tied to  
3 the enforcement system.

4 Moving quickly to finances. The way  
5 the state finances public defense right now  
6 is unjust, anarchic, chaotic. The  
7 constitutional right to effective counsel is  
8 one the federal government properly requires  
9 that the states ensure, so it's wrong for  
10 the states, it's insubordinate for the  
11 states to impose that obligation on  
12 localities, as New York does.

13 So, as a result of that, the quality  
14 of how a person is defended in this state

15 very much depends on where that defendant  
16 happens to be arrested. Probably one is  
17 better off being represented in Manhattan,  
18 where there are fulltime public defense  
19 lawyers than, say, in a rural county where  
20 the public defense lawyers tend to be in  
21 private practice, that practice competes  
22 with public defense, and where the public  
23 defender is generally beholden to local  
24 politics for the position, for the money and  
25 as well for the judge to get even the

152

1 Abramson  
2 assignment to represent a defendant.  
3 For New York to require public  
4 defense to be dependent on the whimsy of  
5 county politics for adequate staffing is to  
6 guarantee that staffing will often be  
7 inadequate. Representing people, the kind  
8 of people the public defenders do is  
9 unpopular, so very few office seekers ever  
10 campaign on the need for better  
11 representation of the accused. For the  
12 state to honor its constitutional  
13 responsibility, that means that it should be  
14 guaranteeing the right to counsel, to fair  
15 allocation of funds, not only to Manhattan,  
16 but to places like Franklin County, places  
17 on the Canadian border, where we know public  
18 defense services are inadequate.  
19 So long as the level of public  
20 defense representation varies so starkly  
21 from county to county, the state is shirking  
22 its constitutional responsibilities, and,  
23 again, this is not about money but about  
24 equity, the commitment to fairness to  
25 everybody in the state. Thank you.

153

1 Abramson  
2 MS. LORAND: I would like to know, do  
3 you see a distinction with respect to your  
4 comments about the drug laws? Do you view  
5 as a distinction between possession and  
6 sale?  
7 THE WITNESS: No.  
8 MS. LORAND: Thank you.  
9 THE WITNESS: Only if the sale is to  
10 children.  
11 MR. GRADESS: I just want to clarify  
12 for the record. In your remarks you said

13 that the decriminalization of narcotics, as  
14 distinguished from its legalization.

15 Are you making a distinction you mean  
16 to make here?

17 THE WITNESS: Yes.

18 MR. GRADESS: Amplify the distinction  
19 for the record.

20 THE WITNESS: Well, Jonathan, when I  
21 say decriminalization, I am talking about,  
22 it very well could entail legalizing,  
23 regulating, but what I am saying at this  
24 point is that by bringing the drug problem  
25 into the criminal justice system, it's an

154

1 Letwin  
2 unnecessary impediment on the criminal  
3 justice system. It's obviously not the way  
4 to address the plague of drug abuse in the  
5 country, so my concern really is, I'm not an  
6 expert on how to, I'm not a public health  
7 expert, I'm a lawyer, and when I say  
8 decriminalization, I simply am positing that  
9 because I believe these laws are unjust and  
10 that they have resulted in the imprisonment  
11 of, the ruination of millions of lives,  
12 thousands of lives, and another avenue would  
13 be far more successful in dealing with this  
14 problem than the one that I'm in.

15 MR. GRADESS: Michael Letwin.

16 THE WITNESS: I'm sorry for being  
17 late. I'm not going to read the testimony  
18 that you have, and I certainly would adopt  
19 by reference everything the previous speaker  
20 spoke about in terms of the death penalty  
21 and the war on drugs, but what I want to  
22 focus on today is the question of what seems  
23 to me to be inescapable bottom line of New  
24 York City regarding indigent defense, and  
25 that's the Giuliani administration's

155

1 Letwin  
2 indigent defense policies in the last four  
3 years which certainly continue, if anything,  
4 have accelerated over that period of time.

5 And I think that those policies need  
6 to be seen not only in regard to their  
7 impact on labor, and it is the staff  
8 attorneys at Legal Aid in New York that I  
9 represent, but that in turn can only be  
10 understood by the inseparable relationship

11 between labor and quality of representation  
12 for indigent defendants in New York City  
13 which has been true I think for the last 30  
14 years ever since our union was founded as  
15 the first major lawyers union in the United  
16 States.

17 And I think that that in turn is  
18 discussed most clearly and recently by the  
19 First Department oversight report. I don't  
20 know if you've heard testimony on that  
21 today, and I'm sure you are aware of that,  
22 and I do cite it in my written testimony.

23 But what I think is important about  
24 that First Department report, and it's the  
25 second report that the indigent oversight

156

1 Letwin  
2 committee has issued, is that it verifies  
3 the really tremendously negative impact that  
4 the administration's policies have had on  
5 indigent defense in New York City over the  
6 last four years and specifically talks about  
7 the cut in Legal Aid funding of  
8 approximately 40 percent in its City  
9 criminal funding, \$30 million over that  
10 period of time, while we have essentially  
11 had no decline in the number of cases we  
12 handle and certainly not the workload, we  
13 lost as a result of that cut approximately  
14 200 staff attorneys and probably 30 or 40  
15 supervising attorneys, both of which are  
16 pointed out to be a problem in the First  
17 Department report, a very severe problem in  
18 terms of our ability to provide quality  
19 representation to indigent defendants.

20 The flip side of the policy has been  
21 the establishment of what are referred to  
22 officially as alternate defenders, nonunion,  
23 what we regard as runaway shops, seven of  
24 them in New York City, which have gotten the  
25 bulk of that funding that was cut from Legal

157

1 Letwin  
2 Aid and which not only thereby harm Legal  
3 Aid funding in terms of the deprivation of  
4 funds that we need, but also have  
5 increasingly surrendered or been willing to  
6 surrender such essential principles that  
7 Legal Aid and certainly the union has fought  
8 for for 30 years, such as continuity of

9 representation.

10 And if you look for example at the  
11 bids that were submitted by all of the,  
12 certainly the trial level runaway shops,  
13 what you see is that all of them to varying  
14 degrees make clear their willingness to  
15 surrender and/or abandon to some degree or  
16 another continuity of representation.

17 The reason I focus on continuity of  
18 representation so strongly is that there  
19 really is nothing that is as strong a symbol  
20 of quality representation, not only I think  
21 for the union, but has been universally  
22 recognized in all of the indigent defense  
23 standards now, and I cite those in my  
24 testimony, as being reflective of quality  
25 representation.

158

1 Letwin

2 Most major defenders in different  
3 cities do not have continuity of  
4 representation. That is, they assign  
5 different attorneys from their office at  
6 different stages of the case, for example,  
7 in Los Angeles, where they have defenders  
8 who appear on preliminary hearings and then  
9 they assign to someone else going further.

10 What's unique in the history of New  
11 York City indigent defense, at least as far  
12 as the Legal Aid Society and the union is  
13 concerned, is the union was able in the '70s  
14 to win continuity of representation,  
15 particularly in regard to felony cases, so  
16 that you have the same lawyer picking up the  
17 case at the beginning, and handling it all  
18 the way through.

19 The city has always been opposed to  
20 that, the courts have always been opposed to  
21 that because it gunks up the wheels of the  
22 criminal justice system in their view and  
23 they want a system that moves nicely like an  
24 assembly line where everybody is pled out  
25 early on, and where lawyers essentially are

159

1 Letwin

2 fungible and if you have one or another  
3 lawyer it really doesn't matter who it is  
4 that's on the case.

5 Similarly, they believe it slows down  
6 arraignment statistics, which again is very

7 much the body count by which the system  
8 measures productivity, whether it's judges  
9 or defendants or anyone else.

10 And so I think it's particularly  
11 relevant at this point, 30 years after the  
12 union was founded and about 25 years after  
13 continuity was achieved at least at Legal  
14 Aid in New York City to now note that Legal  
15 Aid, as the report notes, that Legal Aid is  
16 unable to maintain that level of continuity  
17 because of the cuts in funding that we've  
18 experienced.

19 And I would go further and say the  
20 willingness of the runaway defenders to  
21 surrender that in order to get the contracts  
22 and in order to keep the contracts puts  
23 further pressure on anyone's ability in the  
24 system to maintain continuity of  
25 representation.

160

1 Letwin

2 I'm being blunt, finally, today,  
3 because I think it's important that the  
4 current policies not be allowed to be  
5 legitimized over time. Everyone is afraid,  
6 at least in New York City, to take on the  
7 mayor. You don't do that. And our strikes  
8 certainly and the mayor's crushing of our  
9 strike was a policy that was consciously  
10 designed to emphasize that point that you  
11 simply do not oppose what Rudolph Giuliani  
12 wants.

13 But I think that when Rudolph  
14 Giuliani is gone, if not before, we do have  
15 a suit on behalf of our union and 1199 as  
16 the society against administration policies,  
17 but assuming even in the long run the only  
18 time these policies are reexamined in a  
19 serious way is when the mayor is no longer  
20 in office if nothing else by virtue of term  
21 limits, at least in the next couple of  
22 years, that we don't accept as given the  
23 premises that have existed over the last  
24 four years now and will have existed six  
25 years by the time we perhaps do reexamine

161

1 Letwin

2 them, that they are not allowed to be  
3 legitimized and that despite the various  
4 considerable risk which I'm painfully aware

5 of in opposing any position the mayor takes,  
6 that, nonetheless, that there be a blunt and  
7 direct criticism of those policies, and I  
8 think the First Department reports are a  
9 very important step in that direction.

10 MR. GRADESS: Questions?

11 MS. LORAND: Yes.

12 MS. BARR: On the contracts that the  
13 city let for the legal services, were those  
14 requests for proposals, or were they  
15 contracts with specifications written in  
16 that the different legal societies bid on?

17 THE WITNESS: They were both, and  
18 they were requests for proposals that had  
19 certain criteria. It's interesting to note  
20 that continuity of representation is not one  
21 of those criteria. And that's why if you  
22 read any of the bids that were submitted  
23 either successful or unsuccessful bidders  
24 all the way from the Bronx Defenders to  
25 Manhattan group to any of them, they to

162

1 Letwin

2 varying degrees stress they are not going to  
3 be flexible on this issue.

4 MS. BARR: Do they run for a specific  
5 period of time, or is there oversight and  
6 audit within the period of time the contract  
7 runs?

8 THE WITNESS: They are two-year  
9 contracts which is in some cases --

10 MS. BARR: Do they have a renewable  
11 clause in them?

12 THE WITNESS: They do have a  
13 renewable clause. I believe it's up to six  
14 years. This is nothing to stop continual  
15 renewal beyond that. We've gotten a  
16 considerable amount of discovery in the  
17 lawsuits, that's when we first saw the bids  
18 and a number of documents that address this  
19 issue, and in that there is certainly a  
20 tremendous amount of financial material  
21 which the groups are required to submit to  
22 the City on a regular basis.

23 I don't have any information to the  
24 effect that, my objection to the contractors  
25 is not that they are corrupt in some

163

1 Letwin

2 traditional sense. I'm not accusing them of

3 that. I think the issue is much more  
4 fundamental than that in terms of the  
5 philosophy of indigent defense. And,  
6 clearly, the bidders all understood that in  
7 order to get the contracts, if they had to  
8 show their flexibility with things that the  
9 administration regards the union as being  
10 inflexible about, like continuity of  
11 representation.

12 MS. BARR: I presume there were  
13 negotiating meetings with all the  
14 different --

15 THE WITNESS: Yes. Private meetings.

16 MR. PITTARI: I'd like to just go  
17 into one area briefly, and it doesn't  
18 concern the other offices and the Legal Aid  
19 Society, because I know some of the feelings  
20 and intentions there.

21 You made reference to the fact that  
22 you thought the courts were opposed to  
23 continuity of representation, and also that  
24 you talked about a body count as a measure  
25 of productivity. I guess that part of what

164

1 Letwin  
2 you may be referring to also has to go to  
3 OCA standards, that cases must be tried  
4 within a certain time and all of that. Now,  
5 these standards are not part of the law.  
6 This is just an administrative promulgation  
7 by the Office of Court Administration.

8 I wonder if you could address that  
9 type of thing a little more in terms of the  
10 pressure it puts upon the Society's lawyers  
11 in representing people, pressure both  
12 because of the standard or pressure by the  
13 trial court judges in terms of switching  
14 attorneys, moving cases faster, doing more  
15 plea bargaining, et cetera.

16 THE WITNESS: I guess it's important  
17 as I think about how to answer that to  
18 distinguish between different points in the  
19 intake of a case. I think that the body  
20 count approach clearly permeates the  
21 criminal and Supreme courts in New York City  
22 as I think it does throughout the United  
23 States and probably beyond, but certainly in  
24 the United States, where crime is both a  
25 political football and a whole industry, a

165



1 Letwin  
2 aren't interested in a thorough interview.  
3 We are not interested in doing thorough bail  
4 preparation or whatever; we are interested  
5 in the shortest possible time being spent on  
6 a client, and if you don't do it that way,  
7 we will give the cases to someone who does  
8 it that way.

9 And one of the problems, whether it's  
10 18-b's who then perform that role, or the  
11 runaway defenders, is that they tend to be  
12 much more willing to play that role because  
13 they know they are getting the contracts and  
14 keeping the contract based on that kind of  
15 approach to the work, and that puts pressure  
16 on us in order to keep the funding to the  
17 extent we have the funding left, to compete  
18 in that way.

19 It's a pressure that I think it's  
20 very important that we resist, but  
21 nonetheless that's what the administration  
22 is able to do with this kind of competition.  
23 And when they talk about competition that's  
24 in my mind what they are really saying:  
25 Let's set up a situation where it's a race

1 Letwin  
2 to the bottom, fastest assembly line  
3 possible, and whoever really does that job  
4 will be the ones who get the funding.

5 It does go on clearly in other stages  
6 of the process. You mentioned the OCA rules  
7 in regard to judges' productivity. And even  
8 though that isn't perhaps enforceable by  
9 statute, nonetheless it plays a very big  
10 role in the administration of the courts. I  
11 think that's universally recognized that a  
12 judge will be evaluated and assigned by the  
13 administrative judge depending on that.

14 MR. PITTARI: Thank you.

15 MR. GRADESS: I don't know if I'm  
16 listening with too keen an ear here, but it  
17 seems like when you presented the issue of  
18 the willingness to give away continuity, you  
19 referred specifically to the bid process.

20 Is it also your charge that the  
21 alternative providers have given away  
22 continuity, or do they simply express it in  
23 a bidding document?

24 THE WITNESS: I know the most about

25 the Bronx bid because, or the Bronx groups,

169

1 Letwin  
2 because they expressly said, we are going  
3 to, they didn't say the words, we are giving  
4 up continuity, but they established what in  
5 my view is an arraignment bureau, and that's  
6 something the courts have always wanted, and  
7 the city has always wanted, which the idea  
8 is you don't have the same lawyer arraigning  
9 the defendant to begin with and then  
10 handling the case later on.

11 And that particular break, the break  
12 between arraignments and thereafter, is  
13 something the city has continually, 25 or 30  
14 years, has pushed for. For example, in  
15 1991, when we were in the midst of contract  
16 negotiations, we were told by the  
17 then-deputy mayor for criminal justice that  
18 if we agreed to an arraignment bureau, we  
19 the union, that they would give us greater  
20 funding for raises.

21 The same issue is brought up, and you  
22 will see it cited in the testimony I gave  
23 you, in a heretofore secret internal  
24 memorandum that was written right at the  
25 time of the '94 strike by Marty Murphy, who

170

1 Letwin  
2 was then in the criminal justice  
3 coordinator's office, which lays out  
4 arraignment bureau or end continuity at that  
5 point, no continuity between arraignments  
6 and thereafter as being a central goal of  
7 the administration in regard to breaking the  
8 strike and then continuing on, and the text  
9 of that memorandum is contained in the  
10 testimony.

11 So I do know the Bronx group for  
12 example specifically set up an arraignment  
13 bureau, that is they've broken the  
14 continuity between arraignments and  
15 thereafter, and I know that the other  
16 bidders expressly said to varying degrees  
17 that they would be more flexible in doing  
18 that.

19 I don't know specifically how that is  
20 played out. I do hear more for example in  
21 Manhattan about the notion that the  
22 Manhattan contractor in particular has a

23 reputation for, well, in the First  
24 Department report they basically say the  
25 judges regard it as sort of a plea mill,

171

1 Letwin  
2 that it's, they don't use, plea mill, it's  
3 plea something else, but essentially that's  
4 the term.  
5 And I found that striking, because if  
6 judges who after all want us to be a plea  
7 mill or accusing defense lawyers of being  
8 too much of plea mill, I think that says  
9 something. And the notion has been that,  
10 because they have a fixed number of  
11 arraignments to complete, that there is a  
12 very strong incentive for them to get them  
13 done as quickly as possible and then be done  
14 with it.

15 MR. GRADESS: Can you tell us if you  
16 know for the record what the average Legal  
17 Aid caseload was in 1994?

18 THE WITNESS: No, I don't know what  
19 the numbers are. I think the Society  
20 certainly can provide you with those  
21 statistics. I guess what I would want to  
22 stress about that is it's not simply a  
23 question of caseload, although that's very  
24 much.

25 It's obviously a question of the mix

172

1 Letwin  
2 of cases, felonies and misdemeanors, and  
3 perhaps even more importantly it's a  
4 question of institutional assignments, by  
5 which I mean arraignments, the number of  
6 times a given attorney is assigned to handle  
7 a shift such as an arraignment shift, which  
8 is in Manhattan called catch, where you have  
9 an attorney who stays in a particular  
10 courtroom handling cases that other people  
11 are not able to get to from your office and  
12 as a courtesy to the court the Society  
13 provides that.

14 And the reason that's so important,  
15 both of those things, is because it eats up  
16 tremendous amounts of time where you have to  
17 be in court, say, for an arraignment shift,  
18 which will then generate two or three,  
19 perhaps, 180-80 days, depending on when your  
20 various defendants you've picked up were

21 arrested, which you then have to spend  
22 tremendous amounts of time in the part  
23 waiting to see whether that person is going  
24 to be testifying or be indicted or released.  
25 So the more that you have of those

173

1 Letwin  
2 kinds of shifts, the less you can do clearly  
3 on your work because you can't prepare cases  
4 and trials and so forth if you are handling  
5 those kinds of institutional assignments.  
6 So I think, if anything, there needs  
7 to be a standard that takes both of those  
8 things, caseload and institutional  
9 assignments, into account in examining the  
10 amount of work. I think the New York Law  
11 Journal and others in the First Department  
12 report have found that our workload has not  
13 declined even though we have lost this huge  
14 amount of money and staff.  
15 MR. GRADESS: Is there any effort to  
16 unionize the alternative providers?  
17 THE WITNESS: We have said that we  
18 are willing to unionize the alternative  
19 providers. I think the problem there is  
20 first that it's hard to unionize in a  
21 situation where, A, the very creation of  
22 those groups is based on breaking a strike  
23 and undermining a union.  
24 The message clearly intended to go  
25 out and that does go out, is that being in a

174

1 Letwin  
2 union and exercising your union rights is  
3 not a real smart thing to do, because, if  
4 you do that, we will crush you.  
5 Number one, that's the stick, if you  
6 will, that has been very clearly impressed  
7 upon anyone in New York City indigent  
8 defense over the last four years is that you  
9 simply don't act that way if you want to  
10 stay healthy. The flip side is the carrot,  
11 because these groups have been specifically  
12 intentionally funded to lure people from  
13 Legal Aid, you will note, I don't know what  
14 the number is, but the overwhelming  
15 majority, both managers and staff at these  
16 groups, are former Legal Aid attorneys, they  
17 have been funded to get these Legal Aid  
18 attorneys have been funded to pay higher

19 salaries than Legal Aid has been funded to  
20 pay, and this is particularly ironic given  
21 that the 1994 strike was at least in large  
22 part over the City's refusal to allow Legal  
23 Aid to settle our contract on the issue of  
24 compensation without even asking the city  
25 for more money to do it.

175

1 Letwin

2 Notwithstanding the fact that this  
3 was a central issue in 1994, and that the  
4 city then broke our strike on that basis, it  
5 has nonetheless then gone on to give these  
6 groups far higher salaries than what we are  
7 funded to pay. And so between that stick  
8 and that carrot, it makes it very difficult  
9 at this point at least to unionize the  
10 runaway shops. And that is of course the  
11 purpose of a runaway shop is to make it  
12 harder to be union.

13 I think, in the long run, if these  
14 groups continue, that remains to be seen,  
15 because it's one thing to establish and fund  
16 groups at a higher level with a lower  
17 caseload, as the First Department report  
18 discusses in great detail, in the short term  
19 to accomplish a particular goal undermining  
20 Legal Aid and the union, but over the  
21 long-term, it's unclear to me that this city  
22 will be willing to fund at that high of a  
23 level and with that low of a caseload over  
24 the long-term, just as -- there are plenty  
25 of analogies to labor generally where that

176

1 Letwin

2 happens for a brief period of time where  
3 strikebreakers are paid a greater amount to  
4 come in while they are needed to come in,  
5 but then that rate decreases to the degree  
6 to which the union is weakened, and I think  
7 that will probably be true here if in fact  
8 that unfolds.

9 MR. GRADESS: My last question. The  
10 relationship, earlier this year in May, I  
11 received a fax communication that refers to  
12 the Manhattan Institute and its relationship  
13 to this. Could you for the record state  
14 what your sense of that is.

15 THE WITNESS: I think there is some  
16 discussion of this in materials, the

17 attachments, at least, that I gave you, but,  
18 in a nutshell, the Manhattan Institute is  
19 sort of generally turned a neoconservative  
20 think tank in New York City, which has a  
21 certain amount of credibility among powers  
22 that be, and in particular is seen to be the  
23 think tank behind the Giuliani  
24 administration not only in regard to  
25 indigent defense, but in many, many areas:

177

1 Letwin  
2 Privatization, generally, a tax on social  
3 services for poor people, generally, and it  
4 is, it has an intellectual kind of patina  
5 and respectability about it. It issues a  
6 journal called the City Journal. I could be  
7 wrong about that.

8 And the importance of it in this  
9 context is fairly striking, in that just  
10 days before the first RFP was issued in the  
11 fall of '95 by the Giuliani administration,  
12 the Manhattan Institute journal put out a  
13 major article in which was a call for  
14 undermining the Legal Aid Society in general  
15 and the union in particular not simply  
16 because of the strike or anything like that  
17 but more generally because it is seen or  
18 they see the Legal Aid Society as being too  
19 ardent a supporter of poor people.

20 So they criticize not only more  
21 cooperative labor relations at Legal Aid  
22 we've had since the 1994 strike under the  
23 reform-oriented administration of Danny  
24 Greenberg, but they are particularly hostile  
25 towards the union's role in empowering

178

1 Letwin  
2 attorneys at Legal Aid, and I think even  
3 more upset and angry about lawsuits brought  
4 by the Legal Aid Society on a class action  
5 basis around things like homelessness,  
6 prisoners' rights, and so forth, and  
7 juvenile rights, and it very graphically and  
8 expressly and unashamedly lays out the idea  
9 that this needs all to be rolled back,  
10 especially the latter, that Legal Aid needs  
11 to be weakened so it can no longer be such a  
12 thorn in the side to the City administration  
13 in regard to whether it's indigent defense  
14 or poor people generally.

15           Then it goes on to say the way to  
16 handle this is to issue RFPs that break up  
17 Society's work and defund it and essentially  
18 create groups that don't have the ability or  
19 power because of their smaller size and  
20 their limited contracts and so forth and the  
21 fact they were created really for the  
22 specific purpose of undermining the Society,  
23 that that's the way in which you best  
24 undermine Legal Aid.

25           The day after that article came out,

179

1                           O'Boyle  
2           there was a summary of it in the Post, and I  
3           forget which columnist, a conservative  
4           columnist who was also advocating and  
5           popularizing this approach, and then of  
6           course several days later the RFPs  
7           themselves came out, so I think it's not a  
8           big jump to conclude that given the  
9           administration's generally acknowledged very  
10          close relationship with the Manhattan  
11          Institute, and with Rudy Giuliani in  
12          particular, but the administration as a  
13          whole and the proximity in time and  
14          proximity in the concept to what was  
15          implemented in relation to what the  
16          Manhattan Institute advocated it seems to me  
17          quite clear that the Manhattan Institute  
18          therefore had a very major role in  
19          encouraging this and in designing this whole  
20          program.

21           MR. GRADESS: Thank you.

22           Kathleen O'Boyle.

23           THE WITNESS: I'm with the Center for  
24          Community Alternatives. I want to thank the  
25          New York State Defenders Office and the

180

1                           O'Boyle  
2           League of Women Voters for the opportunity  
3           to speak today. I'd like to talk about the  
4           role that sentencing advocacy and including  
5           sentencing alternatives plays in public  
6           defense.  
7           As we all know, sentencing advocacy,  
8           including support for the use of alternative  
9           to incarceration programs is a vitally  
10          important part of a defense attorney's job,  
11          given the reality that two-thirds of all New  
12          York felony arrests end in conviction. Of

13 those, 85 percent come as a result of a plea  
14 bargain. Defense attorneys can and do play  
15 an important gatekeeping function by  
16 ushering clients who are at risk of  
17 incarceration into community corrections  
18 programs and by ensuring that alternatives  
19 to incarceration are reserved for those  
20 defendants who would otherwise be  
21 incarcerated.

22 Despite an increase in sentencing  
23 options, including intensive probation  
24 supervision, electronic monitoring,  
25 community services drug treatment, these

181

1 O'Boyle  
2 programs are often used as supplements to  
3 traditional probation or conditional  
4 discharge instead of as a true alternative  
5 to incarceration. Rather than reducing the  
6 use of incarceration, they end up expanding  
7 the net of social control.

8 Defense attorneys help make sure that  
9 clients who are at high risk of jail or  
10 prison sentence gain access to these scarce  
11 alternative to incarceration resources.  
12 Sentencing advocacy is not only the right  
13 thing to do, but is also a defense  
14 attorney's professional responsibility.

15 A body of research and policy studies  
16 strongly endorses the greater use of  
17 alternatives to incarceration. The 1992 ABA  
18 criminal justice section study, the use of  
19 incarceration in the United States,  
20 sentencing alternatives and procedures and  
21 appellate review of sentences, which  
22 included a range of standards intended to  
23 promote wider use of alternatives or  
24 intermediate sanctions recommended the  
25 greater use of alternatives, as did the

182

1 O'Boyle  
2 December 1996 report of the Unified Court  
3 System's committee on alternative criminal  
4 sanctions, a statewide committee appointed  
5 by Chief Judge Judith Kaye, chaired by Judge  
6 Fritz Alexander.

7 Interest in alternatives is also  
8 spurred by evidence of their effectiveness,  
9 especially when compared with the cost of  
10 jail or prison and post-incarceration

11 recidivism rates. It costs roughly \$30,000  
12 a year to incarcerate someone in state  
13 prison, \$54,000 a year per inmate at Rikers  
14 Island, and \$90,000 a year per youth in a  
15 Division for Youth facility.

16 Even the most expensive alternative  
17 to incarceration, residential drug treatment  
18 at 17 to \$18,000 a year is less expensive.  
19 Most other community-based alternatives cost  
20 far less, \$7,000 to \$8,000 per year per  
21 client. Recidivism rates for people  
22 released from jails and prisons also show  
23 taxpayers are not getting much bang for  
24 their bucks in prison construction.

25 The Unified Court Systems committee

183

1 O'Boyle  
2 on alternative criminal sanctions notes that  
3 42 percent of inmates released from state  
4 prison in 1991 were returned to prison  
5 within three years. The recidivism rate for  
6 juveniles released from Division for Youth  
7 facilities is even worse, 76 percent.

8 Evaluation data from selected  
9 alternative to incarceration programs  
10 suggests that ATIs do far better at much  
11 less cost. The Drug Treatment Alternatives  
12 to Prison program, TASK, run by the Kings  
13 County district attorney's office, reflects  
14 that only 15 percent of program participants  
15 have been rearrested, and the Center for  
16 Community Alternatives, who I represent, our  
17 program data shows less than 15 percent  
18 rearrest rate among all clients, both adult  
19 and youth, that we serve.

20 There is also growing indication that  
21 the public and judiciary would welcome more  
22 alternatives to incarceration. Opinion  
23 polls show the public will support  
24 alternatives to incarceration when informed  
25 these programs include education, job

184

1 O'Boyle  
2 training, drug treatment and supervision.  
3 The survey of judges undertaken by  
4 the Alexander committee shows the judges are  
5 interested in using alternatives to  
6 incarceration. 92 percent said they would  
7 use additional residential substance abuse  
8 treatment services if these they were

9 available, and 81 percent said they would  
10 use additional outpatient services.

11 The committee found the key barriers  
12 to greater judicial use of ATI programs to  
13 be lack of information about these programs  
14 and limited availability of these programs.

15 In the absence of a criminal justice  
16 policy and in an economic and political  
17 climate that does not place sentencing  
18 alternatives as the foundation of  
19 sentencing, defense attorneys have to take  
20 up the struggle for justice on a  
21 case-by-case basis on behalf of individual  
22 clients.

23 The two key ingredients of successful  
24 sentencing advocacy are mitigation and  
25 sentencing planning. Mitigation involves

185

1 O'Boyle  
2 providing the judge and prosecutor with the  
3 information concerning the circumstances of  
4 the offense and background of the offender  
5 in a way that reveals the humanity of the  
6 defendant. Sentencing planning gives the  
7 judge specific sentencing options that  
8 encompass rehabilitation and sanctions.

9 Besides working through the  
10 pre-sentence report process, defense  
11 attorneys can affect sentencing through a  
12 defendant's sentencing memorandum that can  
13 be prepared either by defense counsel or by  
14 a sentencing advocate, also known as a  
15 defender-based advocate.

16 Sentencing advocates are experts in  
17 sentencing procedures and options and are  
18 trained to present arguments and information  
19 and specific sentencing options relevant to  
20 the individual case.

21 Sentencing advocacy is useful even  
22 when the defendant will undoubtedly receive  
23 a prison or jail sentence. New York State,  
24 for example, presently has several  
25 correctional options, including the Willard

186

1 O'Boyle  
2 sentence, substance abuse treatment program  
3 available but little used for limited groups  
4 of predicate offenders as well as parole  
5 violators, boot camp or shock incarceration  
6 and in-prison drug treatment programs.

7 Providing background and mitigating  
8 information to the court, along with a  
9 description of specific prison programs and  
10 information regarding sentence structure  
11 that would allow the defendant to be  
12 eligible for the program and could help  
13 prepare the defendant and the family for the  
14 sentencing process and its possible  
15 outcomes.

16 And Particularly with public defense,  
17 with high caseloads, and often understaffing  
18 and lack of resources, many sentencing  
19 alternative programs can help free the  
20 attorney up to focus on the legal work by  
21 helping to prepare important background  
22 information, psychosocials, and to help  
23 identify necessary resources.

24 The other way I think that we can  
25 make judges more aware of ATI and to make

187

1 O'Boyle  
2 them more readily accessible to all public  
3 defenders is through creating policy and  
4 educating public defenders about ATIs, how  
5 to access them, how to use them, who they  
6 are and where they are.

7 Defense attorneys can and should play  
8 an organized role in promoting wider use to  
9 alternatives to incarceration and help  
10 effect changes in state law that would place  
11 alternatives at the center rather than at  
12 the fringe of criminal justice policy.

13 The ABA report on the use of  
14 incarceration in the United States offered  
15 several specific steps that the local and  
16 state bar should take to promote greater use  
17 of alternatives to incarceration, including  
18 establishing a corrections and sentencing  
19 committee to promote legislative reforms,  
20 collaboration with organizations that share  
21 an interest in a balanced and rational  
22 sentencing policy.

23 On the state level these  
24 organizations include the New York State  
25 Defenders Association as well as the Center

188

1 O'Boyle  
2 for Community Alternatives, the Osborne  
3 Association, the Correctional Association,  
4 Women's Prison Association, the Center for

5 Employment and Sentencing Alternatives,  
6 Fortune Society, and the Legal Action  
7 Center.

8 A number of these programs  
9 unfortunately were not refunded by the city  
10 two years ago, and then fortunately received  
11 money from the city counsel, but, because of  
12 the unnegotiated budget this year, have not  
13 been receiving the city funds that have been  
14 slated for them, and it's unsure at this  
15 point whether or not those funds will remain  
16 in the budget when the court decides or  
17 whether or not that funding will be cut once  
18 again.

19 Interestingly enough, the ones that  
20 were cut, the Center for Community  
21 Alternatives, Fortune Society, Women's  
22 Prison Association, Osborne, were  
23 defender-based ATIs, and for those of you  
24 who are not aware, the city-funded ATI  
25 programs are now accessible only through a

189

1 O'Boyle  
2 centralized court screening service. We no  
3 longer have our own sentencing advocates and  
4 are no longer directly accessible by defense  
5 attorneys.

6 The centralized court screening  
7 service that was instituted by the  
8 coordinator for criminal justice office  
9 paper screens and interviews clients and  
10 sends them to the city-funded alternative to  
11 incarceration programs. We're not allowed  
12 to accept clients any other way.

13 Still, I would urge defense attorneys  
14 to become aware of the systems so that they  
15 can reach out for the centralized court  
16 screening service to request interviews for  
17 clients that were overlooked in the paper  
18 screening or who may not look to the  
19 centralized court screening service like a  
20 good candidate for an alternative to  
21 incarceration program, and also to try and  
22 lobby for increased advocacy on the part of  
23 the individual alternative to incarceration  
24 programs, because this is what the judges  
25 are telling us that they want.

190

1 O'Boyle  
2 The challenge before us is to break

3 through the ideological barriers that equate  
4 the harsh punishment of prison and jail with  
5 achieving public safety and justice. Fox  
6 Butterfield in his wonderful book All God's  
7 Children reminds us of the choices we would  
8 make if the young men and women to fill our  
9 jails and prisons were truly considered our  
10 children. For our children we would  
11 certainly choose teachers, not prison  
12 guards; job training and good schools, not  
13 idle time.

14 Defense attorneys as professionals,  
15 as members of the bar and defender  
16 organizations and as citizens have much to  
17 contribute to the effort to create a  
18 rational and humane criminal justice system.

19 Thank you.

20 MS. LORAND: You mentioned that one  
21 of the reasons that ATC is not used as much  
22 as it could be is the judges' lack  
23 information.

24 Do you have any idea on how this  
25 could be better communicated to the judges

191

1 O'Boyle  
2 so they could make better use of it?  
3 THE WITNESS: Well, when we were  
4 doing our own sentencing advocacy, we had an  
5 interest and an obligation to reach out to  
6 the judges, which we did, both individually,  
7 on a weekly basis, we tried to visit judges  
8 in all the boroughs. We held luncheons to  
9 educate the judges and the defense bar, and  
10 even prosecutor offices as to what services  
11 were being offered.

12 But now that we now longer do our own  
13 sentencing advocacy, we really can't do  
14 that, because we cannot accept referrals  
15 from the court, and I think that judges are  
16 very confused by the new system, and I don't  
17 believe that they are getting the outreach  
18 that they were, and I think that they are  
19 also a little bit nervous about the  
20 introduction of this other level into the  
21 judges' access to the people who are  
22 actually supervising the people that they  
23 release.

24 So the education effort was something  
25 that was ongoing, but I think it's been a

192

O'Boyle

1 bit stymied because of the new system.

2 MS. BARR: You mentioned that there  
3 aren't really enough facilities to take care  
4 of the people who could be released into an  
5 alternative program.  
6

7 Do you have any idea just, say on  
8 drug treatment facilities, what the backlog  
9 is and what would be needed to open it up to  
10 as many people as could possibly use it?

11 THE WITNESS: I don't have those  
12 exact statistics, in terms of drug  
13 treatment, any kind of drug treatment,  
14 residential and outpatient. I was  
15 addressing, certainly we know that there is  
16 a great need for drug treatment services in  
17 this city, and I'm not sure, again, I don't  
18 want to give you the wrong information, but  
19 nowhere near the number of people who even  
20 want these services, even people who are not  
21 in the criminal justice system have access  
22 to them.

23 However, with the, I think there is  
24 another problem with alternative to  
25 incarceration drug treatment programs and

193

O'Boyle

1 other alternative to incarceration programs  
2 and that is when the city set standards,  
3 that we maintained the standards, that these  
4 programs are for serious felony offenders so  
5 they remain a true alternative to jail, and  
6 not an extension of the social net, as I  
7 mentioned before.  
8

9 If these services are used for people  
10 with misdemeanors, who are people who would  
11 be getting probation anyway, then the slots  
12 would not be available for people who would  
13 use these services to remain out of prison.

14 MR. PITTARI: Just a question on  
15 mechanics, because I'm not sure I understand  
16 something.

17 Let's say I am an 18-b attorney. I'm  
18 an assigned attorney. I have a client who I  
19 think would be appropriate for your  
20 organization.

21 Are you saying I can't go directly to  
22 you?

23 THE WITNESS: That's correct.

24 MR. PITTARI: I have to go --

25 THE WITNESS: You have to go through

O'Boyle

1 the centralized court screening service.  
2 The two years ago, when the RFP came out for  
3 alternative to incarceration programs, the  
4 court advocacy, intake and referral court  
5 advocacy functions were taken away from the  
6 service providers. Those slots were taken  
7 away, the money was taken away, and another  
8 RFP was put out specifically for this  
9 function, and the criminal justice agency  
10 won that proposal, won that grant, and so  
11 they operate the strategized court screening  
12 service, and they are the intake referral  
13 screeners and court advocates for all of the  
14 individuals released into city-funded ATIs.

15 MR. PITTARI: Does your organization  
16 also serve a private clientele?

17 THE WITNESS: One of our programs  
18 does, and that's not funded by the city.

19 MR. PITTARI: If I were a retained  
20 attorney on a case, I would directly --

21 THE WITNESS: A client-specific  
22 planning program is available to, is funded  
23 by New York State as a demonstration  
24 project, and we can accept clients for  
25

O'Boyle

1 client-specific plans.

2 MR. PITTARI: So I could make the  
3 direct referral if I were in an  
4 institutional defenders office or a retained  
5 attorney, but not if I was an 18-b attorney?

6 THE WITNESS: For that particular  
7 program, you could, and that particular  
8 program does not provide direct services to  
9 the client, direct rehabilitative service.  
10 The client-specific planning project  
11 prepares what you would call a private  
12 presentence report, with options identifying  
13 other services.  
14

15 If you wanted one of your clients to  
16 be in our Crossroad alternative to  
17 incarceration program for women substance  
18 abusers, you could not deal directly with  
19 us. If you had a juvenile offender who you  
20 wanted to be in our youth advocacy project,  
21 you could not deal directly with us.

22 MR. PITTARI: I'm still with the same  
23 18-b attorney. I've now gone through this  
24 screening process and you are allowed to

25 come into the case.

196

1 O'Boyle  
2 Is your participation limited to the  
3 voucher amounts that are set by statute,  
4 or --  
5 THE WITNESS: No. Once the  
6 alternative to incarceration program is  
7 funded by the city through the coordinator's  
8 office, we are free. We are funded to do  
9 that. This is no charge to the public  
10 defender's office. No charge to the client.  
11 The funding is provided for that reason.  
12 I think the difference would be is  
13 that if you had a client who was approved by  
14 the centralized court screening service to  
15 go into our day drug treatment program for  
16 women, previously, we would work with you.  
17 If a woman didn't show up, which substance  
18 abusers often do, they relapse, because we  
19 are a defender-based program, we reached out  
20 for defense counsel, we tried to get the  
21 woman back in before a crisis, we went to  
22 court when there was a problem, prepared  
23 with another alternative, perhaps we put her  
24 in a hospital to detox or whatever.  
25 Now we really can't do that, and, in

197

1 O'Boyle  
2 fact, we can't even go to court and advocate  
3 for the people that we're working with. So  
4 what you would get is someone who may have  
5 never met your client reading a record from  
6 us concerning attendance, and urine testing,  
7 but really someone who would be unable to  
8 advocate for a person on an individual  
9 basis, which is very important when there  
10 are problems, as there often are in drug  
11 treatment programs, so that the person in  
12 front of the judge would not be able to get  
13 up and say, yes, your Honor, she relapsed,  
14 but her mother died last week or whatever  
15 personal issues we think would mitigate the  
16 woman being remanded.  
17 MR. GRADESS: We need to close down  
18 for a few-minute luncheon, but I just want  
19 to ask you a question to clarify this last  
20 point. Let me posit a hypothetical. I am a  
21 defense lawyer. I represent an indigent  
22 client. I am before a judge who I've

23 appeared before on many occasions. I have  
24 previously used your services, and I now  
25 believe it is my ethical duty to approach

198

1 O'Boyle  
2 the Center for Community Alternatives for  
3 one of its city programs.  
4 The court encourages me to do it, so  
5 I do it. I ask you to come in, and you come  
6 in. What will happen to you?  
7 THE WITNESS: I'm not sure. I'm not  
8 sure I would want to find out.  
9 MR. GRADESS: What have you been told  
10 would happen to you or what do you think  
11 would happen to you?  
12 THE WITNESS: No one said what would  
13 happen if we did that. It's just that we  
14 would be in violation of our contract, so,  
15 theoretically, we could lose our funding.  
16 I'm not sure that someone would do that for  
17 one occasion like that, but it certainly  
18 would be a violation of the contract.  
19 We are not funded to provide that  
20 service, and we are not funded to accept any  
21 clients other than those who come to us from  
22 the centralized screening service. I think  
23 the way we've been getting around that is we  
24 do have attorneys who've worked with us for  
25 years, and now that the centralized court

199

1 O'Boyle  
2 screening service has been in operation, we  
3 certainly do have a relationship with the  
4 court representatives and with the  
5 administrators there, and what we've been  
6 trying to do is defense attorneys who come  
7 to us, we refer them to the centralized  
8 court screening service and keep track of  
9 the case.  
10 We may make a phone call, say, if a  
11 lawyer wants to talk to you, he has a client  
12 that would be good for Crossroads, so we  
13 kind of backtrack, and that has been done.  
14 Also, judges have asked the  
15 centralized court screening service in  
16 court, maybe at the attorney's request, is  
17 this kid eligible for youth advocacy  
18 project, see what you can do.  
19 MR. GRADESS: Am I wrong, the  
20 centralized screening service actually has a

21 contractually based criteria for its  
22 screening?  
23 THE WITNESS: Yes.  
24 MR. GRADESS: Which could exclude  
25 easily a client that your judge would like

200

1 O'Boyle  
2 to have treated by your service.  
3 THE WITNESS: That's right.  
4 MR. GRADESS: And so if you were to  
5 send that client to the screening service,  
6 they would of necessity reject that client?  
7 THE WITNESS: That's correct.  
8 MR. GRADESS: So that the actual  
9 contract with your agency and this new setup  
10 requires an administrative executive branch  
11 agency to make decisions for the judiciary  
12 in that case?  
13 THE WITNESS: That's correct.  
14 MR. PITTARI: The court screening  
15 agency is not an arm of the judiciary, it's  
16 an arm of the executive?  
17 THE WITNESS: It's a private  
18 nonprofit organization that's funded through  
19 the coordinator for criminal justice office.  
20 I just want to add, the judges of course are  
21 free to use any other drug treatment program  
22 that's not contracted through the city.  
23 They can always send clients to Phoenix  
24 House. It's just the city-funded ATIs that  
25 have been restricted.

201

1 O'Boyle  
2 MR. GRADESS: In my hypothetical, it  
3 was the judge's choice and defendant's  
4 choice that you were the most appropriate,  
5 it would be prohibited. If they decided, if  
6 a judge and defense lawyer on behalf of a  
7 client decided you were the most appropriate  
8 service and the executive branch agency  
9 nixed it, you would be out of luck?  
10 THE WITNESS: Right. We are not  
11 allowed to take referrals any other way.  
12 MR. GRADESS: Just trying to be  
13 clear. Thank you very much.  
14 (Luncheon recess: 1:25 p.m.)  
15  
16  
17  
18



17 counsel for everyone charged with a crime.  
18 Consider the limitations placed on an  
19 attorney who tries to pursue his profession  
20 on 18-b rates. In 1991, seven years ago, it  
21 was estimated that an attorney with an  
22 office and one secretary required at least  
23 \$7,000 a month for overhead. Even if an  
24 attorney worked the maximum 35 hours in  
25 court each week at \$40 per hour, assuming no

204

1 Nathanson  
2 court holidays, and an additional 25 hours a  
3 week in the office at \$25 an hour, he could  
4 earn only \$7,100 per month, leaving precious  
5 little for personal expenses and no time for  
6 vacations, holidays, religious observance,  
7 continuing legal education courses, et  
8 cetera.

9 Consequently, many panel attorneys do  
10 not even maintain an office, much less a  
11 secretary or other support staff, have  
12 limited libraries, do not subscribe to an  
13 automated legal research service, do not  
14 subscribe to the Law Journal or other  
15 sources of information about legal  
16 developments.

17 Without an office, an attorney will  
18 do much of his interviewing of non-jailed  
19 clients, family members or witnesses in the  
20 courthouse corridors. Without support  
21 staff, an attorney cannot be easily reached  
22 by clients, family members, witnesses, other  
23 counsel, or the court. Without a library,  
24 automated legal research or legal  
25 publications, an attorney will not be

205

1 Nathanson  
2 knowledgeable about new laws, theories, or  
3 practical skills and will not be as able to  
4 present cogent and persuasive arguments to  
5 the court.

6 The result, an attorney whose  
7 practice is at a minimum less efficient than  
8 it should be, and, at worst, is below  
9 standards of effective representation.

10 The rates have other consequences.  
11 Most obviously, the low rates cause many  
12 attorneys to leave the panel, requiring the  
13 caseload to be divided among fewer  
14 attorneys. Since the attorneys who leave

15 are likely to come from the more experienced  
16 ranks, the fewer attorneys who carry more  
17 cases are the ones least able to cope with  
18 them.

19 The quality of representation  
20 inevitably suffers. The large caseloads  
21 that many panel attorneys carry mean that an  
22 attorney will inevitably miss court  
23 appearances due to conflicting obligations.  
24 When an attorney is unable to appear or  
25 appears late, the court is likely to respond

206

1 Nathanson  
2 by assigning a different attorney who  
3 happens to be in the courtroom.

4 This attorney, of course, will be  
5 unfamiliar with the case and will have to  
6 start all over again, so the final  
7 disposition of the case may well be delayed.  
8 Actually, that is the desirable result. The  
9 undesirable but common result is that the  
10 newly assigned attorney will dispose of the  
11 case regardless of his unfamiliarity with it  
12 and the client.

13 Alternatively, the judge may adjourn  
14 the case before the assigned attorney  
15 appears. When that happens, a court  
16 appearance has been wasted and frequently  
17 the chosen adjourned date conflicts with  
18 other obligations of the attorney, starting  
19 the cycle again.

20 Under either scenario, not only does  
21 the case contribute to the backlog, if a  
22 defendant is in jail additional costs are  
23 incurred for his housing and transportation.  
24 The divided rate structure has its own  
25 negative consequences. Since in-court time

207

1 Nathanson  
2 pays \$40 an hour, and out-of-court time \$25  
3 an hour for out-of-court work, a panel  
4 attorney may for that reason alone focus on  
5 in-court time work and neglect the time that  
6 he should be spending in the office or in  
7 library or in investigations.

8 An attorney is better paid for  
9 sitting in a courtroom waiting for a case to  
10 be tried, which can be as long as three  
11 hours, than for preparing a dispositive  
12 motion. This focuses the opposite of what

13 should be, since a defendant is almost  
14 always better served by an attorney who  
15 prepares.

16 I believe that indigent  
17 representation, at least that part of it  
18 handled by private attorneys, is best  
19 provided when many attorneys each represent  
20 some defendants. I do not think any  
21 attorney should depend on assigned counsel  
22 work for his livelihood, or even the greater  
23 part of his livelihood.

24 Assigned rates will never be high  
25 enough to enable an attorney to operate a

208

1 Nathanson  
2 fully professional office and also maintain  
3 a comfortable style of living. By the same  
4 token, I believe all qualified attorneys  
5 should do some assigned counsel work. In  
6 addition to satisfying a pro bono  
7 obligation, the involvement of a larger  
8 number of private practitioners will help  
9 prevent poor defendants from being ignored  
10 by those who make policy for the criminal  
11 justice system.

12 But this goal, many attorneys  
13 involved to varying degrees, but never  
14 exclusively, in indigent representation,  
15 will never be achieved until the rates bear  
16 some reasonable relationship to the rates  
17 paid in other areas.

18 In short, the current rates result in  
19 too few attorneys with too few resources  
20 providing representation to indigents  
21 charged with crime. Increasing them should  
22 be a major part of any reform of the public  
23 defense system.

24 I think I will finish with that.  
25 This is a little more in the prepared

209

1 Nathanson  
2 statement, but I don't think it will be  
3 necessary for me to read it, and simply  
4 thank you for doing this and letting me  
5 speak with you and state my availability if  
6 anyone has any questions.

7 MS. BARR: We've been hearing just  
8 about all day about the rate structure,  
9 which seems to be horrendous.

10 Do you have any concrete suggestion

11 on how we can make the state change the rate  
12 structure, what actions could conceivably be  
13 taken, either by my organization, by the  
14 legal profession, or by anybody else?

15 THE WITNESS: That's the hardest  
16 question. The criminal defender population  
17 is probably not the most popular lobbying  
18 group in the state. I suppose it's naive to  
19 say, appeal to the better instincts of the  
20 legislators, isn't it? In fact, I think one  
21 of the reasons it hasn't happened is that  
22 those groups that are interested in  
23 accomplishing that result have not focused  
24 their efforts, and have, have acted very  
25 sporadically.

210

1 Nathanson

2 Once a year, perhaps one year, they  
3 will spend a month or so, and then it gets  
4 on the back burner and so on, so nobody has  
5 really attempted to make a concerted effort  
6 to gather together the various groups that  
7 are interested and to concentrate and to  
8 have a continuing lobbying effort.

9 This, I would like to think, is the  
10 perhaps the beginning of a step in that  
11 direction. I think the responsibility lies  
12 to a large extent, with us, and when I say,  
13 us, I mean those of us who have been  
14 concerned and who may have some roles to  
15 play within the legal profession where we  
16 might make our voices heard.

17 We need to be enlisted. We need to  
18 be sending letters, we need to be  
19 communicating with newspapers, and we need  
20 to be doing it on a daily, weekly and  
21 monthly basis, not just on a once-a-year  
22 basis. Lobbying is not my area of  
23 expertise, but I am, the most optimistic  
24 thing I can think of is maybe if we only try  
25 more consistently, it would work.

211

1 Nathanson

2 If that doesn't work, then I suspect  
3 that the only thing that will make any  
4 changes is if the courts -- well, another,  
5 let me add another thought to this. I know  
6 a little bit, not a great deal, about what's  
7 happened in other jurisdictions in the  
8 country, and it seems to me the only time

9 that anything has actually been accomplished  
10 is when either a major bar association or  
11 the court system itself manages to create a  
12 commission, an officially approved  
13 commission of some sort to do a whole study  
14 of the entire system, and then to come out  
15 with a report.

16 That's a time-consuming kind of a  
17 thing, but it seems to be the only thing  
18 that actually works. A lot of time has gone  
19 by with nothing happening, so perhaps time  
20 is not the most important element here. I  
21 would not be happy to simply see a rate  
22 change, even assuming it could be done, but  
23 because I think there are many other  
24 problems.

25 I've talked about rates because when

212

1 Litman

2 I was an administrator, I thought that  
3 perhaps I got some insight into some of the  
4 effects that the problem in rates has that I  
5 might be in a position to share with you.

6 But I think there are other kinds of  
7 problems. There are questions about who  
8 should be funding the system in general,  
9 questions about the availability of support,  
10 backup support that I think needs to be  
11 available on a much broader basis and to  
12 many more attorneys instead of on an ad hoc  
13 basis as it is now.

14 There are questions about training  
15 that I think needs to be offered not just to  
16 organizational defenders, but also to  
17 private attorneys. There are lots of things  
18 that need to be done, so it seems to me that  
19 in order to accomplish those things that  
20 maybe a commission and a report and a  
21 recommendation might be useful.

22 MR. GRADESS: Thank you, Malvina.

23 Jack Litman.

24 THE WITNESS: Good afternoon. It's a  
25 pleasure to appear before you. I seem to

213

1 Litman

2 have lost my voice, only because, unlike the  
3 mayor, I really lost most of it in the right  
4 centerfield bleachers, and it was a lot of  
5 fun, too.

6 I'm just going to speak for a few

7 minutes to you, and I'm privileged to be  
8 here to talk to you just a little bit on  
9 sort of a narrow issue. I understand that  
10 you have many, many larger ones to deal  
11 with. I'm going to try to be brief, and I'd  
12 be happy to answer any questions you have on  
13 any of the issues that I do not address.  
14 All I'm going to address is how I prepare a  
15 case in my office, how many cases I deal  
16 with, and what basically do I do with them.  
17 I guess, when my caseload is heavy, I  
18 am handling approximately 40 to 60 cases a  
19 year. I do not see, really, how any  
20 criminal defense attorney worth her or his  
21 salt can do really much more than that, and  
22 really be totally effective. I know that  
23 many of us have to work under conditions  
24 which do not allow for that, but I really  
25 fail to see how one can be effective as I

214

1 Litman  
2 understand the Constitution requires us to  
3 be.  
4 It's not a subject for levity, but  
5 levity always helps a little. I will never  
6 forget a case I was sitting in the  
7 courtroom, and it was a large federal trial,  
8 and there was an important prosecution  
9 witness who was being cross-examined, and  
10 the question arose as to whether the  
11 prosecutor, as was his duty under the Jenks  
12 Act, had turned over certain documents to  
13 the defense for their use in  
14 cross-examination of this very critical  
15 witness.  
16 And when a certain issue about that  
17 arose, the three defense lawyers, who seemed  
18 to be prepared, said, we never got a copy of  
19 this. And the prosecution, of course, said,  
20 well, we mailed it to you. This was in the  
21 days before, when documents were turned  
22 over, they were memorialized either on the  
23 record or by letter.  
24 And the judge didn't know how to  
25 resolve this. And, after a lively debate,

215

1 Litman  
2 the defense wanting to strike the witness's  
3 testimony because they had not received what  
4 they were entitled to, the fourth defense

5 lawyer who was in the case got up and said,  
6 I can resolve the issue, judge. I have the  
7 Jenks material the prosecutor sent me and  
8 it's still in the original envelope, and I  
9 haven't opened it yet, and so we can look  
10 into it to see if the document is here or  
11 not.

12 While it sounds funny, and I guess it  
13 is, unless you were his client, it bespeaks  
14 the malaise that's in our system where not  
15 that the lawyers are necessarily sloughing  
16 their work, or lazy, but they are literally  
17 overwhelmed, and when you are overwhelmed  
18 and you are defending a person's liberty,  
19 and now, more increasingly, a person's life,  
20 that simply cannot pass reasonable human  
21 muster, let alone constitutional muster.

22 The motto in my office is the DA  
23 should be surprised that we're not  
24 surprised. That's the way we like to handle  
25 our cases, and that's the way I think most

216

1 Litman  
2 criminal defense lawyers who have the  
3 opportunity to prepare their work do their  
4 duty.

5 My goodness, I can spend and do  
6 frequently spend half a dozen hours a week  
7 with a client, just talking to him or her  
8 about their lives, about things that may not  
9 appear directly germane to the case at hand,  
10 because you never know what comes up later.

11 It's not just simply sitting with a  
12 client for days and days to prepare her  
13 testimony, but to find out things. I rarely  
14 make bail applications off the seat of my  
15 pants, certainly in felony cases, and I  
16 research to death, almost, a client's  
17 background. I attempt to get 40, 50, 60  
18 letters from people who know him or her in  
19 all aspects of that person's life, to put  
20 together a realistic and real bail  
21 application that a judge will look at and  
22 seriously consider, because, as we all know,  
23 one of the most critical determinants in the  
24 outcome of any criminal case is whether your  
25 client happens to be in jail or whether or

217

1 Litman  
2 not he or she is free on bail pending the

3 trial.

4 We don't allow in our office motion  
5 practice by computer. Clearly, we save our  
6 motion work, because you can start some  
7 research by what you've done before, but we  
8 don't allow cookie cutter motion practice.  
9 You can't just pluck out this aspect here  
10 and that aspect there from another case,  
11 because we will not allow it, because that  
12 forces attorneys to get into a rut in the  
13 way they do their work, and they don't give  
14 individualized justice which is what you are  
15 trying to impress a judge to give.

16 It is certainly incumbent to you to  
17 give it to your client. That's first thing  
18 a lawyer does is to make the judge, and let  
19 alone later on jury, but certainly a judge  
20 who has tremendous control over the client's  
21 life knows that this is not case number  
22 694023. This is John Smith. He's a human  
23 being. He comes from somewhere. He has a  
24 family. He has friends. He might actually  
25 be married. He might actually have

218

1 Litman  
2 children. He holds a job. People are  
3 responsible to him. He is responsible to  
4 people. He's a human being.

5 To make that come out, you have to  
6 provide individualized justice to your  
7 clients, and I just don't see how many of  
8 the people who are laboring in the trenches  
9 of the criminal justice system in New York,  
10 and lord knows elsewhere, but certainly  
11 here, can provide it, when they are handling  
12 literally dozens and dozens of cases a year.

13 And this applies, by the way, to  
14 every straightforward case. This doesn't  
15 just apply to the obvious cases, and lord  
16 knows I have more than those on occasion  
17 when they will give you a year's worth of  
18 wire taps, which takes almost a year and a  
19 half to just listen to. I'm not talking  
20 about those cases.

21 I'm talking about the one-stab  
22 homicide, the one-incident robbery. The  
23 one-night alleged sexual assault. These  
24 cases all have antecedents. They require a  
25 tremendous amount of work by the lawyer,

219

1 Litman  
2 which is what I do, it's what I do every  
3 day, with my associate, with my paralegal.  
4 That's the only way I know how to properly  
5 prepare a case and to carry out my duty  
6 under the Constitution.

7 And if we're ever going to have a  
8 system where the people who are in the  
9 uncelebrated moments, who are in the  
10 shadows, who are disenfranchised, who are  
11 poor, who are in the minority, are given any  
12 sort of justice, at the very least, before  
13 we take away their liberty, and, clearly  
14 now, before we even on rare occasions  
15 attempt to take away their lives, we had  
16 better, if we value our own decency, make  
17 sure that the lawyers who are representing  
18 human beings are able to do what I said.

19 And what I said is not so  
20 spectacular. It is the only proper way and  
21 straightforward way of defending a criminal  
22 case.

23 Thank you.

24 MR. GRADESS: Let me ask you three  
25 quick questions, if I might. Would you, for

220

1 Litman  
2 the record, give some flavor to the, how  
3 quickly you enter a case and how soon you  
4 might start investigating that case,  
5 factually investigating that case.

6 THE WITNESS: When you say, quickly,  
7 I take it you mean how soon after the events  
8 that are alleged to have occurred which  
9 gives rise to the charge do I enter a case?

10 MR. GRADESS: Yes.

11 THE WITNESS: That would vary. I  
12 have been known to enter cases because  
13 clients have contacted me within 10 minutes  
14 of an alleged incident. Family members who  
15 are aware that their child has been  
16 arrested, or children who are aware their  
17 parents have been arrested or friends that  
18 are aware that their friends have been  
19 arrested will sometimes contact me, and I  
20 will get involved in the case literally even  
21 before it winds up in the system, where it  
22 is just having the person being taken off to  
23 the local police precinct or police barracks  
24 or the FBI and the like.

25 Of course, on other occasions, I will

1 Litman

2 enter a case much later on. How quickly do  
3 I begin investigating the case? As soon as  
4 I get the first phone call, I will reach out  
5 to an investigator or investigators, and I  
6 reach out to people in my office, depending  
7 on the nature of the case, I very frequently  
8 send out lawyers right away, and most  
9 frequently I go myself.

10 I like to get my fingers dirty in a  
11 case, because you can't learn about a case  
12 just by reading a memo that's been given you  
13 by a young person in your office. I've been  
14 doing this for 30 years, and one of the  
15 reasons unfortunately I was unable to come  
16 here prepared is that the last several  
17 nights, other than the Yankee game, I was up  
18 literally digging up rocks somewhere in the  
19 city trying to find some evidence.

20 So as soon as you get involved, you  
21 start investigating, and when you get  
22 involved depends to some extent on the luck  
23 of the draw. Most of the time, I tend to  
24 get involved sooner than later, though.  
25 It's very important, because in any case,

1 Litman

2 certainly in any case where the typical  
3 disenfranchised New Yorker is involved,  
4 which is a single-incident affair, if you  
5 don't immediately attempt to do an  
6 investigation to memorialize past historic  
7 data, you are going to have a very difficult  
8 time unearthing it as the time goes by.

9 The more time goes by the less likely  
10 it is you are going to be able to get any  
11 sort of accurate account of what happened in  
12 the past.

13 MR. GRADESS: We had a questioning  
14 and answer earlier today about 722 C of the  
15 County Law which provides a \$300 cap on  
16 investigative and expert services for public  
17 defenders and assigned counsel. I wonder if  
18 you might comment for the record to that  
19 statute.

20 THE WITNESS: If I didn't have a  
21 cough, I think I would laugh for about two  
22 minutes. I don't understand how lawyers can  
23 do it, and, to the extent they can do  
24 anything, I have to give them credit, but I

25 don't know what to say, and I'm not trying

223

1 Litman  
2 to be condescending, and I pity them, and,  
3 most importantly, I pity their clients. To  
4 get a good investigator, to get a good  
5 expert, to get a good consultant, and I use  
6 them in forensic fields, that before a  
7 particular case I've never heard of before.  
8 I've used experts in at least 50 different  
9 disciplines, and, most frequently, I can't  
10 get an expert to talk to me on the phone for  
11 an hour for less than \$300.

12 Then I have to beg and borrow and  
13 say, please, the client doesn't have  
14 unlimited funds, can we lower it, and they  
15 lower it to 100, \$125 an hour, which would  
16 give you all of two hours or three hours  
17 given the current 722 C rates.

18 It is literally impossible if we  
19 expect lawyers to be able to provide their  
20 services properly to a human being, not to a  
21 defendant, but to a human being, to labor  
22 under those rates. It's literally  
23 impossible in my view.

24 MR. GRADESS: And one last question.  
25 In passing, you made reference to use of

224

1 Litman  
2 paralegals in your office. I wonder if you  
3 could address sort of how you staff up a  
4 case and the role of paralegals in your  
5 practice.

6 THE WITNESS: Again, I don't have a  
7 specific formula for doing it, but if there  
8 are things that can be done that don't  
9 require a senior partner's time in the  
10 investigation of a case, you use a paralegal  
11 to do it. If there are documents involved,  
12 for example, on a prior witness, and the  
13 investigator is not available, I will send a  
14 paralegal out to courthouses to get such  
15 things. If there are witnesses that can be  
16 spoken to, I will send a paralegal and  
17 another person to speak to that witness, if  
18 a lawyer is not available.

19 If immediate human research needs to  
20 be done, not necessarily legal research,  
21 getting weather reports, finding out traffic  
22 conditions, finding out the ethnic diversity

23 in a particular neighborhood if you are  
24 trying to make a motion attacking the proper  
25 array of a jury panel, there are millions of

225

1 Leven  
2 things in terms of straightforward  
3 investigation that any smart person can do,  
4 and we like to think that our paralegals fit  
5 that bill, and, rather than either charge a  
6 client for the rates that a senior attorney  
7 can do, or, more importantly, to allow the  
8 senior attorney to better utilize her time  
9 on a more important matter, you let junior  
10 people do what appears to be junior work,  
11 but which may turn out to be foundation  
12 stones for a critical and important defense.

13 MR. GRADESS: Thank you very much.

14 THE WITNESS: Thank you. And good  
15 luck.

16 MR. GRADESS: David Leven.

17 THE WITNESS: Good afternoon. My  
18 name is David Leven. I'm the Executive  
19 Director of Prisoners' Legal Services of New  
20 York and have been for the past 19 years.  
21 With liberty and justice for all. Those are  
22 the words that conclude our pledge of  
23 allegiance. Those words have been betrayed  
24 by the reality of our justice system, and,  
25 particularly, our criminal justice system as

226

1 Leven  
2 it applies now to prisoners, convicted  
3 felons who are serving more than a year in  
4 the state prison facility.

5 Now, they have no justice at all.  
6 They have no right to an attorney because of  
7 the defunding of Prisoners' Legal Services.  
8 Governor Pataki vetoed our funding this  
9 year, \$4.8 million. There was no  
10 justifiable basis for the veto. PLS costs  
11 the state virtually nothing, as we reduced  
12 the need for over 100 prison beds each year.

13 For over 20 years since its creation  
14 by the New York State Bar Association, PLS  
15 has provided high quality, effective and  
16 cost efficient legal services to inmates in  
17 New York State prisons. New York State must  
18 continue to fund these services, and such  
19 funding is necessary for PLS to survive.

20 Because of the veto, we have closed

21 each of our five upstate offices. We have  
22 laid off 58 of our 62 staff, and there are  
23 four of us now left working part-time. We  
24 assume this is only a temporary setback.

25 As I mentioned, we are a cost

227

1 Leven  
2 efficient program. Virtually all of the  
3 money that is expended on PLS is returned to  
4 the state because we ensure the proper  
5 release dates of inmates, saving the state  
6 about as much money as it costs to fund PLS.  
7 The savings are noted at the bottom of the  
8 first page of our testimony.

9 Report issued by Amnesty  
10 International this month states, every day  
11 in prisons across the United States of  
12 America, the human rights of prisoners are  
13 violated. I can assure you that New York  
14 State prisons are no exception, and that is  
15 why PLS is absolutely needed to ensure that  
16 inmates receive justice in a number of  
17 different areas, important areas for inmates  
18 to have their rights protected, inmates who  
19 may serve up to a year in a solitary  
20 confinement cell, only being allowed out of  
21 that cell for one hour a day, or even two  
22 years or five years.

23 Jonathan is well aware of a case of  
24 an inmate who served 15 years and is now, as  
25 a disciplinary measure, and is now going to

228

1 Leven  
2 be serving probably the rest of his life in  
3 a prison cell 23 hours a day, in  
4 administrative segregation. Inmates who are  
5 brutalized by correction officers. Yes,  
6 it's only a small percentage of correction  
7 officers who brutalize inmates, but it's  
8 enough so that there needs to be  
9 accountability, and correction officers will  
10 not be held accountable unless there are  
11 lawyers to represent inmates to pursue their  
12 claims against those correction officers,  
13 and, unless that is done, the inmates will  
14 not have their rights vindicated.

15 Let me briefly describe to you a few  
16 cases that we have been involved in  
17 concerning guard brutality. In one case,  
18 which was settled for \$50,000 for two

19 different clients, much of the assault of  
20 the plaintiffs was captured on videotape,  
21 they videotape in the prison, especially  
22 when an inmate is being moved from a general  
23 population cell to a special housing unit  
24 cell where the inmate is being disciplined.

25 In this case, despite the videotape,

229

1 Leven

2 a grand jury refused to indict any of the  
3 officers allegedly involved for any crime  
4 whatsoever.

5 However, one of the officers was  
6 fired by the Department of Correctional  
7 Services, something which rarely happens.  
8 In a related case challenging the  
9 disciplinary proceeding held against the  
10 inmates, the court found when the correction  
11 officers entered Diaz's cell ostensibly to  
12 escort him to the SHU, they proceeded to  
13 administer a totally unprovoked beating of  
14 Diaz and continued to assault him on the way  
15 to SHU. Mr. Marquez observed the beating,  
16 our other client. When corrections officers  
17 returned to get our other client,  
18 Mr. Marquez, they beat him with batons,  
19 fists and kicks and even after handcuffing  
20 and shackling him. They continued to  
21 physically abuse him en route to the SHU and  
22 after arriving there.

23 In another case three inmates were  
24 awarded a total of \$18,000 damages as well  
25 as punitive damages based on a claim that

230

1 Leven

2 they were assaulted by 15 corrections  
3 officers and sergeants. The inmates were  
4 repeatedly punched, struck, kick, struck  
5 with batons, often while their hands were  
6 cuffed behind their backs.

7 The court said that this type of  
8 treatment, quote, particularly when in  
9 restraints was not only excessive but  
10 cowardly. No trained or even civilized  
11 corrections officer could believe that such  
12 conduct does not violate clearly established  
13 statutory and constitutional rights of which  
14 a reasonable person would have known. The  
15 court further said in issuing a decision  
16 awarding punitive damages that, quote, with

17 the firm conviction gained from 13 years as  
18 a judicial officer handling litigation  
19 involving prisoner's claims of civil rights  
20 violations that the incidents occurred as  
21 described by plaintiffs, and that such  
22 violations of prisoners civil rights are not  
23 uncommon.

24 It has been suggested that PLS is not  
25 necessary, that a cadre of lawyers could be

231

1 Leven  
2 found to represent inmates in this type of  
3 litigation. In a letter to the governor  
4 three years ago, the president, then  
5 president, immediate past president and  
6 president elect of the New York State Bar  
7 Association responded, quote: We  
8 respectfully disagree. Our experience  
9 indicates that a substantial portion of the  
10 legal needs of the poor are presently unmet.  
11 To expect the private bar to shoulder yet  
12 another burden at this juncture is clearly  
13 unreasonable.

14 It is also be suggested that law  
15 libraries are all that is needed for  
16 inmates. In fact, in the October edition of  
17 Docks Today, a publication of the New York  
18 State Department of Correctional Services,  
19 there is a column. In that column it is  
20 stated quite simply, PLS is redundant and  
21 duplicative under the standard set by the  
22 nation's highest court, end of quote.

23 Nonsense. The letter by the three  
24 state bar presidents to Governor Pataki  
25 stated the following: Unquestionably,

232

1 Leven  
2 libraries cannot serve as a substitute for  
3 trained lawyers to provide meaningful access  
4 to the courts. Experience demonstrates that  
5 citizens are not able to adequately  
6 represent themselves in litigation,  
7 particularly that which requires discovery  
8 or trial, and inmates who are not literate  
9 and do not speak English well or who are  
10 mentally ill surely are entitled to the  
11 services of lawyers.

12 The fact is that lawyers are  
13 essential to the fair administration of  
14 justice for prisoners. That's a quote from

15 the letter from three state Bar Association  
16 presidents who should know far better than  
17 the Department of Correctional Services what  
18 the needs are of prison inmates.

19 You talk to prison inmates. Go into  
20 any prison and talk to them about their  
21 legal needs and whether law libraries are  
22 adequate for them in terms of  
23 representation. I can guarantee you that  
24 inmates cannot win their cases without  
25 lawyers available to help them pursue their

233

1 Leven

2 cases, to help them pursue discovery.

3 They cannot conduct discovery by  
4 themselves. They cannot do depositions.  
5 They do not have access to expert witnesses.  
6 They do not have access to doctors who can  
7 testify on their behalf about their  
8 injuries.

9 There is an absolute need for  
10 lawyers. The former chief judge of the  
11 United States Court of Appeals, John O.  
12 Newman, commented in a New York Law Journal  
13 article three years ago that, quote, inmates  
14 have important rights, but unless a lawyer  
15 steps forward to assert their rights, there  
16 will be no vindication, end of quote.

17 Lawyers, judges, the news media,  
18 legislators all agree that there is an  
19 absolute need for lawyers if inmates are  
20 going to have meaningful access to our  
21 system of justice.

22 We need to be refunded. We need to  
23 be back in the state budget in the spring.  
24 It is absolutely essential that you take a  
25 leadership role, that you in your report

234

1 Leven

2 make a strong recommendation that Prisoners'  
3 Legal Services be refunded at a meaningful  
4 level so we can continue to provide high  
5 quality legal services to prisoners.

6 Without Prisoners' Legal Services, I  
7 can assure you that the justice system is  
8 going to be in deep trouble. As the Bar  
9 Association president said regarding PLS,  
10 the services which it renders are necessary  
11 and irreplaceable. Thank you.

12 MS. BARR: Did Governor Pataki when

13 he vetoed the funding give any reason  
14 besides saying it wasn't necessary and the  
15 law library would suffice?

16 THE WITNESS: That is the principal  
17 reason that has been given that there are  
18 law libraries there, that they meet the  
19 Constitutional requirements for providing  
20 meaningful access to the courts. An  
21 argument can be made in that regard,  
22 depending upon how one interprets the  
23 Supreme Court's latest decision on this  
24 issue.

25 However, we firmly believe that if a

235

1 Leven  
2 case were to be brought under New York  
3 State, that under the New York state  
4 constitution, our state Court of Appeals  
5 would find that New York has an obligation  
6 to provide lawyers for inmates, as well as  
7 law libraries, and that is particularly true  
8 for inmates who are illiterate, those who  
9 are mentally ill and those who only speak  
10 Spanish.

11 But regardless of the Constitutional  
12 requirement, as a practical matter, there is  
13 an absolute need to have lawyers available  
14 to represent inmates. One thing I think  
15 that happened this year is I really do  
16 believe we were a victim of the budgetary  
17 process that was used this past year, a new  
18 budgetary process.

19 As a consequence, we were actually  
20 funded the first three years of the Pataki  
21 administration, three years when the state  
22 was not in as good fiscal shape as it was  
23 last spring. The governor's counsel sent a  
24 letter to the chair of our board indicating  
25 the governor will have an open mind toward

236

1 Leven  
2 our funding next year if we are in the  
3 legislature's budget, and the fact he vetoed  
4 our funding this year should not be taken as  
5 a reflection that the governor necessarily  
6 thinks that Prisoners' Legal Services  
7 shouldn't be funded.

8 So we are confident we will be back  
9 in the budget next year, that the  
10 legislature and the governor will work out

11 an agreement so that Prisoners' Legal  
12 Services will be funded again. But I do  
13 think we are going to need an awful lot of  
14 support to ensure that that happens.

15 MR. PITTARI: If you could give us  
16 some idea, if you know, either in terms of  
17 numbers or percentages, an estimate, the  
18 total in those three groups you are talking  
19 about, that's not an inconsiderable number  
20 of people, is it, those who are illiterate,  
21 those who don't speak English and those who  
22 are mentally ill? Do you have any idea what  
23 proportion of the prison population might  
24 fall within that?

25 THE WITNESS: If you interpret

237

1 Leven

2 illiterate as meaning that those that do not  
3 have a college education, because how can  
4 anyone without a college education even read  
5 law books and interpret the meaning of  
6 what's in those books accurately, it's  
7 probably at least 60 or 70 percent. If you  
8 talk about an eighth grade reading level,  
9 you are still talking about probably  
10 40 percent of the inmate population, and  
11 there are 70,000 inmates in the system, and  
12 I should mention we get requests for 12,000  
13 assistance each year.

14 And those requests are still coming  
15 in despite the fact that we have notified  
16 prison administrators, law libraries in the  
17 prisons. We responded to 85 letters last  
18 week. We had 60 that have come in so far  
19 this week.

20 MR. PITTARI: Are all of those law  
21 libraries up-to-date?

22 THE WITNESS: I don't know the answer  
23 to that. The Department of Correctional  
24 Services claims that they are. But it  
25 really doesn't matter. Any inmate can bring

238

1 Bernhard

2 a case. You can file a claim which may or  
3 may not be dismissed based upon what's in  
4 your papers.

5 But for a lot of litigation,  
6 especially federal court litigation, cases  
7 involving guard brutality, inadequate  
8 medical care and the like, you need to do a

9 tremendous amount of discovery. You  
10 absolutely have to have expert witnesses,  
11 and there the inmates' cases are going to be  
12 dismissed because they are not going to be  
13 able to do what's necessary in order to  
14 properly pursue their cases.

15 MR. GRADESS: Thank you. I want to  
16 thank you also for waiting for our last  
17 witness so we could accommodate his  
18 schedule.

19 THE WITNESS: I appreciate  
20 opportunity for testifying today.

21 MR. GRADESS: Adelle Bernhard.

22 THE WITNESS: Good afternoon. My  
23 name is Adelle Bernhard, and I thought I  
24 would give you a little background about who  
25 I am and why I'm here. I am currently one

239

1 Bernhard  
2 of eight members who serve on the First  
3 Department indigent defense organization  
4 oversight committee. What that is is an  
5 Appellate Division committee that members  
6 were suggested by the Bar Associations and  
7 appointed by the presiding justice of the  
8 Appellate Division, and this committee's  
9 responsibility is to monitor and evaluate  
10 the provision of defense services by  
11 organizations that provide defense services,  
12 so that means the Legal Aid Society,  
13 Neighborhood Defender Service of Harlem, the  
14 Office of the Appellate Defender, and the  
15 new defense services, Bronx Defenders and  
16 New York County Defender Services. We are  
17 not responsible for monitoring and  
18 evaluating the services provided by the  
19 assigned counsel or 18-b lawyers.

20 So our job is just to look at the  
21 organizations that provide defense services.  
22 I have been involved in thinking about  
23 criminal defense work and the provision of  
24 criminal defense services for poor people  
25 for literally the last 22 years since I

240

1 Bernhard  
2 graduated law school. I started working for  
3 the Legal Aid Society right out of law  
4 school, and I've been involved since then  
5 with trying to improve the quality of  
6 services provided in a number of different

7 ways. I've put together continuing legal  
8 education courses for 18-b lawyers, and now  
9 I work at a law school, where I direct a  
10 criminal defense clinic, and my students are  
11 working in the Bronx criminal court, so I'm  
12 in the court on a daily basis.

13 I'm aware of the conditions in the  
14 courts. I'm aware of criminal justice  
15 initiatives, and, by virtue of my  
16 responsibilities with the indigent defense  
17 organization oversight committee, I am able  
18 to sort of pay attention to the broad  
19 spectrum of issues, at least in the First  
20 Department, because it's an Appellate  
21 Division committee in the First Department,  
22 which means I'm only focusing on the Bronx  
23 and Manhattan.

24 What I thought that I would do is  
25 just explain a little bit about what the

241

1 Bernhard  
2 committee has done and how it's done it, and  
3 a little bit about what we've found.

4 In order to monitor and evaluate  
5 services provided by organizations, what the  
6 committee first did was draft standards. We  
7 wanted to come up with some kind of a ruler  
8 or measure or yardstick that would help us  
9 evaluate the job that a defense organization  
10 was doing.

11 And these standards didn't exist.  
12 What was out there in the world for  
13 measuring performance related to the  
14 individual performance of lawyers, so there  
15 are American Bar Association standards,  
16 which apply to the job that a lawyer does;  
17 did the lawyer do an investigation, did the  
18 lawyer file a motion, did the lawyer keep  
19 his or her client apprised of what was going  
20 on in the case, was an investigation  
21 conducted, were the appropriate experts  
22 contacted and used.

23 And there are also standards which  
24 relate to the qualifications of attorneys  
25 assigned to do specific work in the criminal

242

1 Bernhard  
2 courts, so, for example, the assigned  
3 counsel screening committee used standards  
4 to approve lawyers who want to join the

5 panel and then be assigned to do work in the  
6 courts.

7 Those are standards which look at  
8 what kind of experience a lawyer has, what  
9 kind of work that lawyer has done, how many  
10 cases that person has tried and those kinds  
11 of things. But what didn't exist in the  
12 world was something that would help us look  
13 at the organization and evaluate the kind of  
14 job that the organization was doing to  
15 support its lawyers.

16 In other words, what does the  
17 organization do in terms of training, what  
18 does the organization do in terms of  
19 evaluation, what does the organization do in  
20 terms of case management.

21 So the very first thing we did was  
22 come up with some kinds of standards which  
23 we circulated very broadly. I think the New  
24 York State Defenders Association read the  
25 standards and gave us some feedback, as did

243

1 Bernhard

2 the organizations that we were to be  
3 monitoring with those standards.

4 Once that was done, we then were able  
5 to kind of go out and take a look at the job  
6 that the organizations were doing, and we  
7 did two rounds of evaluation and monitoring,  
8 so what we first did would be to write to  
9 the organizations and ask them to let us  
10 know how they were complying with the  
11 standards.

12 And they gave us a lot of  
13 information, feedback and numbers to tell us  
14 how they were in compliance with the  
15 standards or where they were having problems  
16 complying with the standards. Once we  
17 digested that material and had gotten a  
18 sense of where things were, where we ought  
19 to be focusing, we would go into the field  
20 and talk to the staff attorneys themselves  
21 and say, what's going on, what is the  
22 caseload and training like, and we would try  
23 to see much in the same way much as an  
24 academic accreditation committee would do  
25 whether or not the reality of the situation

244

1 Bernhard

2 in the organizations complied with what the

3 organization said they were doing; in other  
4 words, did the staff agree with the  
5 organization's self-evaluation, did the  
6 staff agree that the training was  
7 sufficient, did the staff agree that the  
8 workload was manageable.

9 We did two reports, both of which are  
10 available. They are public information. If  
11 anyone wants copy of the reports and doesn't  
12 have them, they are available from either  
13 the Appellate Division First Department  
14 clerk's office or from the chair of the  
15 committee, Klaus Eppler at Proskauer Rose,  
16 and of course the standards are available as  
17 well.

18 And the description of how we went  
19 about coming up with the standards and doing  
20 the evaluations is available in a little  
21 article I wrote which was published in  
22 Criminal Justice Magazine, which is the  
23 Criminal Justice Section of the ABA's  
24 publication.

25 Well, we expected to find that

245

1 Bernhard

2 workloads would greatly affect the quality  
3 of performance, and we knew that we should  
4 be paying attention to workloads. We were  
5 still surprised to find how large the  
6 caseloads were, how many cases the Legal Aid  
7 Society lawyers were handling, how much  
8 larger their caseloads were than the  
9 caseloads of the new organizations.

10 And for those of you who don't know,  
11 I guess I should give two sentences of  
12 background. In 1994, there was a short  
13 strike. The Legal Aid Society lawyers went  
14 out on strike, and the Legal Aid Society I  
15 think is following me, so you can hear more  
16 about this in detail from them if you want  
17 to ask more questions, but, in response to  
18 that strike, Mayor Giuliani decided that he  
19 was going to create new defender  
20 organizations ostensibly so that he wouldn't  
21 be dependent on the services of a primary  
22 defender.

23 So contracts went out, and the city  
24 decided to select an organization in the  
25 Bronx and an organization in New York County

246



Bernhard

1  
2 in New York was assigned a total of  
3 approximately 76,000 new cases, of which  
4 42,000 survived arraignment, so that's just  
5 in Manhattan, total number of cases.

6 Those cases were handled by a staff  
7 of, and we're not 100 percent sure of these  
8 numbers, and you have to ask Legal Aid, but  
9 we think those cases were handled by a staff  
10 of about 117 fulltime equivalent lawyers,  
11 which means that the average full year  
12 lawyer was assigned, if you count the cases  
13 they handle at arraignment, 650 cases. If  
14 you don't count the cases handled at  
15 arraignments, you have 366 newly assigned  
16 cases during the year.

17 Although few lawyers handled more  
18 than 150 new felony assignments, most  
19 lawyers who handled over 100 felony  
20 assignments also handled over 150  
21 misdemeanor assignments. That's a lot of  
22 cases. That is a lot of people to take care  
23 of. And the effect of having that many  
24 cases and not enough resources to makes sure  
25 that people get to handle fewer cases than

Bernhard

1 that is that people aren't getting the  
2 attention I think that we would like them to  
3 have in criminal court.  
4

5 Because, if we are going to bother to  
6 arrest them and charge them with a crime and  
7 assign them a lawyer, I think we would all  
8 expect and hope that the lawyer would have  
9 the time to competently, adequately,  
10 zealously represent that person.

11 Otherwise, if we don't really expect  
12 that, it seems to me we should just bite the  
13 bullet and say we don't care whether we  
14 assign lawyers to people or not. They could  
15 do perfectly well handling these cases on  
16 their own. Let's not pretend we are giving  
17 people counsel. Let's just not do it at  
18 all. I see I have no more time.

19 MR. GRADESS: Any questions?

20 MS. LORAND: Did you see a marked  
21 difference in the way that the two groups  
22 handled their cases, particularly as it  
23 relates to what you consider to be  
24 effectiveness?

THE WITNESS: Well, we didn't, and

250

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Bernhard

one of the things we hope to do in the future is, we didn't spend time in court watching people, okay, and we didn't go through closed case files to see how many people did motions and how many people didn't, so we don't have that kind of information.

What we have are the numbers, and the numbers are quite disparate. The numbers are very different. The new defenders have many fewer cases, so we know that for sure.

We also have a standard of what we think are an appropriate number of cases for organizations to have, and the Legal Aid Society had more than what our standards say and the other organizations had less, and we also have the perceptions of the staff attorneys themselves who told us that they felt they were doing much too much work.

We also have the perceptions of the judges sitting in criminal court who are supervising and watching the attorneys do that work, and who felt that the attorneys couldn't keep up with the number of cases

251

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

Bernhard

that were being handled in their courtrooms every day, that there were clients sitting waiting at the end of the day who hadn't seen anyone, that when they needed to find someone to come over and do something for the client, they were very hard to find, that it looked like everybody was really stretched to the bone, and they weren't getting to court for those clients when they needed to be there. They just couldn't manage it.

MR. PITTARI: Where does your report go, to whom are you giving it, and what do they do about it? Does it go to the court system?

THE WITNESS: Well, the report was done for the Appellate Division, so they have it, and we tried to make it available as widely as possible, so we just put a little notice in the Law Journal to let people know it was available and to call and

23 get it. But we are not doing that much to  
24 advance it, if that's what you are asking  
25 me.

252

1 Bernhard

2 MR. PITTARI: The court system, if  
3 it's going to the court, that doesn't do any  
4 of the funding for the offices, the funding  
5 is done by the legislature and executive,  
6 correct?

7 THE WITNESS: Yes, and the funding,  
8 yes, the executive and the city, as well as  
9 the executive and the state, so all we can  
10 really hope, I suppose, is that if the court  
11 agrees with us, which I think they do,  
12 having read the report, that they might in  
13 some other kind of way put some pressure on  
14 the executive to come up with the funding.

15 The court actually assigns people to  
16 the cases, so, if they were concerned that  
17 organizations were inadequately funded, and  
18 thus inadequately prepared to do the job,  
19 they might be able to say, until things  
20 change, judges in the trenches, don't assign  
21 the organizations cases. I don't know.

22 MR. PITTARI: One other question.

23 Your oversight committee was looking  
24 at organizations that provide services, not  
25 at 18-b attorneys.

253

1 Bernhard

2 Does anybody provide the same type of  
3 oversight service for the 18-b panels to  
4 your knowledge?

5 THE WITNESS: Well, there is the  
6 screening committees for the 18-b panels.

7 MR. PITTARI: That's in terms of who  
8 gets on the panel.

9 THE WITNESS: Well, they have  
10 broadened the scope of their  
11 responsibilities, and I know that both in  
12 the First and Second Department, the  
13 screening committees have undertaken to  
14 reevaluate everyone that's on the panel, so  
15 they are trying to do that, and I think  
16 they've actually completed at least one  
17 round of reevaluating everyone on the  
18 panels, and they are also responsible for  
19 hearing and adjudicating complaints against  
20 individual attorneys, so they do perform

21 some of that function.  
22 MR. GRADESS: I now understand why  
23 these hearings are so hard, because we have  
24 to get out by 5:00, but I just have few  
25 quick questions.

254

1 Bernhard  
2 Has there been any amendment to the  
3 New York City plan to your knowledge since  
4 1994, the original plan filed with the  
5 judicial conference under 18-b of the County  
6 Law?  
7 THE WITNESS: I thought it was  
8 earlier than that. That's why I was  
9 confused. Wasn't it '66?  
10 MR. GRADESS: The plan was 66, and  
11 I'm wondering if there has been any change  
12 to that plan.  
13 THE WITNESS: Not that I know of.  
14 MR. GRADESS: Did the committee  
15 itself have any question about its own  
16 statutory authority or inquire into the  
17 ability to function after its appointment?  
18 THE WITNESS: Well, we were appointed  
19 pursuant to court rules which were drafted  
20 which laid out our authority and the size of  
21 it and terms and all that stuff, so rules  
22 were drafted and given to the Appellate  
23 Division. First they enacted the rules and  
24 then appointed us pursuant to the rules.  
25 MR. GRADESS: In terms of an inquiry

255

1 Bernhard  
2 into whether authority existed to draft  
3 those rules, no such inquiry was conducted  
4 by the committee itself?  
5 THE WITNESS: What do you mean?  
6 MR. GRADESS: The assumption has been  
7 that the appellate division possesses the  
8 authority to promulgate that rule from the  
9 outset?  
10 THE WITNESS: Yes, sort of under its  
11 authority to pay attention to the quality of  
12 services provided in its courts. They do  
13 have the responsibility to watch over what  
14 happens in the courts and not just in the  
15 Appellate Division.  
16 So, ultimately, I think the buck  
17 stops at their desk, that they are  
18 responsible for what goes on in the courts.

19 And I think that they thought that was the  
20 power that enabled them to enact the rules.

21 MR. GRADESS: To clarify for the  
22 record, the recommendation of the First  
23 Department committee was included the idea  
24 that there ought to be a staff monitoring?

25 THE WITNESS: Yes.

256

1 Bernhard

2 MR. GRADESS: Could you just briefly  
3 delineate what if anything is meant by that.  
4 Can you layout what you had in mind  
5 specifically.

6 THE WITNESS: Yes. Here is what we  
7 thought. We were concerned about a couple  
8 of things. First of all, we were concerned  
9 that our standards might not be the perfect  
10 standards, and we we're using them and we  
11 are promulgating them and they were the best  
12 we could come up with, but we still think we  
13 ought to be thinking about them and looking  
14 at them and testing them more.

15 The other thing we were concerned  
16 about about the work we did, we wanted to be  
17 able to do this evaluation and monitoring  
18 procedure over a continuing course of the  
19 year. What we had basically done was we  
20 would write to the organizations, we would  
21 get this information back from them, we  
22 would put it together over the course of  
23 about six weeks, and then we would go out in  
24 the field and do our site visits over the  
25 course of another six weeks, so we were

257

1 Bernhard

2 getting what we thought was a pretty  
3 accurate snapshot of a couple of months  
4 period in the life of all these  
5 organizations.

6 We would prefer to be able to be in  
7 there on a continuous basis, because we  
8 think we were getting a more accurate  
9 picture, and we also think if things are  
10 developing, like for example the fact that  
11 NDS isn't getting any more funding and has  
12 had to give up a tremendous number of their  
13 cases, that we should be able to be in a  
14 position to report on that to the Appellate  
15 Division at the time it happens, and we  
16 ought to know what kind of effect that is

17 having on the quality of services provided  
18 generally so that the Appellate Division can  
19 know.

20 We don't want to wait until the year  
21 comes around again and we can put together  
22 our volunteer staff of lawyers and get  
23 enough energy to go out and do this work.  
24 We also were concerned that we wouldn't be  
25 able to keep the energy going to do this

258

1 Daniel Greenberg  
2 kind of work with a volunteer committee of  
3 attorneys, and we thought that if we had a  
4 staff to help us assemble the material,  
5 schedule our site visits, do a lot of that  
6 work for us, we would make sure that we  
7 would be able to keep up this quality of  
8 work.

9 So those were the things that we were  
10 concerned about: The quality of work, the  
11 continuous nature of the work, the  
12 continuity of the work. We thought having a  
13 staff, even just one or two, one and a half  
14 people, half a person, something, would help  
15 us to do a better job on all of those  
16 issues.

17 MR. GRADESS: Thank you very much.  
18 (Recess: 2:55 p.m. to 3:00 p.m.)

19 MR. GRADESS: This is the Legal Aid  
20 panel. Welcome.

21 THE WITNESS: We're delighted to be  
22 here. I'm Daniel Greenberg. I'm Executive  
23 Director and Attorney-in-Chief of the Legal  
24 Aid Society. Michelle Maxine on my right is  
25 the attorney in charge of the Criminal

259

1 Daniel Greenberg  
2 Defense Division, and Sue Wykoff on my left  
3 is the attorney in charge of the Criminal  
4 Appeals Bureau of Legal Aid.

5 One of the great advantages of  
6 testifying late in the day at any hearing is  
7 we've heard much of what we would want to  
8 say already, and I can simply say that the  
9 remarks of Adelle Bernhard and her  
10 committee, Legal Aid Society agrees with  
11 them wholeheartedly. She made an allusion  
12 to it, but I would point out even more  
13 strongly that that committee is made up of  
14 volunteers that are doing an extraordinary

15 job and important job of monitoring those of  
16 us who are delivering these services.

17 I also heard David Leven's remarks  
18 from Prisoners' Legal Services, and again I  
19 think that we agree with everything he said  
20 and the importance of the kinds of services  
21 that he provides uniquely in the State of  
22 New York and the importance of those  
23 services. I will get back in a few moments  
24 to some of the larger issues.

25 I think that we first should talk

260

1 Daniel Greenberg  
2 about some of the specific things about the  
3 Legal Aid Society and the funding that we've  
4 heard. When Adelle Bernhard talks about the  
5 fact the committee that looked into it saw  
6 that in Manhattan, there were problems,  
7 rather than being defensive about that, let  
8 me first say that that committee is  
9 absolutely right.

10 What is most significant to me is, if  
11 you read their report from last year, it  
12 says the Legal Aid Society is giving  
13 adequate services, good services, quality  
14 services, in all of the places in which it  
15 gives services. The Bronx and Manhattan  
16 were what they studied on criminal defense  
17 area, the First Department of Appeals.

18 They also said in last year's report,  
19 but if their budget continues to be slashed,  
20 and if they don't have caseload relief, this  
21 can't go on forever, and there will come a  
22 time when we will not be able to say there  
23 is adequate services. That's what the  
24 report said last year.

25 This year, the report says, in

261

1 Daniel Greenberg  
2 effect, the Bronx is still okay, the appeals  
3 is still okay, Manhattan on felonies is  
4 still okay, the capital defense work of the  
5 Society is still okay, but there are  
6 problems with the lower level cases, with  
7 misdemeanor cases.

8 And, like a hospital that triages and  
9 like any organization that simply doesn't  
10 have the staff to do all the things it needs  
11 to do, we are not proud or happy about that  
12 reality, but we're not defensive about it.

13 The numbers tell the story. It doesn't  
14 matter how far you can stretch people; there  
15 is only so far that they can go.

16 The numbers interest are instructive.  
17 They are included in our testimony in a  
18 graph and in a few pages of testimony, but  
19 let me briefly tell you what they are. From  
20 1994, the date of the strike that you heard  
21 about no doubt from Michael Letwin and just  
22 now from Adelle Bernhard, the budget of  
23 Legal Aid Society has lost \$27 million. We  
24 went from \$79.4 million to \$51.9 million, a  
25 loss of 35 percent of our budget.

262

1 Daniel Greenberg

2 This is reflected in staffing,  
3 because there are only so many pencils and  
4 pads that you can cut, and our staff  
5 staffing went from 620 to 397, a loss of 223  
6 lawyers, or, again, 35 percent of our staff,  
7 more than one out of every three lawyers and  
8 support staff.

9 During that time, however, the  
10 caseload went from 216,000 in 1994 to  
11 203,000 this year, a loss of only 13,000  
12 cases, or six percent of the caseload. You  
13 don't have to be terribly good in arithmetic  
14 to understand what all of that means in  
15 terms of how many bodies are there. You  
16 still have to be in the parts to do the  
17 intake, you still to be in the arraignment  
18 part, you still have to treat the cases  
19 seriously, and when even in the critical  
20 parts of our work, the First Department  
21 report says that the judges have a  
22 perception that Legal Aid lawyers aren't  
23 always where they should be, they are not.

24 But they are not in Barbados. They  
25 are not on the beach. They are not at home

263

1 Daniel Greenberg

2 sleeping late. They are not watching  
3 television. They are in another part, in  
4 another part, in another part, trying to  
5 handle the crushing caseload, and not even  
6 the talented Legal Aid Society lawyers can  
7 be in three or four places at one time. We  
8 know they can be in two or three places, but  
9 they are getting stretched so far they can't  
10 be everywhere they need to be.

11           These numbers are reflective simply  
12 of not putting into criminal defense that  
13 which must be put in. There have been  
14 decisions at the highest levels of  
15 government that crime is an issue to be  
16 addressed. That is perfectly within the  
17 realm of the executive and the legislature  
18 to decide. When they decide that, they  
19 understand that there are resources that go  
20 with it. You need more police, you need  
21 more probation officers, you need more  
22 corrections officers, you need more prisons.  
23 You also need more lawyers for those accused  
24 of a crime.

25           It is simply a cost of having been

264

1                           Daniel Greenberg  
2 decided that the system will go where it  
3 goes, and, yet, while the prosecutors  
4 budgets have gone up, while the budgets for  
5 all of the other agencies have gone up, it  
6 is the criminal defense budget as a whole,  
7 the Legal Aid Society in particular, that  
8 has seen a drastic reduction, and understand  
9 that this reduction of 35 percent comes at a  
10 time that, obviously, like any organization,  
11 it costs more each year to do business.

12           I am giving you absolute numbers.  
13 This doesn't even take into account that the  
14 salaries go up by a tiny amount, and that  
15 other supplies and telephones and costs of  
16 equipment, all of those things, go up.

17           Now, we understand that we need to be  
18 cost efficient. We have been. We have  
19 taken any number of steps so that in the  
20 three years previous to this, by the skin of  
21 our teeth, the First Department and others  
22 were saying, we were still holding on. The  
23 caseloads were crushing, but we had taken  
24 numbers of other things. We trained a  
25 paralegal class of 40 secretaries and clerks

265

1                           Daniel Greenberg  
2 who are who were no longer necessary to do  
3 that work, because by technology we had  
4 become more efficient, and we retrained them  
5 in probably the largest retraining  
6 organization in the history of this city to  
7 take 40 of those workers and make them  
8 paralegals to help the lawyers do the work

9 more efficiently.

10 We have undertaken numbers of other  
11 things. We also are ancillary to the direct  
12 service. I need to address for a few  
13 moments the role that Legal Aid plays in  
14 this city so that you understand the great  
15 damage and harm being done for the future.  
16 Already testifying before you today when I  
17 looked over the list of people were a number  
18 of people currently employed by the Legal  
19 Aid Society. Susan Lindenauer, who  
20 testified on behalf of state bar's criminal  
21 justice committee is our counsel. Michael  
22 Letwin is the head of the union, and Russell  
23 Neufeld was testifying about capital rates,  
24 but he's the head of the capital defender  
25 union.

266

1 Daniel Greenberg

2 Numbers of these people sitting  
3 behind me who are about to testify were  
4 trained like many private lawyers and now  
5 the new providers by the Legal Aid Society.  
6 Six of the seven new providers, the  
7 alternate providers, the leadership at least  
8 in part was trained at the Legal Aid  
9 Society. Some were lawyers while they were  
10 bidding for the work of the Society. Most  
11 of them have on their staff many of the  
12 lawyers at the Legal Aid Society.

13 This is not about competition with  
14 them; this is not about fighting with them;  
15 this is not about saying that they don't do  
16 a good job. This is about saying that the  
17 Legal Aid Society has always as the primary  
18 defender been the place where people were  
19 trained, where they learned their craft,  
20 where they went out and either went into  
21 private practice or other places and did  
22 their work.

23 It is an essential function of the  
24 Society, and, when we lose lawyers to places  
25 that are still doing the work, that is part

267

1 Daniel Greenberg

2 of the doing of business. But if we cease  
3 to be the premier organization that we've  
4 been, if we are starved in the way that we  
5 are being starved -- it is not just a narrow  
6 institutional perspective that brings me

7 here today. It's saying that the very  
8 system of justice is going to have its  
9 consequences felt. It's saying that the  
10 next generation of the private bar simply  
11 won't be as well-trained as we have always  
12 trained them. It's saying the clients who  
13 are sitting there in court and deserve their  
14 day in court regardless of the severity of  
15 the crime, and we understand that people are  
16 being arrested for riding bicycles on the  
17 street and selling oranges at car stops and  
18 writing graffiti on wet paint signs, we  
19 understand that that is the climate in which  
20 the criminal justice system now exists.

21 But we are also saying that if that's  
22 what the powers that be, if they want those  
23 numbers of arrests, then they have to  
24 understand the consequence that we have to  
25 be adequately funded so that we can go

268

1 Daniel Greenberg  
2 forward and do the work that we have to do.  
3 So with that brief statement and  
4 knowing that you are running behind time and  
5 knowing that so many other people have said  
6 things that I would have said had they not  
7 said it, I'm going to stop my remarks now  
8 before a sign gets held up telling me how  
9 much time I have left and ask this committee  
10 if they have any questions that I or my  
11 colleagues can answer for you.

12 MS. LORAND: What proportion of the  
13 lawyers that you currently have have less  
14 than three years experience?

15 THE WITNESS: I don't know an exact  
16 answer. What I do know is that particularly  
17 at this time, we have not hired that many  
18 lawyers in the last three years. One of the  
19 realities of the lack of funding is that the  
20 traditional classes that have come in, that  
21 used to number 80, 90, 100, because of  
22 attrition, and then inadequate funding to  
23 replace it, there has not been that kind of  
24 hiring.

25 This year for the first time in three

269

1 Daniel Greenberg  
2 years we had a class of 55, of whom 25 were  
3 assigned to Manhattan, given the crisis that  
4 exists there. But it is by far the largest

5 class we've been able to hire since I've  
6 come.

7 MR. PITTARI: Just a couple of  
8 questions. The funding cuts that you've  
9 had, I assume that didn't affect just the  
10 lawyers, but also your investigative support  
11 and your social workers and other ancillary  
12 things, you've lost many of those services,  
13 I assume?

14 THE WITNESS: That's not only  
15 correct; it's had its impact on the support  
16 staff. It's also had its impact, although  
17 we try to keep this to a minimum, in  
18 understanding all the other roles we play.  
19 Let me just take a minute to talk about  
20 that. We have social workers at Rikers  
21 Island, so that when people are arrested and  
22 go there, but they have families to take  
23 care of, they have jobs that have to be  
24 contacted, all of that stops the moment you  
25 are arrested, you get within that system.

270

1 Daniel Greenberg

2 Before Michelle Maxine brought her  
3 lawsuit, as a matter of fact, you would be  
4 three days in that system. It was more than  
5 72 hours from the time you were arrested,  
6 regardless of how minor the allegation was,  
7 regardless of your guilt or innocence, you  
8 were spending three days in jail simply  
9 because you were arrested, and one of the  
10 things the Legal Aid Society did through our  
11 special litigation unit was to bring  
12 litigation to say that that was  
13 unconscionable; unconstitutional in a  
14 literal sense to be there for three days on  
15 mere allegation of a crime regardless of how  
16 serious it was. That lawsuit was  
17 successful.

18 A number of things are important  
19 about that. First that it was successful  
20 because it saved the city millions of  
21 dollars because the city had to respond by  
22 becoming more efficient. The police had to  
23 get people in quicker, corrections had to  
24 get people down quicker, the court system  
25 had to respond adequately.

271

1 Daniel Greenberg

2 That has now happened. Most of the

3 cases are now from arrest to arraignment for  
4 24 hours, two full days down.

5 All the other parts of the criminal  
6 justice system are taking credit for that  
7 happening. They are all very proud of  
8 themselves. On one level they should be.  
9 They had to adapt to do that.

10 On the other hand, without the role  
11 of the Legal Aid Society to have brought the  
12 lawsuit, there is no question that somebody  
13 selling oranges on the street for which the  
14 crime would be punishable by a slap on the  
15 wrist would be spending three days in jail.  
16 The ancillary function that Legal Aid plays  
17 that no other provider can play because they  
18 are not adequately funded to do it, because  
19 they are not, it's not part of their mandate  
20 and because they don't see the volume of  
21 cases that we have and don't have the  
22 ability to respond to.

23 So what we do when we see these  
24 pervasive systemic problems is we look and  
25 say, this isn't just happening in one

272

1 Daniel Greenberg  
2 borough. It's not just happening to a few  
3 people. This is a real issue that we should  
4 take, and we go ahead and challenge the  
5 people who fund us directly on these issues.

6 In one sense, that's pretty stupid  
7 politics. The people who fund you don't  
8 like to be sued. They certainly don't like  
9 to be sued systemically to say their  
10 policies have to be changed. On the other  
11 hand, that's what we do. We've done it for  
12 more than 120 years, and that's what we're  
13 going to continue to do.

14 But one of the difficulties of lack  
15 of funding those kinds of services, the  
16 Prisoners' Rights Project, the parole  
17 revocation, all of the social work programs  
18 that we have that help people once they are  
19 there, going to the precincts and watching  
20 lineups or getting a phone call saying the  
21 case isn't in court, but my sister-in-law  
22 wants to go in tomorrow and surrender  
23 herself.

24 Those are all the cases that don't  
25 show up on our statistics. When I talk

273

1 Daniel Greenberg

2 about the amount of work we have, not one of  
3 those things shows up as a case we have  
4 because they are not included in the  
5 official statistics, but they are all part  
6 of the infrastructure of what Legal Aid  
7 Society does for this city, and, without  
8 that kind of work, this city and its systems  
9 would be much the poorer for it.

10 MR. PITTARI: Just another question  
11 to follow up a bit, and I don't know if you  
12 care to comment on this or not, but to what  
13 extent do you think that the loss of funding  
14 was because of anger by the funding source  
15 both at any systemic attacks, not only in  
16 the criminal area, but on things you may  
17 have done, since you have a civil division  
18 and a civil area, like being an advocate for  
19 the homeless, for example.

20 THE WITNESS: I long ago stopped  
21 commenting on people's motives, because they  
22 are generally not important enough to me.  
23 It's what happens that's important. So part  
24 of that I will simply deflect and not go  
25 into. I will say this, however. The

274

1 Daniel Greenberg

2 mayor's statement after the strike was  
3 straightforward. He said he wanted  
4 competition for our work.

5 Competition, as we had always  
6 understood it, was a means toward an end, an  
7 end being either better services or the same  
8 services for less money. It was a means to  
9 something.

10 The mayor made clear by not allowing  
11 us to bid for that work that competition to  
12 him meant an alternative regardless of  
13 whether it was more cost efficient, better  
14 quality or something else. There simply had  
15 to be someone else, another entity other  
16 than the Legal Aid Society there, and we  
17 were not permitted to bid for that work.

18 As you may know, there are some  
19 lawsuits pending about that. We believe  
20 that those actions violated numbers of state  
21 laws and even civil rights and labor laws,  
22 and that is going to go toward its end. If  
23 you ask me directly about relations between  
24 the City and the Legal Aid Society, I will  
25 say there have been a series of initiatives

1 Daniel Greenberg  
2 of great cooperation between the mayor and  
3 the Legal Aid Society.

4 We at his request were  
5 representatives along with the Civil  
6 Liberties Union, of the deaf Mexican  
7 immigrants who were picked up on the  
8 subways. It was a wonderful way in which  
9 all of the divisions of the Legal Aid  
10 Society, criminal defense in Queens,  
11 negotiating with the DA, the federal  
12 defender, which is also the Legal Aid  
13 Society, was negotiated with the INS, the  
14 FBI, our homeless rights project was taking  
15 care of housing people, the immigration unit  
16 took care of getting them S-visas, special  
17 visas and our civil division also worked  
18 with their welfare problems, and Sullivan &  
19 Cromwell through pro bono efforts of their  
20 volunteer division gave us two lawyers and a  
21 paralegal. So again the Legal Aid Society  
22 in its very breadth is able to take parts of  
23 the criminal justice system and do more with  
24 it.

25 The mayor appreciated that. We

1 Daniel Greenberg  
2 staffed hotlines when it looked like rent  
3 control might go under. We had filed  
4 immigration lawsuits around food stamps with  
5 the city and corporation counsel. So  
6 whatever may have existed in the past, which  
7 I haven't commented on, suffice it to say  
8 that as we go forward, I think everybody is  
9 struggling to have better relations.

10 MR. PITTARI: One comment and then a  
11 further question on something I thought of as  
12 you were talking.

13 The comment is just that I think the  
14 record should reflect that even when we're  
15 talking about lower level cases, we're  
16 talking about misdemeanors that in some  
17 instances can carry up to a year in jail,  
18 and for a family, for a defendant or a  
19 family that's never been in the criminal  
20 justice system before, that doesn't seem  
21 like a lower level case to them, and their  
22 representation they view as important as  
23 anybody else's, and I know you know that,  
24 but the record should reflect that.

1 Daniel Greenberg  
2 true, and there are also increasingly  
3 consequences to having been found guilty or  
4 pled guilty to lower level offenses as you  
5 go forward. There are civil consequences  
6 sometimes, and there are also criminal, so I  
7 couldn't agree with you more.

8 To each individual defendant, they  
9 have the absolute right to have the best  
10 quality that they can have, and it is not a  
11 defense by either us or any part of the  
12 system to say, well, they are small cases,  
13 they are not important cases, they are lower  
14 level cases.

15 I only meant to say that we do have  
16 some triage and do handle a capital case  
17 somewhat differently than we do the other  
18 cases, but they are all important.

19 MR. PITTARI: One further question  
20 is, what effect, if any, has this had on  
21 your work in the family court, representing  
22 juveniles, cutbacks --

23 THE WITNESS: Our juvenile rights  
24 division is funded entirely separately. It  
25 is all state funding and actually comes

1 Daniel Greenberg  
2 under the OCA budget as part of the court  
3 budget, and that has not been subject in  
4 recent years to the kinds of cuts that other  
5 divisions have, so there is that safe haven  
6 there.

7 MR. GRADESS: I just have a couple of  
8 questions.

9 You may have heard the question I  
10 asked to Adelle Bernhard. Is there any  
11 question in your mind about the legality of  
12 the oversight committee? I understand that  
13 its current recommendations are excellent  
14 recommendations, and they did a thorough  
15 job, but I'm concerned about the legitimacy  
16 of the committee.

17 Has there been an analysis of that by  
18 Legal Aid?

19 THE WITNESS: I don't believe we made  
20 an analysis of that. The statement that it  
21 is under the supervisory powers of the court  
22 seems reasonable to us, much more important

23 just simply from the perspective of how we  
24 respond as an organization.  
25 We think it's right that there is

279

1 Daniel Greenberg  
2 oversight. There is nothing that we have to  
3 fear from someone looking at our work and  
4 giving us feedback in a healthy,  
5 constructive way, telling us things that we  
6 may not know, or highlighting and  
7 publicizing things that we do know, in much  
8 the same way that we welcome this committee  
9 and are pleased that there are people here  
10 who are listening to this work to try to  
11 publicize the realities.

12 So we have not looked into it, but in  
13 part we haven't looked into it because we  
14 have no objection to it.

15 MR. GRADESS: And am I also correct  
16 that the Second Department committee did not  
17 review Legal Aid in its work?

18 THE WITNESS: That's correct. They  
19 issued a report. We were not given any  
20 standards by which we had to measure what  
21 that report said, nor given any notice of  
22 the fact that the report was coming out. We  
23 simply received a report as did others that  
24 talked about the adequacy of what we were  
25 doing and said it was okay.

280

1 Daniel Greenberg  
2 MR. GRADESS: And in all of this  
3 activity with reference to oversight, has  
4 there been any movement afoot to have  
5 oversight extended to the 18-b panel that  
6 anybody is aware of?

7 THE WITNESS: None that I know of  
8 other than what has historically taken  
9 place, which is periodically some good  
10 government or watchdog group comes out with  
11 a report in which they've monitored  
12 something and then talks about it.

13 Clearly, it's something of value, and  
14 clearly the report, the committee, Adelle  
15 Bernhard's testimony, Klaus Eppler's work,  
16 Steve Rosenfeld, others on that committee as  
17 volunteers, they have done an extraordinary  
18 job, but this is too important to be left to  
19 volunteers. They take their job seriously,  
20 but they don't have a staff as all good

21 oversight and watchdog commissions should  
22 have to be able to do the work, and, again,  
23 we would welcome that.

24 MR. GRADESS: Thank you very much.

25 THE WITNESS: Thank you.

281

1 Nerney

2 MR. GRADESS: Sister Mary Nerney.

3 THE WITNESS: Hello. My name is  
4 Sister Mary Nerney. I'm the director of two  
5 programs that work with women and their  
6 families in the criminal justice system, and  
7 we provide services to them. The first one  
8 is Steps to End Family Violence, which  
9 provides alternatives to incarceration for  
10 women with a history of abuse, who have been  
11 arrested for defending themselves, or their  
12 children, or whose abusers have forced them  
13 into illegal activities.

14 Our staff completes an assessment of  
15 the abuse experienced, advocates in court  
16 with the assigned attorney, and provides  
17 individual and group counselling, plus other  
18 services as needed.

19 We are an official alternative to  
20 incarceration program funded by New York  
21 City criminal justice coordinator's office,  
22 and while we provide the opportunity for  
23 abused women to have that victimization  
24 considered in their cases, it is possible in  
25 some of the courts, with some of the judges,

282

1 Nerney

2 and by some of the attorneys. This is so  
3 uneven because of the lack of education  
4 about the issues of abuse.

5 I think we all know that domestic  
6 violence is a new area of consideration in  
7 the criminal justice system, and some of the  
8 lawyers really feel that they know it all,  
9 and, therefore, do not need to learn any new  
10 area of the law.

11 And, so, I could say that some of  
12 them will say all different things to the  
13 women, and to us, too. For example: I've  
14 been practicing for 15 years. I know how to  
15 defend someone. I don't want any woman  
16 telling me what to do. Obviously, that was  
17 a male attorney. Oh, everybody is saying  
18 it's domestic violence. You can't believe



17 defense.  
18 So the client feels isolated, unless  
19 they have a program such as ours. And then,  
20 however, some of the lawyers will use our  
21 program, then, instead of going to speak to  
22 the client, saying, oh, you are going to go  
23 see her. That's good.  
24 So, therefore, the lawyer doesn't  
25 need to see her. This is good, but it isn't

285

1 Nerney  
2 enough. If the client has a legal question  
3 that our staff is not able to respond to,  
4 that means that we have to make many phone  
5 calls, and perhaps even wait until the next  
6 court appearance before that question can be  
7 addressed.  
8 Interviews with witnesses are usually  
9 not done immediately, but not done until the  
10 time for the trial or the time for a plea.  
11 It's too late. If evidence of the abuse  
12 experienced in the past can be brought into  
13 the case on an earlier basis, then there  
14 will be a more thoroughly prepared trial, or  
15 a better plea for that person. I'm not  
16 describing all assigned attorneys. However,  
17 I am describing a majority of them,  
18 unfortunately.  
19 Several clients asked me to share  
20 with you their desires that their 18-b  
21 attorneys would be more assertive in their  
22 cases. One described her lawyer as a mouse  
23 who was more concerned with pleasing the  
24 judge and appeasing the district attorney  
25 than in advocating for her. Another said

286

1 Nerney  
2 that she wished that her lawyer would tell  
3 her the truth, instead of saying, it's going  
4 to be all right, and then at the next court  
5 appearance, I have bad news.  
6 My next recommendation is about model  
7 programs, and I wrote this before I knew  
8 that the Neighborhood Defenders Service  
9 would also be in the room with me, but there  
10 have been model program, such as the  
11 Neighborhood Defenders Service of Harlem.  
12 It's been a joy to work with them. They  
13 provide a team of lawyers, social workers,  
14 investigators, and support staff.



13 that person than the person who is abused.  
14 I know there is training by the police  
15 department, but I also know that among the  
16 police department is a very high percentage  
17 of abusers, and, so, therefore, that's also  
18 one of the reasons why, it depends on what  
19 precinct you are in as to whether or not  
20 domestic violence is taken seriously within  
21 that precinct, and also whether or not that  
22 particular police officer is an abuser.

23 So that's a particular problem. But  
24 also another one, that comment that you  
25 made, one part of the criminal justice

289

1 Nerney  
2 system doesn't work with another part of the  
3 criminal justice system, so the police don't  
4 work with the lawyers, and vice versa.

5 MS. BARR: The second part is we seem  
6 to be going around in circles, because we've  
7 heard a lot today before you arrived here  
8 about the problems that the 18-b rates have  
9 placed on the individual lawyers, that  
10 because of the rates that, the moneys that  
11 they are given, which is \$25 per hour for  
12 out-of-court and \$40 for court experiences,  
13 they really can't do the job that they  
14 should be doing, because, when they do do  
15 the job they should be doing, they are  
16 basically doing pro bono work.

17 THE WITNESS: I believe that's true.

18 MS. BARR: Sooner or later they have  
19 to get out of doing all 18-b work because  
20 they can't afford it, and we had some  
21 lawyers here that said exactly that, that  
22 the more qualified 18-b lawyers have to get  
23 out of it because they need food to eat on  
24 their tables, too, and it just keeps, a  
25 revolving circle, so that the defendants

290

1 Nerney  
2 don't get what they should be getting, but  
3 neither do the lawyers.

4 THE WITNESS: You are absolutely  
5 right. I think that is true that they are  
6 not paid enough, so therefore they take more  
7 cases than they would probably take if they  
8 were paid more in order to make whatever  
9 amount of money they wish to make and so are  
10 not able to adequately defend that person.

11           They are pretty good at trying to get  
12 pleas, but not at actually really going into  
13 the details of the case, particularly one  
14 that might be complex. And what we have  
15 found with the 18-b attorneys that we have  
16 worked best with have been ones who are  
17 private attorneys and who only take a few  
18 18-b cases. Those that take all 18-b cases  
19 I think are the problems.

20           MR. PITTARI: Just one question,  
21 sister. This morning, another speaker  
22 mentioned that now that there is a screening  
23 committee or a screening panel for ATI  
24 services in the city, that her organization  
25 could not be directly contacted by a defense

291

1   Nerney  
2 attorney on behalf of a client, that they  
3 had to go through this criminal justice  
4 screening committee.

5           Can you take direct contact from the  
6 attorney, or do you have to go through the  
7 screening committee?

8           THE WITNESS: Yes. We have been  
9 taking direct contacts with attorneys. What  
10 has happened is, my little battle with the  
11 centralized court screening service, and  
12 that is if they only would put two  
13 additional questions on their questionnaire  
14 that asked about the abuse the person had  
15 experienced, then they could screen for our  
16 program.

17           But they haven't been able to screen  
18 for our program, so we have been continuing  
19 to do the court advocacy, and also the  
20 outreach as well, which has put a great,  
21 great stress on our program. But, again,  
22 because we are the only program doing this  
23 in New York City, most of the attorneys or  
24 other agencies would know about us, and so  
25 would contact us.

292

1   Gann

2           MR. GRADESS: What would those two  
3 questions be?

4           THE WITNESS: Have you been abused  
5 currently or in your past, and, does what  
6 you have been arrested for now relate to  
7 that abuse that you've experienced, because  
8 then that would show there was some

9 relationship.  
10 MR. GRADESS: Thank you very much.  
11 Marc Gann.  
12 THE WITNESS: Good afternoon. As you  
13 know, my name is Marc Gann. I'm a criminal  
14 defense practitioner primarily in Nassau  
15 County, and I'm here on behalf of Arthur  
16 Iverson, who is the administrator of the  
17 assigned counsel plan for Nassau County. He  
18 unfortunately could not be here.  
19 My background is I'm a former  
20 prosecutor in Nassau County, and I've been  
21 doing criminal defense work in Nassau County  
22 on my own and as a member of the assigned  
23 counsel plan there for approximately the  
24 last nine or 10 years. And I don't know  
25 whether anybody from our county or from

293

1 Gann  
2 Suffolk County has spoken today.  
3 MS. LORAND: Suffolk.  
4 THE WITNESS: I'm sure what I'm going  
5 to say is in some sense repetitive. I will  
6 keep my comments very brief. What I really  
7 wanted to talk about was rates, and the  
8 effect that I think that has had on the  
9 quality of representation in Nassau County  
10 in particular. I think Long Island is  
11 different in that we have a screening  
12 process not only for the attorneys that get  
13 onto the 18-b panel, and I know that exists  
14 in all of the jurisdictions, but there is a  
15 screening process for people to get assigned  
16 attorneys, whether that be 18-b attorneys or  
17 Legal Aid attorneys.  
18 I think that's a very effective  
19 process. Family members must come in, or  
20 the individual themselves must document  
21 their ability to earn, or lack thereof,  
22 before they are assigned an attorney, so not  
23 everyone gets an assigned attorney.  
24 I think that cuts down on the  
25 caseload of the assigned attorneys both not

294

1 Gann  
2 only in the Legal Aid Society there but the  
3 18-b attorneys that work within the county.  
4 However, the rates I think have had a  
5 drastic effect on the quality of  
6 representation and the number of attorneys

7 willing to remain on the panel. For the  
8 reasons that you just stated a few minutes  
9 ago, Ms. Barr, many attorneys find it  
10 totally impractical to handle assigned cases  
11 because of the rate structure. You get,  
12 what you find is that on our panel, most of  
13 the attorneys are new practitioners or older  
14 individuals who are winding down their  
15 practices.

16 And so there is very, there are fewer  
17 and fewer truly experienced attorneys  
18 handling 18-b or assigned cases. There is  
19 another thing that's happening in Nassau  
20 County that I've seen that has discouraged  
21 people from handling assigned counsel work,  
22 and that is suits, lawsuits. The clients  
23 have become somewhat sophisticated, and  
24 there have been a number of suits that I'm  
25 aware of that have been filed against 18-b

295

1 Gann  
2 lawyers, either suits or grievances by their  
3 clients for the sole purpose, it seems to  
4 me, of getting new counsel, getting someone  
5 that is either more experienced, and  
6 predominantly more experienced than the  
7 person they have been dealing with, and that  
8 has discouraged people from either getting  
9 onto the 18-b panel or remaining on the 18-b  
10 panel and taking assigned cases.

11 If you look at the risk reward, the  
12 risk in dealing with some of these people  
13 greatly outweighs the \$40 an hour in-court  
14 fee and the \$25 an hour out-of-court fee.

15 People say, why do I need to go  
16 through the aggravation of being sued by  
17 somebody or having a grievance filed against  
18 me. I feel like I'm doing this pro bono  
19 anyway. I've heard that expressed by a  
20 number of people, and I think it's  
21 unfortunate, and I think some of the  
22 individuals who want particular attorneys to  
23 represent them have taken to filing those  
24 grievances or filing lawsuits pro se and  
25 establishing a conflict of interest between

296

1 Gann  
2 themselves and the attorney that was  
3 representing them.

4 I think with the rate structure the

5 way it is and the inexperience of the  
6 attorneys that practice predominantly in the  
7 18-b plan, the cost associated with  
8 administering the plan is actually greater  
9 than it would be if the rates were higher.

10 If the individual had the trust and  
11 confidence in the attorney originally  
12 assigned to represent them, if that attorney  
13 had the knowledge and experience to  
14 adequately investigate the case from the  
15 get-go, cases would be disposed of more  
16 quickly, appropriate dispositions would be  
17 entered into, I think less cases would  
18 actually go to trial, and the ones that do  
19 go to trial are the ones that really should  
20 go to trial, rather than ones that go to  
21 trial merely because nobody has done any  
22 work on the case or very little work on the  
23 case prior to getting it to that point.

24 While it looks good in the short-term  
25 to say, keep rates low, I think it actually

297

1 Gann

2 costs more in the long run to do so. Just  
3 one brief statement as to statistics. It's  
4 my understanding that in the last 12 months,  
5 approximately one-third of the assigned  
6 counsel, members of the assigned counsel  
7 plan in Nassau County have asked to be  
8 removed from that plan predominantly because  
9 the rates are so low. I will leave it at  
10 that and address any questions if you have  
11 any.

12 MR. PITTARI: I'm just curious if of  
13 those attorneys that have left the Nassau  
14 panel, do you have any idea how many of them  
15 may have because of higher rates gone on to  
16 the federal CJA panel?

17 THE WITNESS: I know a number of them  
18 have tried to. The federal panel has its  
19 own criteria, including either trying or  
20 second seating on trials with that  
21 particular jurisdiction, so I don't know  
22 what the success rate has been in terms of  
23 getting onto that panel, but I know a number  
24 have tried to.

25 MR. GRADESS: Is it a fair

298

1 Gann

2 characterization of your testimony that a

3 majority of Nassau County's assigned counsel  
4 panel are primarily inexperienced  
5 practitioners?

6 THE WITNESS: I think it's either  
7 Relatively inexperienced practitioners, or,  
8 for lack of a better way of describing them,  
9 older people who are in essence winding down  
10 their practice. There are fewer and fewer,  
11 in my opinion, or people in my age range, if  
12 you will, of people approximately 40,  
13 mid-40s, who have been practicing criminal  
14 defense anyway for 10 to 15 years, fewer and  
15 fewer of those people are on the panel.  
16 Those are predominantly the ones that have  
17 left the panel within the last 12 months.

18 MR. GRADESS: And let me ask you one  
19 other question. On this screening process  
20 for eligibility that you referred to, not  
21 the screening panel for attorneys, but  
22 screening process for eligibility, could you  
23 for the record clarify how that works.

24 THE WITNESS: I don't know who funds  
25 it particularly, I assume it's the county

299

1 Gann

2 that funds it, but there is a staff of  
3 personnel, three or four people, who  
4 actually, if somebody applies for assigned  
5 counsel, whether that be Legal Aid or an  
6 18-b attorney, it's called the Defense  
7 Counsel Screening Bureau, they interview the  
8 person and investigate their finances to see  
9 whether or not under their criteria they  
10 would qualify for an assigned attorney,  
11 either a Legal Aid attorney, an assigned  
12 18-b attorney or someone who might  
13 contribute a partial fee, a partial payment  
14 toward the assigned attorney to represent  
15 them.

16 MR. GRADESS: So this is an executive  
17 branch agency?

18 THE WITNESS: I assume so, yes.

19 MR. GRADESS: And so let me just get  
20 this straight. If I'm crossing the Queens  
21 border and I'm arrested and taken then to  
22 district court for arraignment, how would  
23 this work for me if I were indigent?

24 THE WITNESS: If you request  
25 screening through the attorney representing

300

1 Gann

2 you at arraignment, which is usually the  
3 Legal Aid attorney, between the time of your  
4 arraignment and your next court appearance,  
5 you will have been interviewed by someone  
6 from the Defense Counsel Screening Bureau  
7 who will begin the process of investigating  
8 your finances.

9 That process begins by discussing  
10 with you where you work, if you work, if you  
11 own property, whether you have bank  
12 accounts, whatever assets you may have, if  
13 that can be verified through documentation  
14 that you have, that's great. It can also be  
15 verified through family members who come in  
16 or are requested to come in and speak to the  
17 members of the Defense Counsel Screening  
18 Bureau. Hopefully that process only takes a  
19 couple of days at most, sometimes shorter,  
20 and the decision to assign an attorney can  
21 occur at the next court appearance after the  
22 arraignment.

23 MR. GRADESS: During this time am I  
24 represented?

25 THE WITNESS: Yes. If you requested

301

1 Gann

2 screening, you are represented by the Legal  
3 Aid Society for a period of time.

4 MR. GRADESS: And are they actively  
5 pursuing my case thereafter?

6 THE WITNESS: I don't know if I can  
7 answer that question accurately. I don't  
8 know that, active, actively pursuing your  
9 case is an answer I can accurately give. I  
10 wouldn't say they are actively pursuing your  
11 case. I don't think they are beginning the  
12 process of conducting an investigation.  
13 They are merely preparing to handle that  
14 case at the next conference or the next  
15 court appearance.

16 MR. GRADESS: If this turns out to be  
17 a felony case, what's its impact on 180-80?

18 THE WITNESS: Quite commonly the  
19 impact is that the 180-80 time is told until  
20 such time as that either the Legal Aid is  
21 assigned or an 18-b is assigned or private  
22 counsel is retained.

23 MR. GRADESS: You mean by told that  
24 the district attorney doesn't pursue an  
25 indictment?

1 Gann

2 THE WITNESS: That's correct. It's  
3 deemed to be an adjournment at the request  
4 of the defendant, rather than imposing an  
5 obligation upon the prosecutor to pursue the  
6 case.

7 MR. PITTARI: But the defendant in  
8 fact just requested an attorney; he didn't  
9 request an adjournment.

10 THE WITNESS: Well, what the effect  
11 of it is is that the Legal Aid Society  
12 attorney that is standing in at the  
13 arraignment has requested the attorney.  
14 Because that attorney is actually assigned  
15 until there is a, is assigned for purposes  
16 of that initial appearance, that arraignment  
17 and that subsequent conference, that one of  
18 the things that that Legal Aid attorney  
19 routinely says at the arraignment is we are  
20 requesting on behalf of the defendant a  
21 conference either in the district court or  
22 in the county court, depending whether it's  
23 a misdemeanor or felony case within X-number  
24 of days from the date of arraignment.

25 MR. PITTARI: Now, suppose the

1 Gann

2 screening committee determined that the  
3 person in its opinion is not eligible for  
4 assignment of counsel. Is the judge bound  
5 by that, or in what percentage of cases do  
6 the judges overrule that?

7 THE WITNESS: They do overrule it. I  
8 will tell you it's not a common practice to  
9 overrule that recommendation in the Nassau  
10 County courts. They will routinely, what  
11 will happen is the judge will direct  
12 defendant and/or his family, and induce most  
13 commonly the family to go retain an attorney  
14 and adjourn the case for a short date. If  
15 they don't come back with an attorney  
16 because they indicate they can't afford one,  
17 they've spoken to attorneys and can't afford  
18 one, then the judge may get involved and  
19 assign an attorney or assign the Legal Aid  
20 Society over the recommendation of the  
21 defense counsel screening bureau.

22 MR. PITTARI: Most times when that  
23 happens, it's probably at least a week  
24 later, because you have a couple of days for

25 the interview, and a couple of days after

304

1 Dean  
2 the person has been turned down to go and  
3 try and retain.

4 THE WITNESS: That's correct.

5 MR. GRADESS: Thank you very much.

6 Robert Dean.

7 THE WITNESS: Hello. My name is  
8 Robert Dean. I am the attorney in charge of  
9 the Center for Appellate Litigation. The  
10 center is a not-for-profit corporation  
11 funded by the City of New York to represent  
12 indigent criminal defendants in appeals and  
13 post conviction proceedings arising in the  
14 Appellate Division First Department.

15 My purpose in testifying here today  
16 is to sensitize the panel to a problem that  
17 does not generally receive much attention,  
18 assigned counsel fees for 18-b appellate  
19 counsel. I understand there have been a  
20 couple of speakers here today on that  
21 already, but I do have some additional  
22 things to say.

23 Let me point out that our office is  
24 not funded through the assigned counsel  
25 plan, and we have no connection to it. Our

305

1 Dean  
2 funding is not in any way pegged to or  
3 dependent upon the fees set by the  
4 legislature for compensating panel  
5 attorneys. The center's city funding is  
6 completely adequate to our office's task at  
7 hand, and I am not here to seek an increase  
8 in the center's funding.

9 Indeed, the city's institutional  
10 appellate defense offices, the Center for  
11 Appellate Litigation, Appellate Advocates,  
12 the Office of the Appellate Defender and the  
13 Appeals Bureau of Legal Aid Society have  
14 received sufficient funding to allow us to  
15 provide quality representation to indigent  
16 defendants on appeal. The city provides us  
17 with adequate funding for library resources,  
18 training and supervision and office space so  
19 as to allow our attorneys to provide that  
20 kind of representation.

21 The city's quality of life initiative  
22 has not hit us hard in the appellate arena

23 since misdemeanor prosecutions which have  
24 proliferated in trial court under that  
25 initiative seldom result in a conviction

306

1 Dean  
2 that is taken to a appellate court.  
3 Overall, appellate caseloads are mainly  
4 determined by the number of felony trials  
5 which have remained relatively stable.  
6 These institutional appellate defense  
7 offices have not had to deal with an overall  
8 increase in assignments and current funding  
9 levels are sufficient to the task at hand.

10 However, our colleagues who practice  
11 criminal appeals in the private sector and  
12 who accept 18-b assignments are not so  
13 lucky. At \$40 an hour the economics of 18-b  
14 appeals are highly unfavorable. That  
15 remuneration discourages attorneys from  
16 doing a careful job.

17 Assuming the court adheres to the  
18 \$1,200 statutory cap per appeal, an  
19 appellate panel attorney will spend a total  
20 of only 30 hours on an appeal before the cap  
21 kicks in, and they are working for free.  
22 Even assuming the court waives the statutory  
23 cap of \$40 an hour, at least in New York  
24 City, is insufficient pay for any appellate  
25 lawyer. From that fee, of course, the panel

307

1 Dean  
2 attorney pays her own overhead costs and  
3 library research expenses which are  
4 considerable.

5 If the panel attorney takes a  
6 vacation or is sick, she does not get paid.  
7 There are no supervisors with expertise to  
8 help with a brief or answer questions.

9 In contrast, a staff attorney with my  
10 office is able to spend on average over  
11 three times that amount of time briefing and  
12 arguing an average appeal from a trial  
13 conviction. That doesn't even include the  
14 hours a paralegal spends preparing the  
15 record on appeal and a supervisor spends in  
16 assisting the staff attorney craft a quality  
17 brief.

18 The staff attorney is a salaried  
19 employee, has no overhead or library  
20 expenses. She gets paid vacation and other

21 benefits, including health insurance. In  
22 this regard, the center is typical of all  
23 the New York City institutional appellate  
24 defense offices.

25 Thus the comparison between the

308

1 Dean  
2 resources available to an appellate panel  
3 attorney on the one hand and a staff  
4 attorney with an institutional appellate  
5 office in the city is a stark one. At \$40  
6 an hour, the panel attorney is being  
7 squeezed. Essentially, she faces a choice  
8 between doing a proper job and taking a  
9 severe financial blow.

10 The result of this financial dilemma  
11 is that the more able and experienced  
12 appellate lawyers eventually cease taking  
13 18-b assignments and instead either seek out  
14 federal CJA appellate panel assignments  
15 which pay \$75 an hour, or cease taking any  
16 assigned appeals. As a further consequence,  
17 the assigned counsel plan has difficulty  
18 recruiting and retaining the best appellate  
19 lawyers.

20 The ones it attract and retain are  
21 financially discouraged from expending the  
22 time or effort necessary to render quality  
23 representation on appeal. This situation is  
24 rendered all the more painful by the fact  
25 that quality representation on appeal is

309

1 Dean  
2 crucial to the criminal defendant. There is  
3 a proven statistical connection between  
4 superior appellate advocacy and better  
5 outcomes. And on my written testimony, I  
6 have a citation to a book written by fellow  
7 named Wasserman, A Sword for the Conviction,  
8 which details this at length.

9 Where there is appellate reversal, it  
10 is usually for an issue which involves the  
11 type of judgment or reasoning in which  
12 advocacy and close factual analysis play a  
13 real crucial part.

14 Increasingly, in recent years, it has  
15 been more and more difficult to get a  
16 reversal on appeal. There is more of a  
17 presumption of regularity with respect to  
18 trial level proceedings, to say the least,

19 and overcoming that presumption places a  
20 premium on skilled appellate advocacy.  
21 Additionally, most appeals are for  
22 defendants serving long prison sentences  
23 based on felony convictions after trial.  
24 Over half of our clients who went to trial  
25 are serving sentences of 25 years or longer.

310

1 Dean  
2 Relatively few misdemeanor convictions are  
3 appealed, and the overwhelming majority of  
4 plea bargained felony dispositions are not  
5 appealed. Hence, the stakes are almost  
6 always higher or very high in a criminal  
7 appeal.  
8 Finally, and no less important, the  
9 law in New York State is molded by appellate  
10 court decisions. The better the appellate  
11 advocacy on both sides, the better the law  
12 will be for all criminal practitioners,  
13 judges and defendants.  
14 In sum, there is an inherent  
15 contradiction between the need to provide  
16 quality representation on appeal, and \$40 an  
17 hour. We believe that increasing the rate  
18 to \$75 an hour, which is the CJA rate, and  
19 eliminating the statutory cap of \$1,200 per  
20 appeal would go a long way toward rectifying  
21 this disparity.  
22 I understand that increasing the  
23 rates would potentially place a difficult  
24 financial burden on the localities, and I'm  
25 not unsympathetic to that plight. I believe

311

1 Dean  
2 the state should step in and fund the  
3 increase using some imaginative thinking.  
4 For example, Gerald Damiani, president of  
5 the New York State Association of Criminal  
6 Defense Attorneys has proposed exploring  
7 whether the penalty or mandatory surcharges  
8 imposed pursuant to the penal law and the  
9 BTL could be increased with the additional  
10 revenue used to fund an increase in 18-b  
11 rates.  
12 However the money is found, it is  
13 crucial that it be found, because, as time  
14 passes, the ability of the plan to provide  
15 quality representation on appeal becomes  
16 increasingly more difficult.

17 I would happy to answer any  
18 questions.  
19 MR. PITTARI: No really a question.  
20 I ought to state something for the record.  
21 I happen to be on the board of the New York  
22 State Association of Criminal Defense  
23 Lawyers, and the recommendation or the  
24 statement about Mr. Damiani is correct. It  
25 was not something that he has recommended as

312

1 Dean  
2 the policy of the organization, or that has  
3 been endorsed by the board. It was  
4 something he mentioned in a newsletter as  
5 just, that we ought to be looking at all  
6 sorts of different ways of possible funding.  
7 That's not a position that has been adopted  
8 by NYSACDL. I wanted to clarify the record  
9 on that.

10 MR. GRADESS: Thank you. Two quick  
11 questions.

12 Do you know the percentage of  
13 appellate cases in the First and Second  
14 Departments that are being handled by 18-b  
15 vis-a-vis the other providers?

16 THE WITNESS: No, I don't. I could  
17 get that information for you possibly.

18 MR. GRADESS: Maybe we can  
19 collaborate.

20 THE WITNESS: I think a greater  
21 percentage is handled by 18-b in the Second  
22 Department than in the First, so it varies.

23 MR. GRADESS: We heard testimony  
24 earlier about what seems to be a widespread  
25 pattern of voucher cutting, so that this

313

1 Dean  
2 exacerbates what you've been describing  
3 here, and it included the Court of Appeals.

4 Could you comment on your experience  
5 or your observation of voucher cutting in  
6 the Second and First in the Court of  
7 Appeals.

8 THE WITNESS: In the Second  
9 Department, for years they have been cutting  
10 vouchers. It's been a longstanding policy  
11 that appellate vouchers would be cut. The  
12 First Department has not done so  
13 traditionally until very recently when they  
14 have started cutting vouchers, and I think

15 that possibly one result of that is when the  
16 appellate attorneys put in the vouchers,  
17 they might conceivably put in the voucher  
18 with that potential cut in mind. In the  
19 Court of Appeals, they adhere very strictly  
20 to this 1,200 cap. They do not deviate from  
21 it.

22 So they take that statutory cap very  
23 seriously. I don't believe that they cut  
24 vouchers. Up in the Appellate Division  
25 First and Second Department, they don't

314

1 Dean  
2 adhere rigidly to the cap, but they cut the  
3 vouchers.

4 MR. GRADESS: So is it a fair  
5 statement to say that the court's voucher  
6 cutting process is in part in your view  
7 responsible for reducing the quality of the  
8 appellate advocacy that comes before it?

9 THE WITNESS: Absolutely. Every time  
10 I talk to one of my colleagues who do some  
11 18-b appeals, and I know many who left the  
12 Criminal Appeals Bureau of the Legal Aid  
13 Society either about the same time I did, or  
14 shortly before, they were very experienced  
15 appellate attorneys, mostly supervisors,  
16 they all started off taking some 18-b  
17 appellate cases, and they all complained to  
18 me.

19 One of the first things they talked  
20 about was that their vouchers are cut, and  
21 these are really excellent attorneys, by the  
22 way, and they couldn't to continue to take  
23 on such cases.

24 MR. GRADESS: So they quit.

25 THE WITNESS: They tried to take as

315

1 Schreibersdorf  
2 few of those cases as possible, which is a  
3 real shame, because these are very, not only  
4 very experienced, but very highly qualified  
5 appellate attorneys, kind of people you'd  
6 want on the panel taking cases.

7 MR. GRADESS: Thank you very much.  
8 Lisa Schreibersdorf.

9 THE WITNESS: My name is Lisa  
10 Schreibersdorf. I am the Executive Director  
11 of the Brooklyn Defender Services. We are a  
12 not-for-profit corporation with a contract

13 with the City of New York to handle 12,500  
14 cases per year in Brooklyn. We handle  
15 felony cases, misdemeanor cases and any type  
16 of cases other than homicide cases in  
17 Brooklyn.

18 What I want to talk about is some,  
19 really some interesting things that have  
20 happened in Brooklyn. I'd just like to give  
21 some feedback to this committee regarding  
22 some things that are good and some things  
23 that aren't so good in Brooklyn.

24 Brooklyn was one of the first places  
25 to get a federally funded drug treatment

316

1 Schreibersdorf  
2 court, and it has been an excellent  
3 experiment which has now become much more  
4 common throughout the country for the  
5 federal and local governments to finance  
6 these drug treatments courts. Brooklyn is  
7 one of the first and is often used as a  
8 prototype. Our clients are, any client  
9 who's eligible for the drug treatment court  
10 and is found to be a drug abuser is entitled  
11 to drug treatment in response to their case.

12 And if they are successful in  
13 completing drug treatment, their case will  
14 be dismissed. Any person who has been a  
15 defense attorney or has been involved with  
16 defendants knows that an enormous number of  
17 our clients have drug problems and that this  
18 is the proper solution of a great deal of  
19 them. An enormous amount of resources have  
20 been saved in the corrections aspect of the  
21 cases, because upstate sentences in a lot of  
22 cases have been avoided.

23 However, the drug court in Brooklyn  
24 does not have enough financing to take all  
25 of the cases which would normally be

317

1 Schreibersdorf  
2 eligible for drug treatment court, so  
3 approximately three-fifths of the people who  
4 meet the external criteria for treatment are  
5 not really even allowed to take advantage of  
6 it because their case, the court just simply  
7 can't handle the numbers.

8 So I just want to say that we can  
9 certainly divert a number of more cases into  
10 drug treatment. The success rate has been

11 very good and the model for this kind of  
12 treatment alternative is different, and has  
13 been I think proven, or, certainly in my  
14 experience, has been that great deal more  
15 successful.

16 So I know that in about two years the  
17 federal funding will expire also and that  
18 the state will then be required to take over  
19 the funding for this project. So I would  
20 like to be on record saying that certainly,  
21 as a defense community, and I don't think  
22 I'm the only one in the defense community  
23 who would say so, that we support this drug  
24 court and we support any efforts that anyone  
25 on this committee can make to continue its

318

1 Schreibersdorf  
2 funding.

3 The other thing I'd like to talk  
4 about is open-file discovery, which is also  
5 an innovation that we've had in Brooklyn.  
6 The district attorney's office in Brooklyn  
7 has decided that in every case, all of the  
8 police reports and the grand jury minutes  
9 and everything regarding the case should be  
10 turned over to the defendant and to the  
11 defense attorney early in the case, which is  
12 not normally the practice in the rest of the  
13 state and is not required by law.

14 This has been an excellent  
15 opportunity for our lawyers to investigate  
16 our cases very thoroughly early on in the  
17 case, for us to be in a better position to  
18 negotiate cases for the best plea bargain  
19 for our clients. Our clients are in a  
20 better position to make an informed decision  
21 about what they want to do about their case.

22 It has certainly saved a number of  
23 resources, I know in my office alone, we  
24 have taken on additional cases this year,  
25 without additional funding almost entirely.

319

1 Schreibersdorf  
2 We have some additional funding, I don't  
3 want to say that, but without as much  
4 funding as we might have needed last year or  
5 in years past because this open file  
6 discovery rule has reduced the number of  
7 wasted hours that we spend on boiler plate  
8 motions that often never resulted in any

9 substantial information that we can really  
10 use to benefit our clients.

11 Our attorneys can spend their time  
12 looking at police documents and carefully  
13 examining grand jury minutes and the real  
14 documents that can make a real difference in  
15 our client's case. The reason I'm talking  
16 about this is I believe Brooklyn, as the  
17 front runner in this practice, has made  
18 inroads which could benefit all of the  
19 counties of New York City and probably the  
20 entire state.

21 And from a defense perspective, this  
22 has been one of the greatest changes that  
23 has come certainly since I've been  
24 practicing law in the last 14 years. I  
25 believe also in conjunction with the grand

320

1 Schreibersdorf  
2 jury where our clients have the right and  
3 the opportunity to testify or to present  
4 their own evidence before they get indicted,  
5 that in conjunction with our use of the  
6 grand jury, for our clients, at least in  
7 Brooklyn, that we have been able to avoid a  
8 number of innocent people from not only  
9 being convicted, but being prosecuted at  
10 all.

11 Many people would be in jail awaiting  
12 their trial or the term of their  
13 prosecution. Our grand jury has dismissed  
14 approximately 60 percent of the cases that  
15 we've made presentations regarding our  
16 clients's innocence, or we have presented  
17 witnesses, alibi witnesses or any number of  
18 other information that the grand jury should  
19 find helpful, not to mention the number of  
20 clients who received reduced charges based  
21 on our presentation.

22 The reason I bring that up is because  
23 I know often there is legislation up in the  
24 state legislature to either get rid of the  
25 grand jury or to change the procedures in

321

1 Schreibersdorf  
2 the grand jury and perhaps get rid of the  
3 defendant's right to make a presentation.

4 But that has been extraordinarily  
5 helpful to us, at least in Brooklyn, in  
6 protecting innocent people, and certainly as

7 a society we want to do everything we can to  
8 keep innocent people out of jail and to  
9 makes it easy for defense attorneys to do  
10 that as quickly as possible, not to mention  
11 the resources it saves.

12 The other thing I would like to talk  
13 about is the domestic violence. It has not  
14 been as successful from a defense  
15 perspective. I heard earlier some testimony  
16 regarding domestic violence cases, and there  
17 has been a enormous increase in the number  
18 of domestic violence prosecutions within the  
19 City of New York. Certainly, in Brooklyn,  
20 it's increased by, I would say, 50 percent  
21 from what it was a year or two ago.

22 Our attorneys are spending a lot of  
23 time on these cases. Because of this  
24 special domestic violence court and because  
25 the special attention being paid by the

322

1 Schreibersdorf  
2 district attorney's office and by the court,  
3 a number of troubling things have happened  
4 regarding the treatment of these cases.

5 For one thing, it is my experience  
6 that the police have no discretion regarding  
7 whether to make an arrest or not, that in  
8 the last year or so, any person who is  
9 alleged to have committed a domestic  
10 violence offense is arrested, and even if  
11 the people are complaining about each other,  
12 if a man and a woman, which is normally the  
13 case, are complaining, she hit me first, he  
14 hit me first, both get arrested even if one  
15 of the persons has more serious injuries.

16 This has not resulted in really a  
17 fair series of prosecutions, because there  
18 is no investigation, there is no discretion  
19 on the part of the police. The district  
20 attorney does not choose to take action and  
21 increase their discretion.

22 They also, once the case has begun,  
23 the district attorney will not, absolutely  
24 will not drop the charges on a felony case,  
25 even if the complainant wants to. So what's

323

1 Schreibersdorf  
2 happened now is that the choices have been  
3 taken away from people who are the  
4 complainants in domestic violence cases, and

5 then they have taken choices away, and in  
6 some ways have victimized further people who  
7 have already been victimized.

8 I want to respond to something that  
9 was said earlier by Michael Letwin,  
10 Association of Legal Aid Attorneys. I am  
11 one of the new defender offices, as was  
12 Mr. Dean. I just want to state for the  
13 record that my office is 100 percent  
14 vertical, and we represent our clients from  
15 the arraignment, from the initiation of the  
16 case until the end of the case up until  
17 hopefully, until acquittal after trial, or,  
18 if there is a conviction, we will handle the  
19 sentence.

20 I believe and I think I have good  
21 knowledge that most of the other offices in  
22 the city are also vertical. For sure  
23 Manhattan New York County Defenders office  
24 is vertical. Queens Law Associates is  
25 vertical, and I can't speak for the Bronx or

324

1 Schreibersdorf  
2 Staten Island.

3 However, I would like to state that  
4 my office and the new offices take what  
5 we're doing very seriously. We do not in  
6 any way want to interfere with the rights of  
7 any clients, and we do nothing to reduce the  
8 quality of representation, even though  
9 sometimes Legal Aid takes the position that  
10 we do.

11 I brought with me a report from the  
12 oversight committee from the Second  
13 Department regarding my office. Certainly  
14 it's available regarding Queens Law  
15 Associates and the appellate advocate's  
16 office, also that we provide the best  
17 representation that we can for our clients,  
18 including vertical representation.

19 MR. GRADESS: For the record, by  
20 vertical you mean the representation by the  
21 same lawyer from arraignment throughout?

22 THE WITNESS: Absolutely. From, the  
23 same attorney represents in my office  
24 represents the person at the initial  
25 arraignment and handles the case straight

325

1 Schreibersdorf  
2 through the trial. We do not transfer cases

3 within the office, and, to the extent  
4 possible, we discourage anybody even  
5 covering cases for each other. The same  
6 attorney will make each and every court  
7 appearance to be fully aware of everything  
8 that's happening in the case, and to have  
9 every contact with the client and his  
10 family.

11 MS. LORAND: Do you have any  
12 information on what happens to, I'm  
13 referring here to the drug court and your  
14 statement that other counties could benefit  
15 from it.

16 Do you have any sense of what the  
17 percentage of recidivism is for these people  
18 who you referred to, because it was assumed  
19 that's one of the criteria, people would  
20 want to know in deciding whether or not this  
21 is something that should be spread to other  
22 counties. Do you have any idea?

23 THE WITNESS: I can't give you an  
24 exact statistic, and one of the problems is  
25 that because it's a new court, it's very

326

1 Schreibersdorf  
2 hard to get accurate statistics regarding  
3 recidivism. I know the recidivism rate for  
4 the drug court is lower than the general  
5 population for the same types of crimes, and  
6 they are doing a study right now funded by  
7 the federal government.

8 And one of the other problems in  
9 giving an answer at this time is for one  
10 client who is not in drug court, they may be  
11 serving a sentence of two to four years, or  
12 some similar sentence, and they are still in  
13 jail right now, versus a client from  
14 treatment court who has completed treatment  
15 or is nearing completion in treatment.

16 So to compare those two people almost  
17 doesn't make sense yet. It may take another  
18 year or two. I know they are making a very  
19 careful study of those statistics, because  
20 they have asked our permission to interview  
21 some of our clients regarding that, and I  
22 can put you in touch with people who can  
23 give you exact statistics on that. The  
24 success rate in treatment is a very good  
25 success rate. People enter treatment, I

327

1 Schreibersdorf  
2 believe it's 60 percent of them go through  
3 and complete it. I can't be sure about  
4 that, but --

5 MS. BARR: When you were speaking of  
6 the abuse cases and you said that both  
7 parties wanted to drop the cases, anything  
8 I've ever read about abuse cases says that  
9 at one point in time, that would usually be  
10 both the abuser and the abused don't want to  
11 go through the court system, and, to a great  
12 degree, the abused person is going to be  
13 abused even more afterwards.

14 Do you have any statistics on that,  
15 or is it research that they do, that both  
16 parties really do want to drop the case, and  
17 maybe it really wasn't an abuse case,  
18 because all that I've ever heard about is  
19 it's leaving yourself open to more trouble.

20 THE WITNESS: Domestic violence is an  
21 extremely complicated dynamic between two  
22 people, and it's a confusing and  
23 difficult-to-understand social problem.  
24 There are situations where a woman is  
25 dropping charges because of the pattern of

328

1 Schreibersdorf  
2 abuse that she's experienced.

3 I would not deny that's true, but  
4 there are also cases where it's the first  
5 time that this has happened, or there are  
6 other reasons why the complainant has  
7 decided she wants to drop the charges, and  
8 nobody is really listening to why she wants  
9 to drop the charges, but, because the  
10 district attorney has the taken the  
11 position, no, we're going to step in and  
12 make that decision for you.

13 Now, whatever the reasons are,  
14 certainly there are resources out there to  
15 help a woman if she is in an abusive  
16 relationship, there are battered women's  
17 shelters, there are victim advocates, victim  
18 resources; a significant amount of money is  
19 being put into this type of thinking about  
20 victims and abused women and what is the  
21 best solution for them.

22 And I think it should be up to that  
23 woman herself which way she wants to go with  
24 the case, whether she wants to prosecute her  
25 husband, so many implications, whether he is

1 Schreibersdorf  
2 the breadwinner in the home, children are  
3 involved, it may be a family court  
4 proceeding, certainly should be to some  
5 extent or to a large extent up to her  
6 whether or not he should be prosecuted.

7 I can't speak about anything else you  
8 brought up, but I do know because this is  
9 such a complicated problem, the simple  
10 solution taken by the DA's office in  
11 Brooklyn and by the police doesn't seem to  
12 address it in all of its complexity.

13 MR. PITTARI: Just quickly, one or  
14 two questions. I don't mean to sound  
15 nitpicking here, but there's something I  
16 want to clarify. Running an office that  
17 once received federal funding for something  
18 that was supposed to be taken over by the  
19 locality and then the locality pretended to  
20 for about three months satisfy the  
21 requirements of the grant and dropped it,  
22 I'm just curious, when you say said, getting  
23 federal funds for the federal drug treatment  
24 court, you said that at some juncture, the  
25 state will be required to pick that up.

1 Schreibersdorf  
2 Do you know whether it's the state  
3 who will have to pick it up, or the City of  
4 New York that will have to pick that up in  
5 terms of the funding grant application? It  
6 could make a difference. I'm curious if you  
7 are using state as opposed to federal, or  
8 you meant New York State as opposed to New  
9 York City.

10 THE WITNESS: I was told by the  
11 project director that it was OCA that would  
12 have to pick it up. I'm assuming because it  
13 was the a Supreme Court program, it would  
14 have to be the state.

15 MR. PITTARI: So it would be in that  
16 case the judiciary, OCA is picking it up?

17 THE WITNESS: I suppose.

18 MR. PITTARI: One other quick  
19 question. You said you had increased use of  
20 putting people into the grand jury and  
21 saving court time, et cetera.

22 Are the demographics of Kings County  
23 grand jury, are they more similar to the  
24 other people in the Kings County grand jury

25 who share similar background, ethnicity,

331

1 Noisette  
2 race, economics, et cetera, with your  
3 clientele?

4 THE WITNESS: I would suppose that  
5 the success we have in our grand jury may  
6 not translate to the rest of the counties in  
7 the state, but, yes, grand jury is pretty  
8 receptive to what our clients are saying,  
9 possibly because of the demographics or  
10 because of unique experience they have had  
11 as an inner city pool of people.

12 MR. PITTARI: Thank you.

13 MR. GRADESS: Thank you.

14 Lenny Noisette.

15 THE WITNESS: Good afternoon. My  
16 name is Leonard Noisette, and I'm director  
17 of Neighborhood Defender Service.

18 I prepared written testimony, but for  
19 sake of brevity, I would like to address a  
20 couple of issues. The Neighborhood  
21 Defenders Service are not-for-profit  
22 organization that has been in existence  
23 since 1990. It's a public defender office  
24 located in Harlem that seeks to explore  
25 different ways to provide criminal defense

332

1 Noisette  
2 service.

3 As I sat here this afternoon, I heard  
4 a lot of talk about a number of systemic  
5 issues. I think one of the things we've  
6 tried to do as an office is to step back and  
7 look at the way the services have been  
8 provided and try to ask are there structural  
9 ways you can provide this service  
10 differently.

11 As listened to Jack Litman's  
12 testimony and some of the questions the  
13 panel has asked, it made me think of what we  
14 also are trying to do at Neighborhood  
15 Defender Services. Jack Litman talked about  
16 the time and energy they take and put into  
17 each and every case and his concerns about  
18 size of caseload.

19 He talked about cooperative work  
20 among staff in his offices. He talked about  
21 entering cases early to begin working on  
22 cases both in terms of meeting the clients

23 and investigating the cases at the earliest  
24 possible stages, preparing for bail  
25 applications in a more comprehensive way.

333

1 Noisette

2 Those are some of the things Neighborhood  
3 Defender Services tries to do.

4 We are community based. Clients can  
5 request our services. We encourage them to  
6 request those services as early as possible.  
7 If they call us and they are located in the  
8 police precinct, we will respond to the  
9 police precinct. We have had a number of  
10 occasions where we represent people prior to  
11 arrest over the last year. We probably  
12 arrested, probably represented 150 people  
13 prior to arrest.

14 Sometimes, where appropriate, we will  
15 look to arrange voluntary surrenders which  
16 then work to our clients' benefit at the  
17 first court appearance in terms of their  
18 demonstrating cooperation. We probably  
19 participated in close to 75 voluntary  
20 surrenders over the last fiscal year. We  
21 provide a team based approach to  
22 representation.

23 I don't know, I wasn't here for  
24 Michael Letwin's testimony, I know some  
25 people raised concerns about team defense in

334

1 Noisette

2 terms of whether that provides true  
3 continuity and vertical representation. We  
4 believe that it does. A lawyer in my office  
5 is assigned to every case, has primary  
6 responsibility. But, beyond that lawyer,  
7 there is responsibility of other staff for  
8 work on those cases.

9 I was very pleased to hear Sister  
10 Mary Nerney talk about what at least her  
11 clients' experience with my office was, but  
12 one of the things she talked about was that  
13 team approach. The fact that a client or  
14 family member can talk to someone in the  
15 office other than the lawyer who has primary  
16 responsibility for the case, that the client  
17 knows who the social worker is working on  
18 the case, who the investigator is who is  
19 working on the case, can speak with that  
20 person as well.

21 I think that our ability to service  
22 clients and their families is enhanced by  
23 our being neighborhood-based as opposed to  
24 being courthouse-based. The fact of the  
25 matter is most of the clients we represent,

335

1 Noisette  
2 all of the clients we represent live in  
3 northern Manhattan, but in northern  
4 Manhattan, 30 percent of the people  
5 prosecuted in Manhattan criminal court live  
6 above 96th Street in the Catchment area that  
7 we serve.

8 If you look at people who are  
9 residents of Manhattan, as opposed to  
10 nonresidents of Manhattan, 50 percent of the  
11 people who are residents of Manhattan and  
12 who are prosecuted in Manhattan courts live  
13 above 96th Street in the Catchment area that  
14 we service. Downtown for many of those  
15 clients may as well be in another country,  
16 and our office being in their community and  
17 accessible to their community is something  
18 that's very important to the representation  
19 that they receive.

20 I spend a lot of time in my written  
21 testimony talking about the crisis that  
22 we're going through right now that Adelle  
23 Bernhard alluded to and Sister Mary Nerney  
24 alluded to: Neighborhood Defender Services  
25 is currently not receiving its funding from

336

1 Noisette  
2 the City of New York. There has been a  
3 \$2 million appropriation made in this year's  
4 budget being held up because of political  
5 disputes that don't really involve the  
6 Neighborhood Defense Service. We are not  
7 the only agency whose funding is being held  
8 up, but it has had a dramatic effect on us.  
9 We had to lay off two-thirds of our staff in  
10 the beginning of July, including 11 of 15  
11 lawyers, two of three of our investigators.

12 We try to maintain the ability to  
13 handle cases, but once the dispute was not  
14 resolved quickly, we had to seek to be  
15 relieved from a substantial number of cases  
16 to handle the remainder of them. This has a  
17 dramatic impact on the office, but, more  
18 importantly, it has had a dramatic effect on

19 our clients.  
20 I think that our concern is always  
21 maintaining the ability to provide this  
22 representation. It seems to me that when  
23 the city is looking at alternative models  
24 and exploring different ways of doing  
25 things, one of the things that must be

337

1 Noisette  
2 paramount in that equation is innovation and  
3 experimentation.

4 I think the Neighborhood Defender  
5 Service has done that. We have been  
6 recognized on the state level. We have been  
7 recognized on the federal level. We get  
8 visits from all over the country, all the  
9 time, to look at some of the innovations  
10 that we have spent many, many years  
11 perfecting, and there is a role for  
12 innovation as we really question what is the  
13 quality of criminal defense services in New  
14 York City and in New York State.

15 Last point I'd like to make that  
16 exemplifies the question about innovation is  
17 that things are changing. There is a big  
18 emphasis on this thing called community  
19 justice in this country. The federal  
20 government is spending tons and tons of  
21 dollars on community courts and drug courts  
22 and community policing, and all sorts of  
23 community-based strategies.

24 I over the last two years have been  
25 to three different conferences at the

338

1 Noisette  
2 federal level that are called community  
3 justice or community crime prevention, or  
4 community-based initiatives. They all deal  
5 with law enforcement approaches and new law  
6 enforcement approaches.

7 The troubling thing is that I am very  
8 often one of a handful of defenders there.  
9 We are not part of that discussion. We are  
10 not part of that discussion because I think  
11 that the system does not believe that we are  
12 broadening our roles, that we are interested  
13 in crime prevention. They do not believe we  
14 are interested in innovation.

15 I know that's not true, but I think  
16 an office like the Neighborhood Defender



15 in large part.  
16 MR. PITTARI: I want to clarify one  
17 thing. You said your office had been  
18 funded. The funding is there. It was  
19 voted, it's in?  
20 THE WITNESS: Right. That's correct.  
21 MR. PITTARI: And if you had that  
22 funding, if it had been given to you, you  
23 would not have had to lay off that staff you  
24 laid off.  
25 THE WITNESS: That's correct.

341

1 Noisette  
2 MR. PITTARI: And this is just being  
3 arbitrarily held up? Have you been given a  
4 reason why this is being held up?  
5 THE WITNESS: The official reason is  
6 that the mayor's office is reviewing  
7 spending in a number of areas because they  
8 believe that the counsel had been  
9 irresponsible in some of the funding  
10 initiatives included in the budget during  
11 the budget passage process.  
12 So that's been the official reason.  
13 MR. PITTARI: So it's been voted by  
14 the legislature branch, held up by the  
15 executive branch?  
16 THE WITNESS: Voted by the  
17 legislative branch, vetoed by the executive  
18 branch, overridden by legislative branch,  
19 and carefully managed by the executive  
20 branch.  
21 MR. PITTARI: Thank you. I wanted  
22 the record to be clear on that, exacty what  
23 had happened.  
24 MR. GRADESS: Thank you.  
25 William Holden.

342

1 Holden  
2 THE WITNESS: Good evening. I've  
3 listened to several people, and I don't know  
4 if I should have appeared. I was for 30  
5 years a simple 18-b lawyer, and I thought  
6 that the discussion would relate to the  
7 problems of an 18-b attorney, and that's  
8 what I came down to talk about.  
9 I do not represent a volume of people  
10 for a lesser price, or anything of that  
11 nature, which seems to be my predecessors.  
12 As an 18-b attorney from Suffolk County, I

13 gave it up about three, four years ago  
14 because of the problems that I incurred of  
15 over the years and the difficulties which  
16 came about and which appear to me will  
17 continue to persist and to perhaps get more  
18 aggravated as time goes by.

19 It's basically a cost factor, and I  
20 know money has been mentioned here, but the  
21 18-b regulations limit experts,  
22 investigators and all of that to a \$300 fee.

23 And the need for such expertise,  
24 whether it's an investigator, a  
25 psychiatrist, or analyst of some forensic

343

1 Holden

2 type, I would say excepting the manslaughter  
3 and murder cases, there are probably about  
4 20, 25 percent of the regular routine cases,  
5 so you don't need an investigator or this  
6 type of expert in all of the assignment  
7 counsel cases. Maybe 20, 25 percent.

8 But those are the cases that run into  
9 trouble. And what kind of trouble? That's  
10 what I'm here to say. Number 1, the  
11 requirement to go to the court for \$300 to  
12 get an expert is the most silly, asinine and  
13 stupid thing that I can say.

14 The determination of quality and  
15 price should be in the hands of somebody who  
16 is an expert in that field. Somebody from  
17 18-b who creates a list and let's you have  
18 the ability to go do a list. When an  
19 expert, an investigator, goes into that  
20 business, he doesn't throw up his hands and  
21 swear to help the poor. The lawyer does,  
22 but not the expert.

23 Worst of all, you have to go to the  
24 court to get the authority to get money to  
25 pay the amount that your expert requires.

344

1 Holden

2 He's not going to give it unless its  
3 extraordinary. I have several cases where a  
4 judge spent 10 pages explaining why he  
5 wouldn't pay more than \$800 instead of  
6 \$1,300 to some expert.

7 So I think the requirement to go to  
8 the judiciary make a determination as to the  
9 fee, it doesn't make sense. That's number  
10 1.



9 assistance of counsel.

10 That attorney went down alone, in an  
11 adversarial position, and that is not  
12 proper. Any attorney who's an 18-b attorney  
13 required to justify his expertise and  
14 position should not have to do it himself.  
15 He should be given assistance if it goes to  
16 a hearing.

17 The ineffective assistance of  
18 counsel, which is brought up by the courts,  
19 who is the one who becomes the advocate to  
20 say that the lawyer did a proper job? The  
21 district attorney. And who was the district  
22 attorney? He was your adversary during the  
23 entire trial.

24 So, all of a sudden, the district  
25 attorney is going to say that the defendant

347

1 Holden

2 had a proper representation, when at all  
3 times he was trying to defeat you, and now  
4 he's put in the position of being the  
5 advocate for the ineffective counsel.

6 I think that's a conflict of  
7 interest. There is no area of support for  
8 the attorney, either in the appellate  
9 process, or thereafter, in defense of his  
10 position.

11 I'm almost finished. Bear with me.  
12 When you get into ineffective assistance of  
13 counsel, you also open the door to  
14 malpractice. Now, malpractice hasn't been  
15 pressed as much in the failure to give a  
16 proper legal defense, but I handed in some  
17 literature in it. As the article was  
18 written, Cornell University wrote an  
19 article, The Sleeping Dog. It's going to  
20 come about. It's going to be a more  
21 forceful thing. I gave up doing 18-b cases  
22 because I had to give up my malpractice  
23 policy for other reasons, and I feel that  
24 any lawyer who is asked to practice and take  
25 on an 18-b case who doesn't have legal

348

1 Holden

2 malpractice is a silly fool. That's all I  
3 have to say. If you have any questions --

4 MR. PITTARI: Just I'd like to add to  
5 something you said, Mr. Holden. You  
6 indicated that with the problem of having to

7 go to a jurist to get permission to hire an  
8 expert, and you said of course the district  
9 attorney doesn't have to do that because he  
10 has the police doing it. Not only does the  
11 district attorney not have to do it, but a  
12 large institutional defender office, public  
13 defender or legal aid society that has a  
14 budget doesn't have to do it, and a retained  
15 attorney doesn't have to do it.

16 So it's only the 18-b practitioner  
17 that has to get his prior approval. Anyone  
18 else in the system just uses their own  
19 judgment whether the expert is needed and  
20 who the appropriate expert is. It's just  
21 you as the 18-b attorney that has to get --

22 THE WITNESS: It would appear so,  
23 because that is a constant problem, and  
24 there is no area of assistance to me to have  
25 to go to a judge to get the assistance that

349

1 Holden  
2 you need. The judge is not my coach. The  
3 judge is not a coach for the defense. He is  
4 an outside individual who is going to look  
5 at the application as a budgetary item, I  
6 think. I don't see how he could do  
7 otherwise.

8 MR. GRADESS: I want to ask you one  
9 quick question. In your many years of  
10 experience in which you struggled with this  
11 question of experts or investigators, did  
12 you ever experience that an expert or  
13 investigator said, that's the last time I'm  
14 working for you because of this fee  
15 structure?

16 THE WITNESS: I was talking to a  
17 forensic expert two months ago, casually, I  
18 met him on under different circumstances,  
19 and he was saying -- he was dedicated. What  
20 he sees at times is bad, and he wants to  
21 help.

22 But for \$300, he said, it doesn't  
23 make sense. I could see that. For \$300,  
24 he's not, he was not asked to help the poor  
25 when he became a forensic expert. Neither

350

1 Holden  
2 was the investigator when he got his  
3 license. None of these people have sworn an  
4 oath to help the poor, nor do they require

5 it.  
6 And if you want their help and the  
7 poor client needs their help, you are not  
8 going to get a poor investigator, you need a  
9 guy who is out there who has the expertise.  
10 You are not going to get him.

11 And if you get somebody for \$300, you  
12 won't see him again. Remember, most  
13 defendants are in jail. The expert that you  
14 bring into the case, he must go, a  
15 psychiatrist, he must go within the jail.  
16 He must go inside the prison walls. As a  
17 lawyer, that's your job. But as an expert,  
18 that's an added inconvenience. He must go  
19 into the jailhouse, sit and wait until the  
20 prisoner is brought in, and examines him,  
21 and goes through and does what he has to do,  
22 and then he's expected to turn in a report  
23 and also appear in court and testify, all  
24 for \$300. It just doesn't happen.

25 And what is the alternative? To

351

1 Holden  
2 appeal to the court on the basis of  
3 extraordinary circumstances. And what's  
4 extraordinary is the judicial determination.  
5 I don't think it needs to be. I  
6 would think that if the 18-b people would go  
7 through and create the lists, and if they  
8 certify that this person is willing to if  
9 they get more money, that's assuming you can  
10 get more than \$300, you should go to court  
11 with nothing more than a statement from  
12 somebody, from the official from 18-b that  
13 this expert is qualified and will do the job  
14 and is entitled to the money without  
15 begging.

16 MR. GRADESS: I take it from the  
17 implication of your comments that efforts at  
18 getting extraordinary fees in Suffolk over  
19 the years have not been successful.

20 THE WITNESS: I won't say that a  
21 judge hasn't tried, not more than the judge,  
22 or I think he was in the Bronx, wrote his  
23 two opinions. I gave it in. He spent 10  
24 pages justifying giving this poor individual  
25 \$800, which is over the amount, instead of

352

1 Holden  
2 \$1,300, and cut the price down from \$45 an

3 hour to \$30 an hour.

4 Should they require a judicial  
5 effort? Should a defendant be put into such  
6 a position? Should the lawyer who takes on  
7 the assignment have to go through such  
8 grief? It doesn't make sense. I'm just a  
9 plain 18-b lawyer. I took my assignments  
10 and handled them on my own.

11 But these are the problems that come  
12 into it. I'm not a large organization. I  
13 can't state with elegance numerous people  
14 that I have put through or worked up the  
15 ladder. It's as simple as I have stated.  
16 The issues, though, involve cost, and  
17 effective assistance of counsel, a system of  
18 appellate operation, which is unfair,  
19 because it doesn't make sense to have the DA  
20 defend the lawyer who was his adversary, but  
21 that's what happens.

22 When there is a hearing, the lawyer  
23 is required to go down alone without  
24 assistance. That's not proper, and, if he's  
25 sued, he'd better have malpractice.

353

1 Menu

2 MR. GRADESS: Thank you very much.

3 Susan Menu.

4 THE WITNESS: Good afternoon. I have  
5 given some documents, I don't know if you  
6 were given them, that I brought in from  
7 Suffolk. I'm here to speak about the  
8 arraignment problem that I see in Suffolk  
9 County. Just a little bit about my  
10 background. I was assistant district  
11 attorney in the Bronx, and I was an  
12 assistant district attorney in Suffolk  
13 County. I've been in private practice in  
14 Suffolk since about 1993, and that's what a  
15 majority, in fact, all of my practice at  
16 this point is.

17 I think that I certainly share some  
18 of the concerns of the gentleman that  
19 preceded me, but, in general, my problem and  
20 the reason I wanted to come and address you  
21 today was what I see going on in both the  
22 justice courts and in first district court  
23 regarding arraignments.

24 The arraignment situation, my  
25 practice is mainly private practice. I do

354

Menu

1  
2 take 18-b assignments, but I spend the  
3 majority of my time in felony courts, but I  
4 do spend some time in first district court  
5 in Central Islip. Certainly I've been there  
6 numerous occasions and know the procedure  
7 there. I also practice in all the justice  
8 courts in Eastern Long Island. There are  
9 five of them.

10 I would like to take it from justice  
11 courts, which really is in a sense some of  
12 the most egregious practices relating to  
13 rates. The CPL, which I have copied for you  
14 and which I left a copy for you, is 180.10,  
15 and in that it indicates that a defendant  
16 being arraigned on felony complaint has the  
17 right to have counsel present with him to  
18 assist him being arraigned on that felony  
19 complaint.

20 Now, a lot of things happen at the  
21 arraignment, and the justice courts have  
22 arraignments on weekends all the time, but  
23 usually it's before court begins in the  
24 morning and on weekends. On the weekends,  
25 very often they will arraign a defendant

355

Menu

1  
2 when no one is there. There will be no  
3 defense counsel, and, hard as it is to  
4 believe, there is no record kept of this  
5 arraignment. The arraignment proceeds often  
6 with a police officer there. They arraign  
7 people who cannot speak English without any  
8 counsel, or without any interpreter.

9 They then are held over if it's a  
10 felony complaint on a bail remedy, usually  
11 supplied by phone if it's a serious felony,  
12 and in fact I think, at least I can speak to  
13 my experience, that they usually do call in  
14 for a bail recommendation, the police do, to  
15 the district attorney, who is on call for  
16 that purpose.

17 So they will go before the judge,  
18 they will request a certain amount of bail,  
19 and it is the police who make the  
20 recommendations as to what the charges are  
21 and proof is. There is no one there to  
22 counteract, so there is no one there,  
23 certainly with a person who can't speak  
24 English, no one there to interpret for him  
25 what the charges are or what rights he has

Menu

1 at arraignment.  
2

3 Coming over here and speaking to some  
4 of my colleagues, I kind of, because I know  
5 we have short time and everybody is  
6 exhausted at this time of day, I imagine  
7 what is the worst thing that happens at  
8 arraignment that I can tell you about. The  
9 worst thing that happens at arraignment  
10 probably is, the worst thing I've seen  
11 personally is a defendant who was not going  
12 to spend one single day in jail and an  
13 experienced attorney or prosecutor look at  
14 the information and say that they are not  
15 going to do time in jail, that person who  
16 may or may not have ever been arrested  
17 before, then transported on a Friday over to  
18 Riverhead County jail where there are, one,  
19 overcrowding, but numerous people in that  
20 jail, some of whom are sentenced prisoners  
21 for the most egregious crimes that we have,  
22 murder, rape, assault, and this person who  
23 is not going to serve any jail time will be  
24 transported over to Riverhead and held for  
25 five days until he is brought back to court,

Menu

1 where he'll be either released on his own  
2 recognizance, released because he will not  
3 have been indicted, or, if he has been  
4 indicted, there will be a lawyer there to  
5 represent him either from the family, and  
6 hopefully sometimes Legal Aid, although  
7 Legal Aid doesn't step forward unless that  
8 person has been investigated to see whether  
9 or not he fits the criteria.  
10

11 I can assure you Legal Aid does not,  
12 to my knowledge in Suffolk County, visit  
13 them in the jail while they are being held  
14 there. They don't know about it.

15 The second, I personally, this is my  
16 favorite, because grand jury notice is  
17 handed to a defendant at the arraignment.  
18 What that grand jury says is that your  
19 complaint that's now a felony complaint only  
20 is going to be presented to a grand jury,  
21 and that grand jury of 26 people may vote to  
22 have you indicted.

23 In Suffolk County, and I know in the  
24 Bronx also, once you are indicted you are

25 locked into a whole lot of things,

358

1 Menu  
2 particularly if you are a prior felony  
3 offender, and basically what you are locked  
4 into, if you are a prior felony offender,  
5 certainly is upstate time.

6 I represent a number of juveniles  
7 that, I have been very successful, as have  
8 all of my colleagues. The minute I have a  
9 young person or any person for that matter  
10 who is arraigned on a felony complaint, I  
11 either fax over or hand deliver that day a  
12 grand jury notice. I bring it over to the  
13 appropriate bureau, whether it's narcotics  
14 or major crime, and I say, I'm representing  
15 this person, will you present this to the  
16 grand jury, please contact me.

17 Very often what happens, and I would  
18 say a good 50 percent of the time I'm  
19 successful, and I know the cases I will be  
20 successful on of this being presented to  
21 grand jury. Often this requires that I  
22 waive my client's right to be released from  
23 jail, and I do that with, of course, my  
24 client's permission.

25 I will say, okay, DA, I will waive

359

1 Menu  
2 the rights of my client to be indicted  
3 within the statutory period. Don't put it  
4 before the grand jury. Let me bring you  
5 some information about the client, let me  
6 bring you a possible solution to this,  
7 whether it be drug treatment, mental health  
8 treatment, whatever.

9 Very often I will say, look, let's  
10 get rid of this quickly, it's not a great  
11 case, there are weaknesses there, how about  
12 a year, county time. That keeps him close  
13 to the family and, most importantly, they  
14 are not upstate, they don't have a felony  
15 conviction. Very often I can get a  
16 misdemeanor SCI plea.

17 When a client at arraignment is  
18 handed this grand jury notice and it has a  
19 whole bunch of writing on it, they don't  
20 know what to do with it. They have no clue  
21 what to do with it. In the documents I've  
22 handed out to you, two of the cases that I

23 copied just to give you for your  
24 information, if you do have time to look  
25 over them, is a client of mine that was from

360

1 Menu

2 California, and he was arraigned in first  
3 district court, and he was held with no bail  
4 at all.

5 He was accused of a robbery. He has,  
6 and as his case is still pending, he had at  
7 that time an alibi as to where he was when  
8 he was arraigned in first district court  
9 with a lot of lawyers there, and no one  
10 represented him at the arraignment.

11 Certain things happened at that  
12 arraignment. One, he was indicted two days  
13 later. No one knew about the alibi witness  
14 who could have testified before the grand  
15 jury, also, a grand jury notice, and he  
16 could have stayed in the jail when the DA  
17 investigated to see if this was viable or  
18 not, but ultimately, two days later, he was  
19 indicted.

20 While he was waiting, the day he was  
21 brought back to have the local charges  
22 dismissed, I know some of this is technical,  
23 while he was brought down, a court officer  
24 approached him, he still had no counsel,  
25 being held with no bail, already indicted, a

361

1 Menu

2 court officer approached him and said he was  
3 interested in gang matters, he'd heard the  
4 man was a gang member, and they made a  
5 45-minute video tape of him that he talked  
6 to this court officer on videotape in the  
7 jail stripped to the waist, showing his  
8 tattoos and discussing his gang background.

9 He's about to go to trial, and that  
10 tape is out there with certain assurances  
11 that it won't be used, but certainly  
12 information has been garnered from him.

13 The other case I was involved in that  
14 was concerning to me was a man put in jail,  
15 never been arraigned before, Albanian  
16 immigrant accused of beating up his wife.  
17 He was put in jail and never been arrested  
18 before. He suffered from severe anxiety  
19 attacks and was on about 10 or 12 pills a  
20 day for panic attacks.

21 He was held in Suffolk County for  
22 five days, no attorney, no one to call and  
23 ultimately the charges were dismissed by the  
24 district attorney on the grounds that there  
25 had been a miscommunication and language

362

1 Menu  
2 barrier between police officers that  
3 arrested him.  
4 I also attached here copy of an  
5 arraignment where the judge says to the  
6 defendant, no counsel present, in open  
7 court, with other attorneys there, she  
8 arraigns him, she's given a note that he has  
9 mental problems, she said, I understand, to  
10 the man, I understand that you had mental  
11 problems, I understand some of your charges  
12 have been dismissed because of your mental  
13 problems, and I'm not going to order a 730,  
14 a mental exam for you to see if you are  
15 competent, but I will do so on the next  
16 date.  
17 He was then sent over, held on bail,  
18 accused of being a burglar. This was a man  
19 with no felony conviction, a number of  
20 misdemeanor convictions. He was sent over  
21 to jail, district attorney participated in  
22 that arraignment, handed over the grand jury  
23 notice, handed over the statement notice,  
24 and then sent the papers up to the felony  
25 bureau, and this mentally ill man was then

363

1 Menu  
2 indicted two days later for a violent felony  
3 of burglary.  
4 In my opinion as to this individual,  
5 they should enter a plea bargain that will  
6 entail probation. He won't make probation  
7 because he's mentally ill, he has substance  
8 abuse, mentally ill, and they may have just  
9 sent him upstate.  
10 If an attorney were present, he may  
11 have kept him in jail for awhile and filed  
12 certain notices. And, in my opinion, where  
13 there would have been an indictment on that  
14 case, I can't say, but in my experience, and  
15 I've done enough of these to have a sense  
16 for it, I believe he would not have been  
17 indicted.  
18 But the justice courts as I said on a

19 regular basis will arraign people in secret.  
20 They will take them into a room, the  
21 courthouse will be open, they will arraign  
22 them in the back with no one present,  
23 sometimes a DA is there. I think it's a  
24 problem for district attorney's office to  
25 participate in that.

364

1 Menu

2 As former assistant district  
3 attorney, I have been asked to arraign  
4 people who I knew didn't speak English, and,  
5 as a DA looking at the information or the  
6 complaint knowing that this wasn't going to  
7 go anywhere, they just didn't have it. But  
8 DAs do that, and I don't fault them for it.  
9 They are standing there and their bureau  
10 chiefs tell them to do it, and they do it.

11 If they are going to do it, perhaps  
12 there should be safeguards in terms of some  
13 kind of counsel visiting them to preclude  
14 some of these very, very serious things that  
15 arise. It happens in Suffolk on a regular  
16 basis. I don't think I have left anything  
17 out. If I have left anything out, please  
18 ask me about it.

19 MS. BARR: I just don't understand  
20 how it can happen. It would seem to me,  
21 just by watching television programs, if  
22 nothing else, that when you are arrested you  
23 are supposed to be given Miranda rights.

24 Do some of these people not  
25 understand Miranda rights, or --

365

1 Menu

2 THE WITNESS: It's not so much  
3 Miranda rights, although those are  
4 important. When I was coming here today I  
5 had lunch with two of my colleagues who are  
6 very experienced who just, people you admire  
7 that know everything, and I went to lunch  
8 with them and said, am I missing something  
9 here, I read over last night coming here the  
10 statute, the law, I read what the judge has  
11 to do, but the judge has to make sure this  
12 person standing in front of him, one,  
13 understands, and, two, if the person is even  
14 vague, the judge, by law, as I read the law,  
15 and correct me if I'm wrong, is required to  
16 then make sure this person is protected by

17 legal counsel who can advise him.  
18 I'm sitting there saying, wait a  
19 second. I'm just sitting here and I'm  
20 watching the judge in front of a courtroom  
21 of DAs and a courtroom of private lawyers do  
22 this in Suffolk. They are just doing it.  
23 I'm thinking maybe, I honestly now am  
24 saying, maybe they can do this because they  
25 are doing it.

366

1 Menu  
2 They cannot do it. They do do it.  
3 And people who should never be spending a  
4 day in jail, because their case will  
5 ultimately be dismissed or disposed of by  
6 either a violation or a misdemeanor, and  
7 will not do jail time, are sent over and  
8 incarcerated with serious convicted and  
9 waiting to go upstate people.  
10 And that happens on a regular basis.  
11 And they stand there, and do they not  
12 understand? They are standing there, and  
13 they are terrified. They don't understand.  
14 It's in legalese. Papers are handed at  
15 them. Some have problems reading anyway, so  
16 now they do not understand.  
17 And the most sophisticated do, and  
18 they know enough to call an attorney, and  
19 usually they have an attorney there, but the  
20 majority of people I represent, all of whom  
21 are smart people, I don't mean to say they  
22 are not, don't have a clue, and they  
23 certainly do not understand what's going on  
24 with the grand jury notice.  
25 MS. BARR: Just amazing to me that

367

1 Menu  
2 that can happen in New York State.  
3 THE WITNESS: It is amazing to me.  
4 When these things happen, I call my friends  
5 that are still practicing in the Bronx and I  
6 say, just listen to this, and they say to  
7 me, you are lying. And then they say to me,  
8 get out of there quick. So it does happen.  
9 MR. PITTARI: I just want to thank  
10 you for mentioning that to us, because,  
11 often, there are those of us who were either  
12 in New York City or in close to the  
13 metropolitan area, I practice in  
14 Westchester, do not appreciate difficulties

15 and problems, let's say, in the eastern end  
16 of Suffolk or in upstate New York, and don't  
17 fully appreciate the fact that something is  
18 written and is the law and is supposed to be  
19 done, is not carried out by the judiciary,  
20 and is not carried out by the district  
21 attorneys, both of whom have taken an oath  
22 to follow, preserve, protect, and defend the  
23 Constitution of the United States and the  
24 Constitution of the State of New York, and  
25 the statutes of the State of New York.

368

1 Menu  
2 But that isn't always done with  
3 statutes that are perhaps for the  
4 defendant's benefit, particularly for a poor  
5 defendant. It's good to have that kind of  
6 testimony, and we know that that really  
7 happens.  
8 THE WITNESS: Thank you.  
9 MR. GRADESS: One last question. I  
10 want to clarify something you said earlier.  
11 I understand your testimony with reference  
12 to the east end. Do I understand that you  
13 earlier testified at the outset the Legal  
14 Aid Society does not, is not in the  
15 arraignment part of the first district  
16 court?  
17 THE WITNESS: It's in the arraignment  
18 part. Yes, it is, and that has been  
19 discussed, and it's also their new justice  
20 court, the Legal Aid attorney will be there  
21 in the room when these indigent people are  
22 being, or not even indigent, who knows, they  
23 maybe don't have family in the area,  
24 whatever.  
25 My client from California in the

369

1 Menu  
2 minutes I handed you, at that moment accused  
3 of a robbery, where he then was accused of  
4 taking the woman out of the car and stealing  
5 her car and driving away her car that later  
6 was recovered. That car was given back to  
7 the victim at the arraignment, which means  
8 he never could have -- my client had no  
9 opportunity to have a forensic person go in  
10 and take fingerprints. I'm going to go to  
11 trial on that November 4. He doesn't wear  
12 gloves. That was another statement.

13 I don't know whether or not that car  
14 was ever dusted by the Suffolk County Police  
15 Department and Suffolk District Attorney.  
16 Because at arraignments when you stood there  
17 alone and in the minutes the judge is saying  
18 to him, can I release the victim's car, and  
19 he's maintained his innocence all along. He  
20 said, what car are you talking about?  
21 And she told him what car, and he  
22 said, I don't know anything about that car,  
23 what are you referring to. And she said,  
24 I'm going to agree with the district  
25 attorney, and I'm going to release the car.

370

1 Menu  
2 And the car, there it went.  
3 So it does occur at first district  
4 court. Legal Aid is present at this time.  
5 Their position, I don't want to speak for  
6 them, but I understand from my friends Legal  
7 Aid is that they do not want to get involved  
8 until they know that they are going to be  
9 representing that person by means of doing a  
10 financial investigation, which I still don't  
11 understand because when I practiced in the  
12 Bronx, Legal Aid was there from every  
13 minute.  
14 MR. PITTARI: For the record, if I  
15 could clarify, in this instance you are  
16 talking about the Legal Aid Society of  
17 Suffolk County, which I think the record  
18 should reflect is a separate entity from the  
19 Legal Aid Society of New York City or Nassau  
20 County.  
21 THE WITNESS: Right. My  
22 understanding, this was from my colleagues  
23 today at lunch, that Nassau County Legal Aid  
24 does get involved at arraignments. I have  
25 no personal knowledge of that. I know I sit

371

1 Menu  
2 there and watch these people in front of me.  
3 I watched a judge in Suffolk County arraign,  
4 and if you'll bear with me, it's  
5 interesting, because the courtroom was full,  
6 and this is how blatant it is, and now no  
7 one talks about the law, she was arraigning  
8 a man on a DWI, a Spanish man, and she said,  
9 I'm arraigning you today on a driving while  
10 intoxicated, charges are that you are

11 driving a car and that you were under the  
12 influence of alcohol, and the purpose is to  
13 see whether or not you are going to be  
14 released or whether we are going to hold you  
15 on bail.

16 And she said to him, where do you  
17 live. And he stood there, because he  
18 doesn't speak English. The courtroom was  
19 full. Lawyers were there.

20 He didn't know what she said, and so  
21 the cop standing next to him went, casa, and  
22 the man said where he lived, name, address,  
23 at Riverhead, and then the judge said to  
24 him, where do you work. And he stood there  
25 blankly, and the police officer standing

372

1 Menu

2 next to him said trabajo, and the man said  
3 where he worked. He was a landscaper.

4 And then the judge said, what is the  
5 name of your boss. And the police officer  
6 didn't know how to translate that, little  
7 more complicated, so he stood there, and she  
8 set \$500 bail on him, even though he lived  
9 in Riverhead, she set \$500 bail on him, and,  
10 as he walked away from her, she said, are  
11 you going to be making that bail.

12 And then I, sitting, I said, he can't  
13 speak English. And she said, come, if you  
14 have something to say, say it.

15 It's not proper. And it's troubling  
16 to those of us who practice, and you just  
17 can't always be a buttinsky and stand up and  
18 jump in on these cases time after time after  
19 time, because it's not appropriate on one  
20 hand, but it's troubling for all of us who  
21 sit there and watch this, and I don't know  
22 what the answer is.

23 But, certainly, the law is not being  
24 followed. These rights are being lost, and  
25 the ramifications for those of us who know

373

1 Menu

2 them are sometimes, and I don't mean to  
3 overexaggerate, but I do believe absolutely  
4 life-changing for a young person who is  
5 indicted and sent upstate. It is not just a  
6 momentary thing. That's why when I'm trying  
7 to list the awfulness of things, well, is  
8 five days of incarceration really the worst.

9 It's not the worst. The worst is they can  
10 be indicted, then charged a minimum sentence  
11 and go upstate, and that changes a lot of  
12 things.

13 And sometimes, and I do believe in  
14 numerous cases, not just the rare one, in  
15 numerous cases, attorneys are successful in  
16 stopping that, and I know in the Bronx they  
17 have certain pleas they offer preindictment  
18 in Suffolk also, and if you don't have an  
19 attorney, you are out of the game on that.

20 MR. GRADESS: Thank you very much for  
21 coming.

22 We will adjourn this hearing to  
23 Rochester.

24 (Time noted: 5:05 p.m.)  
25

374

1 C E R T I F I C A T E

2  
3 STATE OF NEW YORK)

:ss

4 COUNTY OF NEW YORK)

5 I, CHRIS TE SELLE, RPR, a Shorthand  
6 Reporter and Notary Public within and for  
7 the State of New York, do hereby certify:

8 That hearing hereinbefore set forth  
9 is a true record of the proceedings.

10 I further certify that I am in no way  
11 interested in the outcome of this matter.

12 In witness, whereof, I have hereunto  
13 set my hand this \_\_\_\_ day of \_\_\_\_\_, 1999.

14  
15 \_\_\_\_\_  
CHRIS TE SELLE, RPR

375

1 I N D E X

2	WITNESS	PAGE
3	Lynn Fahey	4
4	Geoffrey Chanin	23

5	Richard Greenberg	45
6	Richard Klein	60
7	Susan Lindenauer	71
8	Andrea Hirsch	82
9	Myra Rochelson	101
10	Henry O'Brien	113
11	Russell Neufeld	127
12	Michael Coleman	143
13	Gary Abramson	147
14	Michael Letwin	154
15	Kathleen O'Boyle	179
16	Malvina Nathanson	202
17	Jack Litman	212
18	David Leven	225
19	Adelle Bernhard	238
20	Daniel Greenberg	258
21	Sister Mary Nerney	281
22	Marc Gann	292
23	Robert Dean	304
24		
25		

376

1	WITNESS	PAGE
2	Lisa Schreibersdorf	315
3	Leonard Noisette	331
4	William Holden	342
5	Susan Menu	353
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		